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A SELECTION OF CASES

ON

THE LAW OF SALES

OF

PERSONAL PROPERTY.

BY

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THIRD EDITION

WITH SUPPLEMENT

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CASES ON SALES.

CHAPTER I.

SUBJECT MATTER OF SALE.

SECTION I.

AT LAW.

GRANTHAM *v.* HAWLEY.

IN THE COMMON PLEAS, TRINITY TERM, 1616.

[*Reported in Hobart,* 132.]

ROBERT GRANTHAM brought an action of debt upon an obligation of £40 against Edward Hawley, the condition whereof was that if a certain crop of corn growing upon a certain piece of ground, late in the occupation of Richard Sankee, did of right belong to the plaintiff, then the defendant should pay him for it £20. Now the case upon pleading and demurrer fell out thus: That one Sutton was seised of the land, and 30 Eliz. in April made a lease of it to Richard Sankee for twenty-one years by indenture, and did thereby covenant, grant to and with Sankee, his executors and assigns, that it shall be lawful for him to take, and carry away to his own use, such corn as should be growing upon the ground at the end of the term. Then Sutton conveyed the reversion to the plaintiff, and John Sankee, executor to Richard, having sowed the corn, and that being growing upon the ground at the end of the term, sold it to the defendant. And it was argued by Hutton for the plaintiff that it was merely contingent whether there should be corn growing upon the ground at the end of the term or not. Also the lessor never had property in the corn, and therefore could not give nor grant it, but it sounded properly in covenant; for the right of the corn standing in the end of the term being certain, accrues with the land to the lessor, and it was said to be adjudged. And it was agreed by the court that if A seised of land sow it with corn, and then convey it away to B for life, remainder to C for life, and then B die before the corn reaped, now C shall have it and not the executors of B though his estate was uncertain. Note, the reason of industry and charge in B fails, yet judgment in this case was given against the plaintiff; that is, that the property and very right of the corn, when it happened, was passed away; for it was both a covenant and a grant, and therefore if it had been of natural fruits, as of grass or hay, which run merely with the land, the like grant would have carried them in property after the term. Now, though corn be *fructus industrialis* so that he that sows it may seem to have a kind of property *ipso facto* in it divided from the land, and therefore the executor shall have it and not the heirs; yet in this case all the color that the plaintiff hath to it is by the land which he claims from the lessor which gave the corn. And though the lessor had it not actually in him, nor certain, yet he had it potentially; for the land is the mother and root of all fruits. Therefore he that hath it may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant, as 21 Hen. 6. A parson may grant all the tithewool that he shall have in such a year, yet perhaps he shall have none; but a man cannot grant all the wool that shall grow upon his sheep that he shall buy hereafter; for there he hath it neither actually nor potentially. And though the words are here not by words of gift of the corn, but that it shall be lawful for him to take it to his own use, it is as good to transfer the property, for the intent and common use of such words, as a lease without impeachment of waste, for the like reason, and not *ex vi termini*, gives the trees.

LOW *v.* PEW.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, NOVEMBER TERM, 1871.

[*Reported in* 108 *Massachusetts*, 347.]

REPLEVIN by the firm of Alfred Low & Company of a lot of flitched halibut from the assignees in bankruptcy of the firm of John Low & Son, all of Gloucester. Writ dated August 24, 1869. The parties stated the following case for the judgment of the court: —

On April 17, 1869, as the schooner "Florence Reed," owned by John Low & Son, was about to sail from Gloucester on a fishing voyage, that firm received $1,500 from the plaintiffs, and signed and gave the plaintiffs the following writing: —

"We, John Low & Son, hereby sell, assign, and set over unto Alfred Low & Company all the halibut that may be caught by the master and crew of the schooner "Florence Reed," on the voyage upon which she is about to proceed from the port of Gloucester to the Grand Banks, at the rate of five cents and a quarter per pound for flitched halibut, to be delivered to said Alfred Low & Company as soon as said schooner arrives at said port of Gloucester at their wharf.

And we, the said John Low & Son, hereby acknowledge the receipt of $1,500 in part payment for the halibut that may be caught by the master and crew of said schooner on said voyage."

In July, 1869, proceedings in bankruptcy were begun against John Low & Son in the district court of the United States for this district, in which they were adjudged bankrupts on August 6, and on August 20 these defendants were appointed the assignees in bankruptcy, and the deed of assignment was executed to them. On Saturday, August 14, the "Florence Reed" arrived at the port of Gloucester on her home voyage, and was hauled to the plaintiffs' wharf; and on the morning of Monday, August 16, the United States marshal took possession of the vessel and cargo under a warrant issued to him on August 6 in the proceedings in bankruptcy, and transferred his possession to the defendants upon their appointment.

The catch of the schooner consisted of about 40,000 pounds of halibut, and of some codfish. The plaintiffs demanded the halibut of the defendants, and offered at the same time to pay the price of it at the rate of five and a quarter cents per pound, less the $1,500 already paid. The defendants refused the demand; and the plaintiffs then replevied such a quantity of the halibut as represented the amount of $1,500 at that rate per pound, and offered to receive the rest of the halibut and pay for it at the same rate, but the defendants refused to acknowledge any right whatever of the plaintiffs in or to the fish.

If on these facts the plaintiffs were entitled to recover, they were to have judgment for nominal damages; but if otherwise, the defendants were to have judgment for a return, with damages equal to interest at the annual rate of six per cent on the appraised value of the fish replevied.

C. P. Thompson, for the plaintiffs.

W. C. Endicott, for the defendants.

MORTON, J. By the decree adjudging John Low & Son bankrupts, all their property, except such as is exempted by the bankrupt law, was brought within the custody of the law, and by the subsequent assignment passed to their assignees. Williams *v.* Merritt, 103 Mass. 184. The firm could not by a subsequent sale and delivery transfer any of such property to the plaintiffs. The schooner which contained the halibut in suit arrived in Gloucester August 14, 1869, which was after the decree of bankruptcy. If there had been then a sale and delivery to the plaintiffs of the property replevied, it would been invalid. The plaintiffs therefore show no title to the halibut replevied, unless the effect of the contract of April 17, 1869, was to vest in them the property in the halibut before the bankruptcy. It seems to us clear, as claimed by both parties, that this was a contract of sale, and not a mere executory agreement to sell at some future day. The plaintiffs cannot maintain their suit upon any other construction, because, if it is an executory agreement to sell, the property in the halibut remained in the bankrupts, and, there being no delivery before the bankruptcy, passed to the assignees. The question in the case therefore is, whether a sale of halibut afterwards to be caught is valid, so as to pass to the purchaser the property in them when caught.

It is an elementary principle of the law of sales that a man cannot grant personal property in which he has no interest or title. To be able to sell property, he must have a vested right in it at the time of the sale. Thus it has been held that a mortgage of goods which the mortgagor does not own at the time the mortgage is made, though he afterwards acquires them, is void. Jones *v.* Richardson, 10 Met. 481. The same principle is applicable to all sales of personal property. Rice *v.* Stone, 1 Allen, 566, and cases cited; Head *v.* Goodwin, 37 Me. 181.

It is equally well settled that it is sufficient if the seller has a potential interest in the thing sold. But a mere possibility or expectancy of acquiring property, not coupled with any interest, does not constitute a potential interest in it, within the meaning of this rule. The seller must have a present interest in the property, of which the thing sold is the product, growth, or increase. Having such interest, the right to the thing sold, when it shall come into existence, is a present vested right, and the sale of it is valid. Thus a man may sell the wool to grow upon his own sheep, but not upon the sheep of another; or the crops to grow upon his own land, but not upon land in which he has no interest. 2 Kent Com. (10th ed.) 468 (641), note *a*; Jones *v.* Richardson, 10 Met. 481; Bellows *v.* Wells, 36 Verm. 599; Van Hoozer *v.* Cory, 34 Barb. 9; Grantham *v.* Hawley, Hob. 132.

The same principles have been applied by this court to the assignment of future wages or earnings. In Mulhall *v.* Quinn, 1 Gray, 105, an assignment of future wages, there being no contract of service, was held invalid. In Hartley *v.* Tapley, 2 Gray, 565, it was held that, if a person is under a contract of service, he may assign his future earnings growing out of such contract. The distinction between the cases is that in the former the future earnings are a mere possibility, coupled with no interest, while in the latter the possibility of future earnings is coupled with an interest, and the right to them, though contingent and liable to be defeated, is a vested right.

In the case at bar, the sellers, at the time of the sale, had no interest in the thing sold. There was a possibility that they might catch halibut; but it was a mere possibility and expectancy, coupled with no interest. We are of opinion that they had no actual or potential possession of, or interest in, the fish; and that the sale to the plaintiffs was void.

The plaintiffs rely upon Gardner *v.* Hoeg, 18 Pick. 168, and Tripp *v.* Brownell, 12 Cush. 376. In both of these cases it was held that the lay, or share in the profits, which a seaman in a whaling voyage agreed to receive in lieu of wages, was assignable. The assignment in each case was, not of any part of the oil to be made, but of the debt which under the shipping articles would become due to the seaman from the owners at the end of the voyage. The court treated them as cases of assignments of choses in action. The question upon which the case at bar turns did not arise, and was not considered.

Judgment for the defendants.

HULL *v.* HULL.

CONNECTICUT SUPREME COURT, JUNE TERM, 1880.

[*Reported in* 48 *Connecticut*, 250.]

REPLEVIN for six colts; brought to the Court of Common Pleas in New Haven County, and tried before Cowell, J., who found the following facts: —

The plaintiff is the sister of the wife of Rev. William H. H. Murray. The defendant is the trustee of his insolvent estate.

In 1868 or 1869 the plaintiff was employed by Mr. Murray as superintendent, book-keeper, and cashier of his stock farm at Guilford in this State, the farm consisting of about three hundred acres, with three dwellings and large and commodious barns and stables. From the commencement of such service down to the institution of insolvency proceedings against him in the summer of 1879, she continued in his employment, residing upon the farm constantly, except occasional visits to Boston and the Adirondacks with Mr. Murray's family. During this period Mr. Murray was a settled minister in Boston, and resided in that city, spending not more than one month in a year upon his farm.

From the commencement of the plaintiff's services until November 12th, 1870, she received no compensation except her board. At that date, being then on a visit to Mr. Murray's family at Boston, he, on account of his indebtedness to her, sold her a brood mare called "Nell," which he then owned and kept in Boston, the mare having never been upon his Guilford farm. At the time of this sale he executed and delivered to her a bill of sale of the mare, and at the same time, to induce her to continue in his employment as superintendent and book-keeper upon his Guilford farm, he agreed with her that she should have the right to keep the mare upon his farm and rear whatever stock she chose to raise from the mare, he paying all expenses of such keeping, and allowing her the free use of his stallions; and that the mare and her progeny should be her compensation for her services as superintendent.

On November 18th, 1870, the mare was sent by Mr. Murray to the Guilford farm with two other horses, a stove, and other furniture belonging to him, all billed as freight to him. All the horses were received at Guilford and placed upon the farm. The plaintiff had meanwhile returned from Boston.

In January, 1872, the plaintiff being again in Boston, the mare "Nell" being unproductive, Mr. Murray, being then further indebted to the plaintiff for her services, sold her another blooded brood mare named "Flying Belle," then owned by him in Boston, and which had never been upon his Guilford farm, under a similar arrangement with that in the sale of the mare "Nell," with the agreement that the plaintiff should thereafter have the two mares, and that whatever stock she could rear from them upon his Guilford farm and at his expense, should be her compensation for services. He gave her at the same time a bill of sale of the second mare. But this mare was not sent to the Guilford farm until June 12th, 1872, when it was forwarded by Mr. Murray with three other horses and a buggy consigned to him, which were received and put upon the farm as in the former case.

At the time these mares were put upon the Guilford farm the average number of horses kept on the farm by Mr. Murray was three or four, but subsequently a much larger number was kept, and many horses owned by other parties were boarded upon the farm. The mares were worked upon the farm and used by Mr. Murray's family, including the plaintiff, in the same way with the horses belonging to Mr. Murray.

The plaintiff has raised from the mare "Nell" four colts, one of which she sold when four years old. The other three are a part of those described in the replevin writ. The plaintiff has had five colts from the mare "Flying Belle," one of which died, one she sold, and the other three are the remainder of the six described in the replevin writ. All these colts have been kept on the Murray farm or on land leased by Mr. Murray since they were foaled, under the supervision of the plaintiff, and fed and cared for by his grooms in the same manner as the colts and horses owned by Mr. Murray, and the taxes on them and their colts have been paid by Mr. Murray. The amount of the taxes on the horses of the plaintiff was not given in evidence, but the taxes on them and on Mr. Murray's horses were generally all paid by him at the same time.

There was no evidence that at the time of the purchase of these mares by the plaintiff Mr. Murray was indebted to any one.

The plaintiff is an unusually active, capable woman, and at the time of the purchases and agreements Mr. Murray intended to deal liberally with her, believing it was to his benefit for her to reside upon and manage his farm, keeping his house there always in readiness for the reception of his family when they should choose to visit the farm; and to her benefit to accumulate property by the rearing of colts pursuant to the agreement. The plaintiff for more than ten years of faithful and valuable services has received no compensation except her board and these two mares and the progeny reared from them.

The mares are now old and of little value, and have been so employed by Mr. Murray's family and upon the labor of the farm, under her supervision, as to have more than reimbursed him for all taxes paid by him on her account.

Mr. Murray, about the commencement of 1879, moved from Boston to Guilford, but spent but little time upon the farm, being engaged in business in New Haven. About the middle of June, 1879, he left the State, and has never since exercised any control or supervision over his farm or personal property in this State.

The plaintiff still owns and keeps the mares, and no one else has ever claimed them or either of them since her purchase.

On the first day of August, 1879, the six colts were attached by a creditor of Mr. Murray, with nine other colts belonging to him, they being all together, — the mares not being attached, as they were away from the farm. The attaching creditor kept the colts at Guilford for about three months, and then delivered them to the defendant, the trustee in insolvency of Mr. Murray.

No attempt was made by the plaintiff to maintain her title to the colts by suit until January 12th, 1880, although she was living during the time at Guilford where the colts were. But as soon as she became aware of the attachment of them she forbade the officer taking them and demanded their immediate return to her.

There was no evidence offered as to the financial condition of Mr. Murray other than the facts that the plaintiff's horses were attached as his, and that other horses of his and other of his personal property were attached, and that the defendant was afterwards appointed trustee of his insolvent estate.

The defendant on the trial offered evidence which he claimed tended to prove that the plaintiff was never the owner of the mares or colts, but that Mr. Murray claimed to own them until about the time of the attachment. To rebut this claim the plaintiff produced the book known as Murray's Stock Book, which had always been kept at the barn office at his farm in Guilford, and offered in evidence three entries therein made by Mr. Murray and one Bixby, his confidential friend, under Mr. Murray's direction, in 1873 or 1874, which entries described the mares, and a colt of one of them, and gave the age of each of them, following each of the descriptions with the words, "The property of Miss Ida E. Hull, of Guilford, Connecticut." The defendant objected to these entries being received by the court as evidence for the purposes for which they were offered. But the court overruled the objection and received the evidence.

Upon the foregoing facts the defendant claimed, and asked the court to hold, that the law was so that the plaintiff was not entitled to take the property from the defendant as such trustee; that she never became the *bonâ fide* owner of the mares and colts; that there was never any such possession on her part as would entitle her to hold the mares or their progeny against the attaching creditors of the vendor or his trustee in insolvency; and that she was guilty of such laches in failing to assert her claim to the property, both before and after the attachment, that she was estopped from now claiming it from the trustee.

But the court overruled all of these claims and rendered judgment for the plaintiff to recover the property claimed.

The defendant filed a motion in error, and also moved for a new trial for error in the admission of evidence.

W. K. Townsend and *J. H. Whiting*, in support of the motion.

H. B. Munson, contra.

LOOMIS, J. The controversy in this case has reference to the ownership of six colts, the progeny of two brood mares, which the plaintiff, some ten years prior to this suit, purchased in Boston of the Rev. William H. H. Murray. The contract of sale provided that the plaintiff might take the mares to Murray's farm in this State, of which she was and had been for several years the superintendent, and there keep them as breeding-mares; and all the colts thereafter foaled from them, though sired by Murray's stallions, were to be the exclusive property of the plaintiff.

No attempt has been made by Murray's creditors or his trustee to deprive the plaintiff of the mares so purchased, and they are now in her undisturbed possession; but the colts, while on Murray's farm on the 1st of August, 1879, were attached by one of his creditors, who subsequently released the property to the defendant as trustee in insolvency, who had the property in his possession at the time the plaintiff brought her writ of replevin.

The sole ground upon which the defendant claims to hold these colts is, that there was such a retention of possession by Murray after the sale as to render the transaction constructively fraudulent as against creditors.

The court below overruled this claim, and in so doing we think committed no error.

The doctrine as to retention of possession after a sale has no application to the facts of this case. A vendor cannot retain after a sale what does not then exist nor that which is already in the possession of the vendee. This proposition would seem to be self-sustaining. If, however, it needs confirmation, the authorities in this State and elsewhere abundantly supply it. Lucas *v.* Birdsey, 41 Conn. 357; Capron *v.* Porter, 43 *id.* 389; Spring *v.* Chipman, 6 Verm. 662. In Bellows *v.* Wells, 36 Verm. 599, it was held that a lessee might convey to his lessor all the crops which might be grown on the leased land during the term, and no delivery of the crops after they were harvested was necessary even as against attaching creditors, and that the doctrine as to retention of possession after the sale did not apply to property which at the time of the sale was not subject to attachment and had no real existence as property at all.

The case at bar is within the principle of the above authorities, for it is very clear that the title to the property in question when it first came into existence was in the plaintiff.

In reaching this conclusion it is not necessary to hold that the mares became the absolute property of the plaintiff under Massachusetts law without a more substantial and visible change of possession, or that under our law, the title to the mares being in the plaintiff clearly as between the parties, the rule imported from the civil law, *partus sequitur ventrem*, applies.

We waive the consideration of these questions. It will suffice that, by the express terms of the contract, the plaintiff was to have as her own all the colts that might be born from these mares. That the law will sanction such a contract is very clear.

It is true, as remarked in Perkins on Conveyances (tit. Grant, § 65), that "it is a common learning in the law that a man cannot grant or charge that which he has not;" yet it is equally well settled that a future possibility arising out of, or dependent upon, some present right, property, or interest, may be the subject of a valid present sale.

The distinction is illustrated in Hobart, 132, as follows: "The grant of all the tithe wool of a certain year is good in its creation, though it may happen that there be no tithe wool in that year; but the grant of the wool which shall grow upon such sheep as the grantor may afterwards purchase, is void."

It is well settled that a valid sale may be made of the wine a vineyard is expected to produce, the grain that a field is expected to grow, the milk that a cow may yield, or the future young born of an animal. 1 Parsons on Contracts (5th ed.), page 523, note *k*, and cases there cited; Hilliard on Sales, § 18; Story on Sales, § 186. In Fonville *v.* Casey, 1 Murphy (N. C.), 389, it was held that an agreement for a valuable consideration to deliver to the plaintiff the first female colt which a certain mare owned by the defendant might produce, vests a property in the colt in the plaintiff, upon the principle that there may be a valid sale where the title is not actually in the grantor, if it is in him potentially, as being a thing accessory to something which he actually has. And in McCarty *v.* Blevins, 5 Yerg. 195, it was held that where A agrees with B that the foal of A's mare shall belong to C, a good title vests in the latter when parturition from the mother takes place, though A immediately after the colt was born sold and delivered it to D.

Before resting the discussion as to the plaintiff's title we ought, perhaps, briefly to allude to a claim made by the defendant, both in the court below and in this court, to the effect that if the plaintiff's title be conceded she is estopped from asserting her claim. This doctrine of estoppel, as all triers must have observed, is often strangely misapplied. And it is surely so in this instance. The case fails to show any act or omission on the part of the plaintiff inconsistent with the claims she now makes, or that the creditors of Murray or the defendant as representing them were ever misled to their injury by any act or negligence on her part. On the contrary, the estoppel is asserted in the face of the explicit finding, that "as soon as the plaintiff became aware of the attachment of her horses she forbade the officer taking the same, and demanded their immediate return to her."

The only fact which is suggested as furnishing the basis for the alleged estoppel is, that from the first of August, 1879, to the 12th of

January next following, "no attempt was made by the plaintiff to maintain her title by suit, although she was living during the time at Guilford where said colts were." But who ever heard of an estoppel in an action at law predicated solely on neglect to bring a suit for the period of five months? To recognize such a thing for any period short of the statute of limitations would practically modify the statute and create a new limitation. Furthermore, in what respect have the defendant and those he represents been misled to their injury by this fact? The plaintiff never induced the taking or withholding of her property. And can a tort-feasor or the wrongful possessor of another's property object to the delay in suing him for his wrong, and claim, as in this case, an estoppel on the ground that his own wrongful possession proved a very expensive one to him, amounting even to more than the value of the property? He might have stopped the expense at any time by simply giving to the plaintiff what belonged to her.

There was no error in the judgment complained of, and a new trial is not advised.

In this opinion the other judges concurred.[1]

CHARLES SHAW *v.* ROBERT W. GILMORE.

SUPREME JUDICIAL COURT OF MAINE, MARCH 19, 1889.

[*Reported in* 81 *Maine*, 396.]

REPLEVIN OF HAY. The plaintiff claimed title under a recorded mortgage, a portion of which is set out in the opinion. The defendant subsequently bought the hay of the mortgagor, without notice of the plaintiff's claim. Further facts appear in the opinion.

Crosby and *Crosby*, for plaintiff.

T. H. B. Pierce, for defendant.

HASKELL, J. The plaintiff claims title to certain hay, cut upon a farm in 1881, by virtue of an equitable mortgage, dated April 19, 1877, of the following tenor:

"For a valuable consideration, to me paid by Charles Shaw of Dexter, I hereby sell to him all the hay that is to be cut on the farm I have bought of him, and I agree to harvest and safely store the said hay in the barn on the said farm, and keep the same without expense to said Shaw, and deliver the same to him on demand. Twenty-five tons of the said hay is to be reserved from this sale for my own use. It is hereby agreed as a condition in this trade that we are to dispose of the said hay from year to year, to the best advantage, and apply the proceeds to the payment of the notes that yearly become due on the payment of said farm. The crop of 1877 is to be applied in payment of the note that becomes due April 14th, 1878, and the crops of

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[1] *Conf.* Sawyer *v.* Gerrish, 70 Me. 254; Bates *v.* Smith, 83 Mich. 347; Battle Creek Bank *v.* First Bank, 62 Neb. 825.

1878 in payment of the note that becomes due in 1879, and so on from year to year. It is further agreed that I am to keep an amount of insurance on the said hay that will amount to four hundred dollars."

This is an action at law, and must be decided upon legal and not equitable principles. It is a maxim of the common law, that a man cannot grant that which he hath not; but it is well settled, that he may assign that of which he is "potentially, but not actually possessed. He may make a valid sale of the wine that a vineyard is expected to produce, or of the grain a field may grow in a given time." The sale, however, can only operate upon a specific thing, as the grass of a particular field during a specified time that the grantor owned the right to cut and gather it in. Emerson *v.* E. & N. A. Railway Co., 67 Maine, 387; Farrar *v.* Smith, 64 Maine, 74. Even in equity, an assignment of wages to be earned in the future, but not under an existing employment, must specify the time during which such wages are to be earned, and the employment from which they are expected to arise; and the assignment must neither contravene public policy, nor be inequitable. Edwards *v.* Peterson, 80 Maine, 367; Lehigh Val. R. Co. *v.* Woodring (Pa.), 9 Atl. Rep. 58.

In the present case, the grant purports to be of the yearly crop of hay for an indefinite period of time. The controversy is over the fifth crop, sold by the assignor, who was in possession of the same, to a *bona fide* purchaser. Under the rules of the common law, the conveyance must be held inoperative as to the hay in dispute and, therefore, the plaintiff's title to the same fails.

Judgment for defendant and for return.

PETERS, C. J., DANFORTH, LIBBEY, EMERY and FOSTER, JJ., concurred.[1]

SECTION II.

IN EQUITY.

HOLROYD *v.* MARSHALL.

IN THE HOUSE OF LORDS, JUNE 14, 17, 18, 1861, JULY 25, 1862.

[*Reported in* 10 *House of Lords Cases*, 191.]

JAMES TAYLOR carried on the business of a damask manufacturer at Hayes Mill, Ovenden, near Halifax, in the county of York. In 1858 he became embarrassed, a sale of his effects by auction took place, and the Holroyds, who had previously employed him in the way of his business, purchased all the machinery at the mill. The machinery was not removed, and it was agreed that Taylor should buy it back for £5,000.

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[1] While the doctrine of potential existence as applied to the transfer of future crops is not generally discarded in this country, it is frequently subjected to limitations not to be found in the early English statements of the doctrine which are adopted to their full extent in Petch *v.* Tutin, 15 M. & W. 110. But see Sale of Goods Act, § 5 (3). The American decisions are collected in Jones on Chattel Mortgages, §§ 141, 142; 8 Am. & Eng. Encyc. of Law, (2d ed.) 311 *et seq.*

An indenture dated the 20th September, 1858, was executed, to which A. P. and W. Holroyd were parties of the first part, James Taylor of the second part, and Isaac Brunt of the third part. This indenture declared the "machinery, implements, and things specified in the schedule hereunder written and fixed in the said mill," to belong to the Holroyds; that Taylor had agreed to purchase the same for £5,000, but could not then pay the purchase-money, wherefore it was agreed, etc., that "all the machinery, implements, and things specified in the schedule (hereinafter designated 'the said premises')" were assigned to Brunt, in trust for Taylor, until a certain demand for payment should be made upon him, and then, in case he should pay to the Holroyds a sum of £5,000, with interest, for him absolutely. If default in payment was made, Brunt was to have power to sell, and hold the moneys, in pursuance of the trust for sale, upon trust, to pay off the Holroyds, and to pay the surplus, if any, to Taylor. The indenture, in addition to a clause binding Taylor, during the continuance of the trust, to insure to the extent of £5,000 contained the following covenant: "That all machinery, implements, and things which, during the continuance of this security, shall be fixed or placed in or about the said mill, buildings, and appurtenances, in addition to or substitution for the said premises, or any part thereof, shall, during such continuance as aforesaid, be subject to the trusts, powers, provisos, and declarations hereinbefore declared and expressed concerning the said premises; and that the said James Taylor, his executors, etc., will at all times, during such continuance as aforesaid, at the request, etc., of the said Holroyds, their executors, etc., do all necessary acts for assuring such added or substituted machinery, implements, and things, so that the same may become vested accordingly." The deed was, four days afterwards, duly registered, as a bill of sale, under the 17 & 18 Vict. c. 36. Taylor, who remained in possession, sold and exchanged some of the old machinery, and introduced some new machinery, of which he rendered an account to the Holroyds before April, 1860; but no conveyance was made of this new machinery to them, nor was any act done by them, or on their behalf, to constitute a formal taking of possession of the added machinery. On the 2d April, 1860, the Holroyds served Taylor with a demand for payment of the £5,000 and interest, and no payment being made, they, on the 30th April, took possession of the machinery, and advertised it for sale by auction on the 21st May following.

On the 13th April, 1860, Emil Preller sued out a writ of *scire facias* against Taylor for the sum of £155 18*s.* 4*d.*, damages and costs, which was executed on the following day by James Davis, an officer of Mr. Garth Marshall, then high sheriff of York. On the 10th May, 1860, a similar writ, for £138 3*s.* 3*d.*, was executed by Davis, and on the 25th May, 1860, the property was sold by the sheriff. Notice was given to the sheriff of the bill of sale executed in favor of the Holroyds. The only part of the machinery claimed by the execution creditors consisted of those things which had been purchased by Taylor since the date of the bill of sale. The sheriff insisted on taking under the writs these added articles, and the Holroyds, on the 30th May, 1860, filed their bill against the sheriff, and the other necessary parties, praying for an assessment of damages and general relief. The cause was heard before Vice-Chancellor Stuart, who, on 27th July, 1860, made an order, declaring that the whole machinery in the mill, including the added and substituted articles, at the time of the execution, vested in the plaintiffs by virtue of the bill of sale. On appeal, before Lord Chancellor Campbell, on the 22d December, 1860, the Vice-Chancellor's order was reversed. This present appeal was then brought.

LORD CHELMSFORD. My Lords, this case, which has become of great importance, has been twice fully and ably argued, there having been a difference of opinion amongst your Lordships upon the first argument, which made it desirable that a second should take place. Upon the original argument I thought that the decree of my late noble and learned friend, Lord Campbell, could not be maintained; but I came to this conclusion with all the deference due to his great legal experience, and with the more doubt as to the soundness of my views, upon finding not only that he adhered to his opinion on hearing the question argued in this House, but that he was supported in it by my noble and learned friend, Lord Wensleydale, for whose judgment (it is unnecessary to say) I entertain the most sincere respect. Aware that I was opposed to such eminent authorities, I listened to the second argument with the most earnest and anxious attention; but nothing which I heard in the course of it tended to shake the opinion which I had originally formed. I should, therefore, have been compelled to state this opinion under such discouraging circumstances, if I had not happily been fortified by the concurrence of the noble and learned lord upon the Woolsack, before whom the last argument took place. His great learning and long experience in courts of equity justify me now in expressing myself with some confidence in a case in which his views coincide with mine, and which is to be decided upon equitable grounds and principles.

In considering the question, I propose to advert to the various points which were touched upon in the course of both the arguments, although upon the last occasion many were omitted which were raised upon the first. The question in the case is, whether the appellants, who have an equitable title as mortgagees of certain machinery fixed and placed in a mill, of which the mortgagor, James Taylor, was tenant, are entitled to the property which was seized by the sheriff, under two writs of execution issued against the mortgagor, in priority to those executions, or either of them.

The title of the appellants depends upon a deed dated the 20th September, 1858. [His Lordship here stated the bill of sale and the other facts of the case; see *ante*.] The machinery sold by the sheriff was more than sufficient to satisfy the first execution, and the appellants, claiming a preference over both executions, contend that the possession taken by them on the 30th April entitled them, at all events, to priority over the second execution of the 11th May. The great question, however, is, whether they are entitled to a preference over the first execution by the mere effect of their deed; or whether it was necessary that some act should have been done after the new machinery was fixed or placed in the mill, in order to complete the title of the appellants.

It was admitted that the right of the judgment creditor, who has no specific lien, but only a general security over his debtor's property, must be subject to all the equities which attach upon whatever property is taken under his execution. But it was said (and truly said) that those equities must be complete, and not inchoate or imperfect, or, in other words, that they must be actual equitable estates, and not mere executory rights.

What, then, was the nature of the title which the mortgagees obtained under their mortgage deed? If the question had to be decided at law, there would be no difficulty. At law an assignment of a thing which has no existence, actual or potential, at the time of the execution of the deed, is altogether void. Robinson *v.* Macdonnell, 5 Maule & S. 228. But where future property is assigned, and after it comes into existence, possession is either delivered by the assignor, or is allowed by him to be taken by the assignee, in either case there would be the *novus actus interveniens* of the maxim of Lord Bacon, upon which Lord Campbell rested his decree, and the property would pass.

It seemed to be supposed upon the first argument that an assignment of this kind would not be void in law if the deed contained a license or power to seize the after-acquired property. But this circumstance would make no difference in the case. The mere assignment is itself a sufficient *declaratio præcedens* in the words of the maxim; and although Chief-Justice Tindal, in the case of Lunn *v.* Thornton, 1 C. B. 379, said, "It is not a question whether a deed might not have been so framed as to give the defendant a power of seizing the future personal goods," he must have meant that under such a power the assignee might have taken possession, and so have done the act which was necessary to perfect his title at law. This will clearly appear from the case of Congreve *v.* Evetts, 10 Exch. 298, in which there was an assignment of growing crops and effects as a security for money lent, with a power for the assignee to seize and take possession of the crops and effects bargained and sold, and of all such crops and effects as might be substituted for them; and Baron Parke said, "If the authority given by the debtor by the bill of sale had not been executed, it would have been of no avail against the execution. It gave no legal title, nor even equitable title, to any specific goods; but when executed not fully or entirely, but only to the extent of taking possession of the growing crops, it is the same in our judgment as if the debtor himself had put the plaintiff in actual possession of those crops." And in Hope *v.* Hayley, 5 Ellis & B. 830, 845 (a case much relied upon by the Vice-Chancellor), where there was an agreement to transfer goods, to be afterwards acquired and substituted, with a power to take possession of all original and substituted goods, Lord Campbell, Chief Justice, said, "The intention of the contracting parties was that the present and future property should pass by the deed. That could not be carried into effect by a mere transfer; but the deed contained a license to the grantee to enter upon the property, and that license, when acted upon, took effect independently of the transfer."

I have thought it right to dwell a little upon these cases, both on account of some expressions which were used in argument respecting them, and also because in determining the present question it is useful to ascertain the precise limits of the doctrine as to the assignment of future property at law. The decree appealed against proceeds upon the ground, not indeed that an assignment of future property, without possession taken of it, would be void in equity (as the cases to which I have referred show that it would be at law), but that the equitable right is incomplete and imperfect unless there is subsequent possession, or some act equivalent to it to perfect the title.

In considering the case, it will be unnecessary to examine the authorities cited in argument, to show that if there is an agreement to transfer or to charge future acquired property, the property passes, or becomes liable to the charge in equity, where the question has arisen between the parties to the agreement themselves. In order to determine whether the equity which is created under agreements of this kind is a personal equity to be enforced by suit, or to be made available by some act to be done between the parties, or is in the nature of a trust attaching upon and binding the property at the instant of its coming into existence, we must look to cases where the rights of the third persons intervene.

The respondents, in support of the decree, relied strongly on what was laid down by Baron Parke in Mogg *v.* Baker, 3 M. & W. 195, 198, as the rule in equity which he stated he had derived from a very high authority, "that if the agreement was to mortgage certain specific furniture, of which the corpus was ascertained, that would constitute an equitable title in the defendant, so as to prevent it passing to the assignees of the insolvent, and then the assignment would make that equitable title a legal one; but if it was only an agreement to mortgage furniture to be subsequently acquired, or" (the word "or" is omitted in the report) "to give a bill of sale at a future day of the furniture and other goods of the insolvent, then it would cover no specific furniture, and would confer no right in equity." The meaning of these latter words must be that there would be no complete equitable transfer of the property, because there can be no doubt that the agreement stated would create a right in equity upon which the party entitled might file a bill for specific performance.

This point is so clear that it is almost unnecessary to refer to the observations of Lord Eldon, in the case of the ship "Warre," 8 Price, 269, *n.*, in support of it. It must also be observed that the proposition in Mogg *v.* Baker hardly reaches the present question, because it is not stated as a case of an actual transfer of future property, but as an agreement to mortgage, or to give a bill of sale at a future day. The only equity which could belong to a party under such an agreement would be to have a mortgage or a bill of sale of the future property executed to him. It does not meet a case like the present, where it is expressly provided that all additional or substituted machinery shall be subject to the same trusts as are declared of the existing machinery.

Under a covenant of this description to hold that that trust attaches upon the new machinery as soon as it is placed in the mill, is to give an effect to the deed in perfect conformity with the intention of the parties; and as, by the terms of the deed, Taylor was to remain in possession, the act of placing the machinery in the mill would appear to be an act binding his conscience to the agreed trust on behalf of the appellants, and nothing more would appear to be requisite, unless by the established doctrine of a court of equity some further act was indispensable to complete their equitable title.

The judgment of Lord Campbell, resting, as he states, upon Lord Bacon's maxim, determines that some subsequent act is necessary to enable "the equitable interest to prevail against a legal interest subsequently *bonâ fide* acquired." It is agreed that this maxim relates only to the acquisition of a legal title to future property. It can be extended to equitable rights and interests (if at all) merely by analogy; but in thus proposing to enlarge the sphere of the rule, it appears to me that sufficient attention has not been paid to the different effect and operation of agreements relating to future property at law and in equity. At law, property non-existing, but to be acquired at a future time, is not assignable; in equity it is so. At law (as we have seen), although a power is given in the deed of assignment to take possession of after-acquired property, no interest is transferred, even as between the parties themselves, unless possession is actually taken; in equity it is not disputed that the moment the property comes into existence the agreement operates upon it.

No case has been mentioned in which it has been held that upon an agreement of this kind the beneficial interest does not pass in equity to a mortgagee or purchaser immediately upon the acquisition of the property, except that of Langton *v.* Horton, 1 Hare, 549, which was relied upon by the respondents as a conclusive authority in their favor. I need not say that I examine every judgment of that able and careful Judge Vice-Chancellor Wigram with the deference due to such a highly respected authority. Langton *v.* Horton was the case of a ship, her tackle and appurtenances, and all oil, head matter, and other cargo which might be caught and brought home. The Vice-Chancellor decided, in the first place, that as against the assignor there was a valid assignment in equity of the future cargo. But the question arising between the mortgagees and a judgment creditor, who had afterwards sued out a writ of *fi. fa.*, his Honor, assuming that the equitable title which was good against the assignor would not, under the circumstances of the case, be available against the judgment creditor, proceeded to consider whether enough had been done to perfect the title of the mortgagees, and ultimately decided in their favor upon the acts done by them to obtain possession of the cargo.

It was said upon the first argument of this case by the counsel for the appellants that the judgment of the Vice-Chancellor was, upon this occasion, fettered by his deference to the opinion apparently entertained and expressed by Lord Cottenham in the case of Whitworth *v.* Gaugain, 1 Phill. 728. It will be necessary, therefore, to direct attention for a short time to that case, and especially as it has an immediate bearing upon the present occasion. The case as originally presented before Lord Cottenham, was an appeal from an order of the Vice-Chancellor of England appointing a receiver. The bill of the equitable mortgagees was founded entirely upon alleged fraud and collusion between the mortgagor and the tenants by elegit. The defendants had denied fraud and collusion, and also notice of the mortgagee's title at the time of obtaining possession under the elegits. The plaintiffs, in argument, attempted to set up a case not made by their bill, viz., that independently of the question of fraud, they had by law a preferable title to the defendants. The Lord Chancellor discharged the order for a receiver, solely on the ground that the plaintiffs had failed in making out the case on which they asked for the interference of the court. Upon discharging the order, Lord Cottenham is reported to have said that in the argument a totally different turn was given, or attempted to be given, to the plaintiff's case; viz., that independently of the question of fraud, they had by law a preferable title to the defendants. "If (he added) the bill had been framed with that view, and the claim of the plaintiffs founded on that supposed equity, I should have required a great deal more to satisfy me of the validity of that equity before I could have interposed by interlocutory order, because I find these defendants in possession of a legal title, although not to all intents and purposes an estate, yet a right and interest in the land which under the authority of an Act of Parliament they had a right to hold, the elegit being the creature of the Act of Parliament, and, therefore, they have a parliamentary title to hold the land as against all persons, unless an equitable case can be made out to induce this court to interfere." Although Vice-Chancellor Wigram, in Langton *v.* Horton, 1 Hare, 549, in adverting to this language, said that he thought Lord Cottenham intended only what his words literally expressed, that he would not interfere against the judgment creditor by an interlocutory order unless he was well satisfied of the validity of the equity to which he was called upon to give summary effect, yet it is impossible to doubt (to use the expressions of his Honor) "that the strong leaning of Lord Cottenham's mind" was in favor of the legal right of the judgment creditor over the equitable title of the mortgagees.

This opinion, though merely expressed incidentally, would be entitled to the greatest weight upon the present question, if the law had not been since settled in opposition to it. For in consequence of the ground upon which Lord Cottenham discharged the order for a receiver, the plaintiffs amended their bill, and inserted a prayer for alternative relief, independent of fraud and collusion; and the cause having been brought on for hearing before Vice-Chancellor Wigram, his Honor decided that the mortgagees were entitled in equity to enforce their charge in priority to the judgment creditors of the mortgagor, although they had no notice of the equitable mortgage, and had obtained actual possession of the land by writ of elegit and attornment of the tenants.

This decision was afterwards affirmed by Lord Lyndhurst, who in the course of his judgment mentioned the case of Abbott *v.* Stratten, 3 Jones & L. 603, where Sir Edward Sugden, then Lord Chancellor of Ireland, had determined that an equitable mortgagee was entitled to priority over a subsequent creditor by judgment, who was in possession by a receiver, and who had no notice of the mortgage; and referring to Whitworth *v.* Gaugain, 3 Hare, 416, expressed his agreement with the conclusion to which Vice-Chancellor Wigram had come in that case, and stated that "he had repeatedly acted on the rule that an agreement binding property for valuable consideration, though equitable only, will take precedence of a subsequent judgment, whatever may be the consideration for it, and whether it be obtained *in invitum* or by confession."

Whatever doubts, therefore, may have been formerly entertained upon the subject, the right of priority of an equitable mortgagee over a judgment creditor, though without notice, may now be considered to be firmly established; and, according to the opinion of Lord St. Leonards, "any agreement binding property for valuable consideration" will confer a similar right.

It does not appear from this review of the case of Whitworth *v.* Gaugain that it could have had any influence over the question in Langton *v.* Horton, as to the imperfection of the mortgagee's title, unless something had been done to perfect it. The point does not appear to have been at all noticed by Lord Cottenham, his observations having been confined to the competition between the equitable title of the mortgagee and the legal title of the judgment creditors. Langton *v.* Horton must therefore be accepted as an authority that there may be cases in which an equitable mortgagee's title may be incomplete against a subsequent judgment creditor. In that case the delivery of possession of the cargo on board the vessel was, as the Vice-Chancellor said, "impossible, as the vessel was at sea. The parties could do nothing more in this country with reference to it than execute an instrument purporting to assign such interest as Birnie (the mortgagor) had, send a notice of the assignment to the master of the ship, and await the arrival of the ship and cargo. This was the course taken; and on the arrival of the ship at the port of London the plaintiffs immediately demanded possession." The cargo was, in point of fact, in possession of the captain, as the agent for the owner, the mortgagor. It would have been rather a strange effect to give to the assignment of the future cargo, to hold that when it came into existence a trust attached upon it for the benefit of the mortgagee, that thereupon the captain became his agent, and that the mortgagee thereby acquired a perfect equitable right to the property, which was valid against all subsequent legal claimants. Langton *v.* Horton may have been rightly decided as to the necessity for the completion of the mortgagee's title under the circumstances which there existed, and yet it will be no authority for saying that in every case of an equitable mortgage of future property something beyond the execution of the deed and the coming into existence of the property will be necessary.

It certainly appears to be putting too great a stress upon this case, to urge it as an authority that an equitable title would have been defective if certain circumstances had not existed, when the existence of those circumstances was established in proof and made the ground of the decision.

But if it should still be thought that the deed, together with the act of bringing the machinery on the premises, were not sufficient to complete the mortgagee's title, it may be asked what more could have been done for this purpose. The trustee could not take possession of the new machinery, for that would have been contrary to the provisions of the deed under which Taylor was to remain in possession until default in payment of the mortgage money after a demand in writing, or until interest should have become in arrear for three months; and in either of these events a power of sale of the machinery might be exercised. And if the intervenient act to perfect the title in trust be one proceeding from the mortgagor, what stronger one could be done by him than the fixing and placing the new machinery in the mill, by which it became, to his knowledge, immediately subject to the operation of the deed?

I asked Mr. Amphlett, upon the second argument, what *novus actus* he contended to be necessary, and he replied, "A new deed." But this would be inconsistent with the terms of the original deed, which embraces the substituted machinery, and which certainly was operative upon the future property as between the parties themselves. And it seems to be neither a convenient nor a reasonable view of the rights acquired under the deed, to hold that for any separate article brought upon the mill a new deed was necessary, not to transfer it to the mortgagee, but to protect it against the legal claims of third persons.

But if something was still requisite to be done, and that by the mortgagor, I cannot help thinking that the account delivered by Taylor to the mortgagees of the old machinery sold, and of the new machinery which was added and substituted, was a sufficient *novus actus interveniens*, amounting to a declaration that Taylor held the new machinery upon the trusts of the deed, — the only act which could be done by him in conformity with it; and it is difficult to understand for what other reason such an account should have been rendered. As between themselves, it is quite clear that a new deed of the added and substituted machinery was unnecessary; no possession could be delivered of it, because it would have been inconsistent with the agreement of the parties; and anything, therefore, beyond this recognition of the mortgagee's right appears to be excluded by the nature of the transaction.

I will add a very few words on the subject of the notice of the claim of the mortgagees to the judgment creditor. I think that the equitable title would prevail even if the judgment creditor had no notice of it, according to the authorities which have been already observed upon. It is true that Lord Cottenham, in the case of Metcalfe *v.* The Archbishop of York, 1 Mylne & C. 547, 555, said that if the plaintiff in that case was entitled to the charge upon the vicarage under the covenant and charge in the deed of 1811, "then, as the defendants had notice of that deed before they obtained their judgment, such charge must be preferred to that judgment." This appears to imply that his opinion was, that if the judgment creditor had not had notice, he would have been entitled to priority. Much stress, however, ought not to be laid upon an incidental observation of this kind, where notice had actually been given, and where, therefore, the case was deprived of any such argument in favor of the judgment creditor. If Lord Cottenham really meant to say that notice by the judgment creditor of the prior equitable title was necessary in order to render it available against him, his opinion is opposed to the decisions which have established that a judgment creditor, with or without notice, must take the property, subject to every liability under which the debtor held it.

The present case, however, meets any possible difficulty upon the subject of notice, because it appears that the deed was registered as a bill of sale, under the provisions of the 17 & 18 Vict. ch. 36. It was argued that this Act was intended to apply to bills of sale of actual existing property only, and it probably may be the case that sales of future property were not within the contemplation of the Legislature; but there is no ground for excluding them from the provisions of the Act; and upon the question of notice, the register would furnish the same information of the dealing with future as with existing property, which is all that is required to answer the objection.

I think that the late Lord Chancellor was right in holding that if actual possession of the machinery in question before the sheriff's officer entered was necessary, there was no proof of such possession having been taken on behalf of the mortgagee. But upon a careful consideration of the whole case, I am compelled to differ with him upon the ground on which he ultimately reversed Vice-Chancellor Stuart's decree. I think, therefore, that his decree should be reversed, and that of the Vice-Chancellor affirmed.[1]

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[1] Lord WESTBURY and Lord WENSLEYDALE delivered concurring opinions.

CHASE *v.* DENNY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER 12, 1880 — APRIL 5, 1881.

[*Reported in* 130 *Massachusetts*, 566.]

CONTRACT, by the assignees in insolvency of Albert E. Smith, and of the firm of Smith and Collier, for money had and received. Answer, a general denial. Trial in the Superior Court, before Wilkinson, J., who allowed a bill of exceptions, in substance as follows: —

On December 18, 1878, Albert E. Smith made two mortgages to David E. Merriam as trustee for the Leicester National Bank, to which Smith was largely indebted, of certain stock then in his mills, and also of all property of a similar character which he might afterwards acquire and place in his mills. These mortgages were duly recorded on December 23, 1878, and, although expressed to be for $3,000 and $10,000 respectively, payable on demand, were intended as collateral security for the general indebtedness of Smith then due or thereafter to be contracted. It was not contended that, at the time of making the mortgages, Smith was insolvent, or in contemplation of insolvency.

There was evidence tending to show that Smith was insolvent on March 7, 1879, and absconded on that day; and that on March 10, 1879, Merriam took possession of the property intended to be covered by the mortgages. Two days afterwards a letter written by Smith to his counsel before possession was taken, requesting him to tell the bank to take possession, was communicated to the bank. It was admitted that all the property taken possession of was acquired by Smith after the making of the mortgages. The possession of the mortgagee, taken as above, was continued until the sale of the property under the agreement hereinafter mentioned.

Smith was at the time a partner with one Collier, engaged in a similar business at another place. On March 14, 1879, Collier instituted proceedings in insolvency in behalf of said firm; and, after due proceedings had, on April 2, 1879, Smith was adjudicated an insolvent debtor and a warrant issued against his estate, and the plaintiffs were afterwards appointed assignees of his estate.

On April 29, 1879, an agreement was entered into between the plaintiffs, the mortgagee, and the defendant, by which the property was to be sold and the proceeds placed in the hands of the defendant, as trustee, to be paid over to the person or corporation entitled to them. And this action was brought to recover such proceeds.

There was no other evidence tending to show that Smith had any participation in the act of taking possession by the mortgagee, either by giving any authority or directions before it was done or taking part in it when it was done, or any knowledge that it was done or was to be done before possession was actually taken.

The judge instructed the jury that, to defeat the mortgagee's title by Smith's insolvency, the plaintiffs must show that Smith was insolvent at the time possession was taken, and that the mortgagee at that time had reasonable cause to believe him to be insolvent, and that the possession was taken by the mortgagee for the purpose of gaining a preference over other creditors, and added: "What did he take possession for? Was it to get the debt secured by the mortgage in preference to other creditors? If all these ingredients are established, then I rule that that would defeat the title under the mortgages. It must have been intended as a preference, and possession taken for that purpose. Smith must have intended a preference, and the jury are at liberty to look at the fact of his going away and leaving the property in the shape he did, and the fact about the letter and the giving of the mortgages as bearing upon that question."

The defendant asked the judge to rule that, in order to constitute a preference, it was necessary for the plaintiff to show some transfer or conveyance of property by the insolvent at a time when he was insolvent with a view to give a preference to a creditor, that the creditor had reasonable cause to believe the insolvency of the debtor, and that the transfer or conveyance was made in fraud of the laws relating to insolvency; and that if Smith did no act and caused none to be done with reference to taking possession of the property, but the mortgagee of his own motion took possession of the property with a view of perfecting his title thereto, the fact that Smith at the time was insolvent, and the mortgagee had reasonable cause to believe it, would not defeat his title to said property on the ground of preference. The judge refused so to rule, except so far as it was embraced in the ruling given.

The jury returned a verdict for the plaintiffs; and the defendant alleged exceptions.

G. F. Verry and *F. A. Gaskill*, for the defendant.

W. S. B. Hopkins, for the plaintiffs.

SOULE, J. It has been repeatedly held in this Commonwealth that a mortgage purporting to convey all the chattels of specified kinds which may thereafter be acquired by the mortgagor does not give any title to those chattels when acquired by him, unless the mortgagee takes possession of them. Jones *v.* Richardson, 10 Met. 481; Barnard *v.* Eaton, 2 Cush. 294. If, however, the after-acquired property is taken by the mortgagee into his possession before the intervention of any rights of third persons, he holds it under a valid lien, by the operation of the provision of the mortgage in regard to it. This is stated to be the rule in the case of Moody *v.* Wright, 13 Met. 17; and we see no reason to question its correctness. The mortgage in that case was held to be inoperative against the assignees in insolvency of the mortgagor, as to the after-acquired property, solely on the ground that the mortgagee did not gain possession of them before the proceedings in insolvency were set on foot; and it was said by Mr. Justice Dewey, in delivering the judgment of the court, that "when the creditor does take possession under it" (the mortgage) "he acts lawfully under the agreement of one then having the disposing power, and this makes the lien good." If, therefore, in that case, the mortgagee had taken possession of the after-acquired property at any time before the insolvency proceedings began, the decision would have been in his favor, on the ground that his title related to the date of the mortgage. Such taking of possession, though effected immediately before insolvency proceedings were instituted, and with full knowledge of the insolvency of the mortgagor, would not be the acceptance of a preference, but the assertion of a right which had been previously acquired by the mortgagee under an instrument in writing made when the parties to it were both competent to contract, and when there was no qualification of the right of either to deal with the other. Mitchell *v.* Black, 6 Gray, 100. See also McCaffrey *v.* Woodin, 65 N. Y. 459; Walker *v.* Vaughn, 33 Conn. 577.

The application of these doctrines to the case at bar is plain. The mortgage was made when the mortgagor was solvent. The defendant took possession of the after-acquired property, which the mortgage purported to convey to him, of his own motion, and without any suggestion from the mortgagor. In doing so, he availed himself of a right given to him when the mortgage was delivered, and did not accept a preference. He undoubtedly obtained security for the debt named in the mortgage, and took possession of the property for the purpose of doing so with full knowledge of the insolvency of the mortgagor; but this failed to make his act the acceptance of a preference, because the right to do what he did was obtained long before, and when there was no suspicion of insolvency.

The judge who presided at the trial in the Superior Court erred therefore in refusing to rule as requested by the defendant, and in making the rulings which were inconsistent with the ruling asked for by him. *Exceptions sustained.*[1]

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[1] An agreement made for value to mortgage personal property sufficiently specified for identification has been held to give an equitable lien. Holroyd *v.* Marshall, 10 H. L. C. 191; Collyer *v.* Isaacs, 19 Ch. D. 351; Coombe *v.* Carter, 36 Ch. D. 348; Tailby *v.* Official Receiver, 13 A. C. 523; Cumberland Banking Co. *v.* Mayport Iron Co., [1892] 1 Ch. 415; *Re* Dublin Co., L. R. 13 Ir. 174; Pennock *v.* Coe, 23 How. 117; Butt *v.* Ellett, 19 Wall. 544; Beall *v.* White, 94 U. S. 382; Mitchell *v.* Winslow, 2 Story, 630, 644; Brett *v.* Carter, 2 Low. 458; Barnard *v.* Norwich Co., 14 B. R. 469; Freights of the Kate, 63 Fed. Rep. 707, 714; Robinson *v.* Mauldin, 11 Ala. 977; Floyd *v.* Morrow, 26 Ala. 344; Apperson *v.* Moore, 30 Ark. 56; Grand Forks Nat. Bank *v.* Minneapolis Co., 6 Dak. 357; Gregg *v.* Sandford, 24 Ill. 17; Scharfenburg *v.* Bishop, 35 Ia. 60; Sawyer *v.* Long, 86 Me. 543; Dexter *v.* Curtis, 91 Me. 505; Butler *v.* Rahm, 46 Md. 541; Hudson *v.* McKale, 107 Mich. 22; Ludlum *v.* Rotchschild, 41 Minn. 218; Sillers *v.* Lester, 48 Miss. 513; Keating *v.* Hannenkamp, 100 Mo. 162; Cumberland Nat. Bank *v.* Baker, 57 N. J. Eq. 231; McCaffrey *v.* Woodin, 65 N.

Y. 459; Coates *v.* Donnell, 94 N. Y. 168; Kribbs *v.* Alford, 120 N. Y. 519; Central Trust Co. *v.* West India Improvement Co., 169 N. Y. 314 (but see Rochester Co. *v.* Rasey, 142 N. Y. 570; New York Co. *v.* Saratoga Co., 159 N. Y. 137 *contra*); Collins App., 107 Pa. 590; Williams *v.* Winsor, 12 R. I. 9; Parker *v.* Jacobs, 14 S. C. 112; Hirshkind *v.* Israel, 18 S. C. 157; Tedford *v.* Wilson, 3 Head, 311; First Bank *v.* Turnbull, 32 Gratt. 695; Braxton *v.* Bell, 92 Va. 229, 235; Horner-Gaylord Co. *v.* Fawcett, 50 W. Va. 487. See also Alexander *v.* Steinhardt, [1903] 2 K. B. 208; *Re* Jackson Mfg. Co., 15 B. R. 438; Nash *v.* Le Clercq, 17 Fed. Cas. No. 10,021; Stover *v.* Kennedy, 23 Fed. Cas. No. 13,510; Southwick *v.* Whipple, 2 Fed. Rep. 770; *Re* Wood, 5 Fed. Rep. 443; Douglass *v.* Vogeler, 6 Fed. Rep. 53.

But see *contra*, *Re* Ronk, 110 Fed. Rep. 154; *Re* Hull, 115 Fed. Rep. 858; Egan Bank *v.* Rice, 119 Fed. Rep. 107 (C. C. A.); *Re* Sentenne & Green Co., 120 Fed. Rep. 436; *Re* Ball, 123 Fed. Rep. 164; Ross *v.* Wilson, 7 Bush, 29; Loth *v.* Carty, 85 Ky. 591; Nanly *v.* Bitzer, 91 Ky. 596, 598; Moody *v.* Wright, 13 Met. 17; Chase *v.* Denny, 130 Mass. 566; Cooke *v.* Blanchard, 144 Mass. 207; Moors *v.* Reading, 167 Mass. 322; Smith *v.* Howard, 173 Mass. 88; Tatman *v.* Humphrey, 184 Mass. 361; Rochester Co. *v.* Rasey, 142 N. Y. 570; New York Co. *v.* Saratoga Co., 159 N. Y. 137; Phelps *v.* Murray, 2 Tenn. Ch. 746; *Re* Allen's Est., 65 Vt. 392; Chynoweth *v.* Tenney, 10 Wis. 397; Merchants' Bank *v.* Lovejoy, 84 Wis. 601. See also Robinson *v.* Elliott, 22 Wall. 513; Cameron *v.* Marvin, 26 Kan. 612; Harding *v.* Lewenberg, 174 Mass. 394; Horton *v.* Williams, 21 Minn. 187, 190; Collins *v.* Myers, 16 Ohio, 547; Francisco *v.* Ryan, 54 Ohio St. 307; Mercantile Co. *v.* Gardiner, 5 S. Dak. 246; Braxton *v.* Bell, 92 Va. 229.

In some of the jurisdictions last cited, though a mortgage of goods to be acquired gives no title legal or equitable, yet if possession is actually taken a title is thereby gained which is good though the mortgagor was then insolvent. *Re* Antigo Screen Door Co., 123 Fed. Rep. 249 (C. C. A.); Blanchard *v.* Cooke, 144 Mass. 207, 222–226; Bliss *v.* Crosier, 159 Mass. 498; Tatman *v.* Humphrey, 184 Mass. 361, 362; Peabody *v.* Landon, 61 Vt. 318; Merchants' Bank *v.* Lovejoy, 84 Wis. 601.

How far the Federal Bankruptcy Law affects the question is a point that must be considered wherever the mortgagor has become bankrupt. The Supreme Court of the United States has, however, decided that a creditor who acquired possession and thereby perfected his lien according to the local law, did not thereby receive a preference, though the mortgagor was insolvent at the time and became bankrupt within four months. Thompson *v.* Fairbanks, 196 U. S. 516; Humphrey *v.* Tatman, April 17, 1905, reversing the decision of Tatman *v.* Humphrey, 184 Mass. 361, in which the Massachusetts court had, a few months before the decision of Thompson *v.* Fairbanks, reached a contrary conclusion.

An agreement made for value to pledge property sufficiently specified was held to give an equitable lien in Martin *v.* Reid, 11 C. B. (N. S.) 730. See also Hook *v.* Ayers, 80 Fed. Rep. 978 (C. C. A.); Huntington *v.* Sherman, 60 Conn. 463, 467; Keiser *v.* Topping, 72 Ill. 226; Tuttle *v.* Robinson, 78 Ill. 322.

But see *contra*, Casey *v.* Cavaroc, 96 U. S. 467; Nisbit *v.* Macon Bank, 12 Fed. Rep. 686; *Re* Sheridan, 98 Fed. Rep. 406; Sabin *v.* Pond, 98 Fed. Rep. 974; *Re* Klingman, 101 Fed. Rep. 691; Hitchcock *v.* Hassett, 71 Cal. 331; City Ins. Co. *v.* Olmsted, 33 Conn. 476; Copeland *v.* Barnes, 147 Mass. 388; Rowell *v.* Claggett, 69 N. H. 201.

An agreement to sell manufactured goods which were paid for in advance was held to give an equitable lien upon the goods as they were manufactured, in Seammon *v.* Bowers, 1 Hask. 496. See also Young *v.* Matthews, L. R. 2 C. P. 127; Hamilton *v.* Nat. Loan Bank, 3 Dill. 230; Post *v.* Corbin, 5 B. R. 11.

Benjamin on Sales, § 81; 1 Ames, Cas. Eq. Jur. 47, *n.*

CHAPTER II.

EXECUTORY AND EXECUTED SALES.

SECTION I.

UNCONDITIONAL SALES OF SPECIFIC GOODS TO WHICH NOTHING REMAINS TO BE DONE.

NOY'S MAXIMS. 1641.

CHAPTER XLII.

IN all agreements there must be *quid pro quo* presently, except a day be expressly given for the payment, or else it is nothing but communication. If a man do agree for a price of wares he may not carry them away before he hath paid for them. But the merchant shall retain the wares until he be paid for them, and, if the other take them, the merchant may have an action of trespass or an action of debt for the money at his choice.

If the bargain be that you shall give me ten pound for my horse and you do give me a penny in earnest which I accept, this is a perfect bargain. You shall have the horse by an action of the case, and I shall have the money by an action of debt.

If I say the price of a cow is four pound, and you say you will give me four pound and do not pay me presently, you may not have her afterwards, except I will, for it is no contract. But if you go presently to telling of your money, if I sell her to another you shall have your action of the case against me. . . . .

If I sell my horse for money, I may keep him until I am paid, but I cannot have an action of debt until he be delivered, yet the property of the horse is by the bargain in the bargainee or buyer; but if he does presently tender me my money, and I do refuse it, he may take the horse or have an action of detainment. And if the horse die in my stable between the bargain and the delivery, I may have an action of debt for my money, because by the bargain the property was in the buyer.

JAMES TARLING *v.* BAXTER.

IN THE KING'S BENCH, HILARY TERM, 1827.

[*Reported in* 6 *Barnewall & Cresswell*, 360.]

ASSUMPSIT to recover back £145 paid by the plaintiff to the defendant's use. The declaration contained counts for money had and received, and the other common counts. Plea, general issue, with a notice of set-off for goods sold and delivered, and bargained and sold. At the trial before Abbott, C. J., at the London sittings after Hilary Term, 1826, a verdict was found for the plaintiff for £145, subject to the opinion of this court on the following case: —

On the 4th of January, 1825, the plaintiff bought of the defendant a stack of hay belonging to the defendant, and then standing in a field belonging to the defendant's brother. The note signed by the defendant, and delivered to the plaintiff, was in these words: "I have this day agreed to sell James Tarling a stack of hay, standing in Canonbury Field, Islington, at the sum of £145, the same to be paid on the fourth day of February next, and to be allowed to stand on the premises until the first day of May next." And the following note was signed by the plaintiff and delivered to the defendant: "I have this day agreed to buy of Mr. John Baxter, a stack of hay, standing in Canonbury Field, Islington, at the sum of £145, the same to be paid on the fourth day of February next, and to be allowed to stand on the premises until the first day of May next, the same hay not to be cut until paid for. January 4, 1825." At the meeting at which the notes were signed, but after the signature thereof, the defendant said to the plaintiff, "You will particularly oblige me by giving me a bill for the amount of the hay." The plaintiff rather objected. The defendant's brother, S. Baxter, on the eighth of the same month of January, took a bill of exchange for £145 to the plaintiff, drawn upon him by the defendant, dated the 4th of January, 1825, payable one month after date, which the plaintiff accepted. The defendant afterwards indorsed it to George Baxter, and the plaintiff paid it to one Taylor, the holder, when it became due. The stack of hay remained on the same field entire until the 20th of January, 1825, when it was accidentally wholly consumed by fire, without any fault or neglect of either party.

A few days after the fire the plaintiff applied to the defendant to know what he meant to do when the bill became due; the defendant said, "I have paid it away, and you must take it up, to be sure. I have nothing to do with it; why did you not remove the hay?" The plaintiff said "he could not because there was a memorandum 'that it should not be removed until the bill was paid;' would you have suffered it to be removed?" and the defendant said, "Certainly not." The defendant's set-off was for the price of the hay agreed to be sold as aforesaid. The question for the opinion of the court was, whether the plaintiff under the circumstances was entitled to recover the sum of £145, or any part thereof.

Chitty, for the plaintiff. The loss in this case must fall upon the defendant. There is a difference between the two contracts; the one contains a stipulation not in the other, that the hay was not to be cut until paid for. Now if that be a material part of the contract, then there was no one sufficient contract in writing to satisfy the Statute of Frauds; but assuming that there was a complete contract of sale without the stipulation, and that the plaintiff thereby consented to waive a right which he otherwise would have had, still the property in the hay had not passed to the vendee because this was a sale upon credit, and the vendee was not entitled to have possession of the goods until the credit expired; and if so the property did not vest in him until the credit expired. [HOLROYD, J. — In Comyn's Dig., tit. Agreement (B. 3), it is laid down, "that if a sale be of goods for such a price, and a day of payment limited, the contract will be good, and the property altered by the sale, though the money be not paid;" and R. 10 H. 7, 8 *a*, 14 H. 8, 20 *a*, and Dyer, 30 *a* are cited. And again, "If A. sell a horse to B. upon condition that he pay £20 at Christmas, and afterwards sell it to D., the sale to D. is void, though B. afterwards do not pay;" and Plowden's Com. 432 *b*, is cited, and the reason there given is, that A. at the time of the second contract had no interest in, nor property, nor possession of the horse, nor any thing but a condition; and therefore the second contract was merely void.] It is true that in Noy's Maxims, p. 88, it is laid down that "if I sell my horse for money I may keep him until I am paid, but I cannot have an action of debt until he be delivered, yet the property of the horse is by the bargain in the bargainee or buyer; but if he presently tender me my money and I refuse it, he may take the horse or have an action of detinue." But that relates clearly to the case of a ready-money bargain. In Goodall *v.* Skelton, 2 H. Bl. 316, A. agreed to sell goods to B., who paid a certain sum as earnest; the goods were packed in cloth furnished by the buyer, and deposited in a building belonging to the seller until the buyer should send for them, but the seller declared at the same time that they should not be carried away till he was paid. It was held that the seller could not maintain an action for goods sold and delivered. In the present case the hay was to remain in possession of the seller, and not to be cut till paid for. This is distinguishable, therefore, from Hinde *v.* Whitehouse, 7 East, 558, where sugars in the king's warehouse were held to pass to the buyer by the contract of sale, although the duties were not paid. It is more like Tempest *v.* Fitzgerald, 3 B. & A. 680, where the purchaser of a horse for ready money rode the horse, and requested that it might remain in B.'s possession for a further time, at the expiration of which he promised to fetch it away and pay the price. This was assented to by the seller, and it was held that the seller could not recover on a count for horses bargained and sold, there having been no acceptance of the horse within the meaning of the Statute of Frauds.

Bayley, J. It is quite clear that the loss must fall upon him in whom the property was vested at the time when it was destroyed by fire. And the question is, in whom the property in this hay was vested at that time. By the note of the contract delivered to the plaintiff, the defendant agreed to sell the plaintiff a stack of hay standing in Canonbury Field, at the sum of £145, the same to be paid for on the fourth day of February next, and to be allowed to stand on the premises until the first day of May next." Now this was a contract for an immediate, not a prospective, sale. Then the question is, In whom did the property vest by virtue of this contract? The right of property and the right of possession are distinct from each other; the right of possession may be in one person, the right of property in another. A vendor may have a qualified right to retain the goods unless payment is duly made, and yet the property in these goods may be in the vendee. The fact in this case, that the hay was not to be paid for until a future period, and that it was not to be cut until it was paid for, makes no difference, provided it was the intention of the parties that the vendee should, by the contract, immediately acquire a right of property in the goods, and the vendor a right of property in the price. The rule of law is, that where there is an immediate sale, and nothing remains to be done by the vendor as between him and the vendee, the property in the thing sold vests in the vendee, and then all the consequences resulting from the vesting of the property follow, one of which is, that if it be destroyed, the loss falls upon the vendee. The note of the buyer imports also an immediate, perfect, absolute agreement of sale. It seems to me that the true construction of the contract is, that the parties intended an immediate sale, and if that be so, the property vested in the vendee, and the loss must fall upon him. The rule for entering a nonsuit must therefore be made absolute.

Holroyd, J. I think that in this case there was an immediate sale of the hay, accompanied with a stipulation on the part of the vendee, that he would not cut it till a given period. Now, in the case of a sale of goods, if nothing remains to be done on the part of the seller, as between him and the buyer before the thing purchased is to be delivered, the property in the goods immediately passes to the buyer, and that in the price to the seller; but if any act remains to be done on the part of the seller, then the property does not pass until that act has been done. I am of opinion, therefore, in this case, not only that the property immediately passed to the buyer by the contract, but that the seller thereby immediately acquired a right in the price stipulated to be paid for the goods, although that was not to be paid until a future day. The property having passed to the vendee, and having been accidentally destroyed before the day of payment, the loss must fall upon him.

Littledale, J. The parties on the 4th of January stipulated for the sale and purchase of a stack of hay to be paid for in a month. Thus the case would have stood but for the note of the contract delivered to the buyer, and in that there was a stipulation that the purchaser should not cut until the money was paid; but the property in the hay had already passed by the contract of sale to the purchaser, and the latter afterwards merely waived his right to the immediate possession. Then the property having passed to the buyer, the loss must fall upon him; and consequently this rule for entering a nonsuit must be made absolute.[1] *Rule absolute.*

OLYPHANT *v.* BAKER.

SUPREME COURT OF NEW YORK, MAY TERM, 1848.

[*Reported in* 5 *Denio,* 379.]

MOTION to set aside the report of a referee. The action was assumpsit for the balance of the purchase price of a quantity of barley. Plea, *non assumpsit.* A contract in writing, signed by the defendant only, was given in evidence by the plaintiff, as follows: —

I hereby agree to sell seven hundred bushels of barley (or what I may have in store at Mr. P. Church, Jr.'s warehouse) to Abner Baker [the defendant], at the rate of forty-five cents per bushel; to be delivered when said Baker may call for it. I agree to hold the barley free of storage until the first day of January next. The barley is to be weighed out of the warehouse, unless Mr. Baker shall agree to take the weight on the books. I hereby acknowledge the receipt of one hundred dollars on the above contract.

MOUNT MORRIS, Dec. 15, 1845.

The plaintiff owned the warehouse called P. Church, Jr.'s, in the contract, and before the contract was made had rented it to one Camp from and after the first day of January then next; and of this he informed the defendant when the contract was made. On that day, or very soon afterwards, the defendant saw Camp, and agreed with him for the storage of the barley, for him, the defendant, from the first of January until the opening of navigation the ensuing spring. Camp took possession of the warehouse under his lease on the first day of January, the barley still remaining in it. After this arrangement with Camp and on the twenty-second day of December, the plaintiff's clerk called on the defendant with a bill of the barley and asked for payment. The defendant paid him $300, and promised to pay the balance,

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[1] "Sir Cresswell Cresswell, in delivering an elaborate judgment of the Privy Council, in Gilmour *v.* Supple, 11 Moo. P. C. 566, says, 'By the law of England, by a contract for the sale of specific ascertained goods the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shown that such was not the intention of the parties.' 'Various circumstances,' he adds, 'have been treated by our courts as sufficiently indicating such contrary intention.' I think this a very accurate statement of the law," — *per* Blackburn, J., Calcutta and Burmah Steam Navigation Co. *v.* De Mattos, 32 L. J. Q. B. 322, 328. See also a similar statement by the same judge in Sweeting *v.* Turner, L. R. 7 Q. B. 310, 313.

$95, the next day. The witness could not say that the bill mentioned the number of bushels of the barley, but it contained the aggregate amount that it came to, and the witness did state to the defendant that there was a little over 1100 bushels of it. The exact quantity, he said, was a little over 1112 bushels. About the middle of January the building with the grain in it was accidentally destroyed by fire.

The referee reported in favor of the defendant.

R. P. Wisner and *O. Hastings*, for the plaintiff, moved to set aside the report.

E. D. Smith and *E. Griffin*, for the defendant.

WHITTLESEY, J. The sole question here is whether there was a delivery of the barley to the defendant, who was the purchaser. In many cases of sales of personal property it is a very nice and difficult question to determine whether there has been a delivery — whether the title has passed. In this case the contract was executory. The quantity of barley was uncertain, and as it was sold by the bushel, the whole price could not be known until the quantity was ascertained. The seller was entitled to immediate payment; at any rate he was entitled to payment before he parted with the property. The purchaser was entitled to the delivery whenever he chose to ask for it, but he could not claim to have it delivered without paying the price. He was entitled to have it weighed out to him, if he chose, for the purpose of ascertaining the exact quantity and aggregate amount of the purchase-money. He could, however, if he chose, take the weight as it appeared from the books. If he had taken such weight as the true quantity, and paid the whole price according to such weight, the barley would have been deemed to have been delivered from the time of such payment. Lansing *v.* Turner, 2 John. 13.

But there was a sale by weight or measure at so much per bushel, and in such cases, as it is necessary that the thing should be weighed or measured before the price can be ascertained, the contract is not consummated so as to change the property until such weighing or measurement is had; but it remains at the risk of the vendor. Pothier, Traité du Contrat de Vente, part 4, 308. In our reports it is held that when, after a sale of goods, some act remains to be done by the vendor before delivery, the property does not vest in the purchaser, but continues at the risk of the vendor. Such previous act may be counting, weighing, measuring, or inspecting, &c. M'Donald *v.* Hewett, 15 John. 349; Outwater *v.* Dodge, 7 Cowen, 85; Hanson *v.* Meyer, 6 East, 614; Rapelye *v.* Mackie, 6 Cowen, 250; Russell *v.* Nicoll, 3 Wend. 112; Ward *v.* Shaw, 7 id. 404; Downer *v.* Thompson, 2 Hill, 137. Even if there has been a delivery to the vendee, and anything remains to be done preparatory to ascertaining the price of the goods, the delivery does not divest the title of the vendor until the price be ascertained and paid. Andrew *v.* Dieterich, 14 Wend. 31.

In this case it does not clearly appear that the precise quantity of the barley was ascertained and communicated to the defendant. The witness says, indeed, that there were 1112 bushels and some pounds, and that he made out a bill and presented it to the defendant; but he does not state that the precise quantity of the barley was put in such bill; and on his cross-examination he states that he is not quite certain that he stated the precise amount of the barley in the bill, but he did state to him there was a little over 1100 bushels. The defendant took the bill, paid the greater part, and promised to pay the balance the next day. Is this evidence that the defendant agreed to take the weight as it appeared on the books? If it is to be so taken, as no objection was made to the weight in the bill, is it to be deemed that the plaintiff assented to parting with the property until the balance of the purchase-money was paid? The plaintiff had a right to insist that the whole price should be paid before the property was delivered, and if the defendant had assumed to dispose of it before the payment of this balance, or had undertaken to remove it, and it should be found that he was insolvent, could not the plaintiff claim the property?

The making of the bargain for the storage of the barley after the 1st of January was doubtless a strong circumstance, but was not of itself conclusive. There is a class of cases which determine that though something remains to be done to ascertain price, &c., yet if it clearly appears to be the intention of the parties that the property shall be deemed to be delivered and the title pass, it will be so held. Macomber *v.* Parker, 13 Pick. 178; Riddle *v.* Varnum, 20 id. 280. There does not appear to be anything in this case to show any different intention of the parties than that which the law presumes from their acts The case is not analogous to those above referred to. It is one of some nicety, but on the whole I think the motion to set aside the report of the referee should be denied.

Beardsley, C. J. It is a general rule of the common law that a mere contract for the sale of goods, where nothing remains to be done by the seller before making delivery, transfers the right of property, although the price has not been paid, nor the thing sold delivered to the purchaser. Long on Sales, 42; Ross on Vend. & Pur. 1; 2 Kent, 492; Simons *v.* Swift, 5 B. & C. 857; Tarling *v.* Baxter, 6 id. 360. In this case the price per bushel for the barley was specified in the written contract, although the precise quantity sold was not then known to the parties; that, according to the contract, was to be ascertained by weighing the barley, unless the defendant should agree to take it as the weight might appear on the warehouse books. When the contract of sale was made, it was impracticable to determine what amount, in the whole, was to be paid by the purchaser, for that would depend upon the quantity of barley sold, to be ascertained in one of the modes agreed upon; it may therefore well be that this contract of sale did not, *ipso facto et eo instanti*, transfer the right of property to the purchaser.

The barley was not afterwards weighed by any one; that mode of ascertaining the amount of the purchase-money may therefore be thrown out of view. Let us, however, see if it was not, in another way, completely adjusted between the parties.

About a week after the contract of sale had been entered into the plaintiff's clerk made out a bill of the barley sold to the defendant, stating the amount which it came to, although it does not appear that the precise quantity was mentioned. This bill was handed to the defendant and payment demanded. He paid three hundred dollars thereupon, and according to the evidence agreed to pay the balance, that is, ninety-five dollars, within a day or two. It is but reasonable to understand from the evidence on this point, although not stated in so many words, that the bill was made out from the warehouse books, and if so the defendant's engagement to pay the balance according to the bill, was an unequivocal agreement to abide by the weight of the barley as stated in said books. But even if the bill was not made out as I have supposed, but was a mere estimate of the quantity, the assent of the defendant to that estimate, as proved by the payment of three hundred dollars on the bill and his agreement to pay the balance as stated, would entirely supersede the necessity of ascertaining, in any other way, the weight of the barley sold and the consequent amount of the purchase-money. From this time, as the agreement for the sale was absolute, and the amount of the purchase-money had been fully adjusted between the parties, the right of property, as I think, clearly vested in the purchaser. Nothing then remained to be done by the seller before delivery was made; and although he still had possession and a lien for the purchase-money, the right of property was in the buyer, and with it the risk of all accidents devolved on him. See the authorities already referred to.

This view, as it seems to me, would dispose of the case; but there is another which leads to the same result, for the barley was in fact actually delivered to and received by the defendant.

When the written contract of sale was made, which was on the 15th of December, the barley was in the plaintiff's warehouse. The defendant was then informed by the plaintiff that he had rented the warehouse to one Camp, from the first day of January then next, and that the defendant must make an arrangement for the storage of the barley from that time with Camp. The evidence shows that on the day of making the contract of purchase, or within a day or two thereafter, the defendants agreed with Camp that the barley should remain in store with him until the next spring, for which the defendant was to pay a price then specified, and assented to by both parties. On the first of January Camp went into possession of the warehouse under his lease from the plaintiff, and at the same time took charge of the barley for the defendant, as had been agreed between them. This gave to the defendant as full possession of the barley as he would have acquired by removing it to his own storehouse, and his right of property was previously complete by the purchase. Property, the right of possession, and the actual possession, were here united, and the plaintiff had no longer any right whatever to the barley. His lien for the purchase-money was gone, as he had voluntarily transferred the possession of the barley to the defendant. The defendant's arrangement with Camp for the storage of the barley was made at the request of the plaintiff, and the transfer of the possession was with his full assent. It amounted to an unqualified relinquishment of all right on the part of the plaintiff, and a complete acquisition of both possession and property by the defendant. 2 Kent Com. 500, 502; Ross, 65–66, 72–73; Chaplin *v.* Rogers, 1 East, 192; Harman *v.* Anderson, 2 Camp. 243; Hurry *v.* Mangles, 1 id. 452; Hollingsworth *v.* Napier, 3 Caines, 182, 2d ed. and note at p. 184; Bentall *v.* Burn, 3 B. & C. 423; Carter *v.* Williams, 19 Pick. 1. The sale being completely executed, the purchaser and owner, not the seller, should stand the loss. I think the report of the referee should be set aside.

McKissock, J., concurred. *Report set aside.*

cf. supplement, p

SECTION II.

Sales of Specific Goods to which something remains to be done.

HANSON and Another, Assignees of Wallace and Hawes, Bankrupts, *v.* MEYER.

In the King's Bench, July 2, 1805.

[*Reported in* 6 *East*, 614.]

This was an action of trover brought to recover the value of 33 cwt. 1 qr. 21 lbs. of starch, which was tried before Lord Ellenborough, C. J., at the sittings at Guildhall after Trinity term, 1803, when there was a verdict for the defendant; and a motion being made for a new trial which was argued in last Michaelmas term, the court by consent in Hilary term last ordered a case to be made of the facts that were proved at the trial, which are as follows: —

The plaintiffs are assignees of J. Wallace and W. Hawes under a commission of bankrupt issued against them. The defendant is a merchant in London. In January, 1801, the bankrupts employed Wright, their broker, to purchase of the defendant a quantity of starch, about four tons, belonging to the defendant, and which was then lying in the Bull Porters' warehouse in Seething Lane; and Wright accordingly purchased the starch of the defendant at £6 per cwt. and sent to the bankrupts, his principals, the following note: —

> Dear Sirs, — I have bought that small parcel of starch which you saw of Mr. James Meyer for your account, £6 per cwt. by bill at 2 months; 14 days for delivery from the 14th inst.
>
> Yours, &c., T. Wright.
>
> January 15th, 1801.

The starch lay at the Bull Porters'. The broker purchased for the bankrupts all Meyer's starch that lay there, more or less, whatever it was, at £6 per hundred-weight; it was in papers; the weight was to be afterwards ascertained at the price aforesaid. The mode of delivery is as follows: the seller gives the buyer a note addressed to the warehouse-keeper, to weigh and deliver the goods to the buyer. This note is taken to the warehouse-keeper, and is his authority to weigh and deliver the goods to the vendee. The following note was given by the defendant: —

TO THE BULL PORTERS, SEETHING LANE, — Please to weigh and deliver to Messrs. Wallace and Hawes all my starch.

Per JAMES MEYER, WILLIAM ELLIOTT.

JANUARY 17, 1801.

This order was lodged by the bankrupts at the Bull Porters' warehouse on the 21st of January, 1801, on which day the bankrupts required the Bull Porters to weigh and deliver to them 540 papers of the starch, which weighed —

		cwt.	qr	lb.
	540	21	1	6
And on the 31st Jan.	250	9	1	20
And on the 2d Feb.	400	15	1	4
	1190	46	0	12

At which respective times the Bull Porters. in consequence of their order, weighed and delivered the same to the bankrupts, who immediately removed the same; the residue thereof, being 33 cwt. 1 qr. 21 lb. remained at the Bull Porters' warehouse till the failure of Wallace and Hawes. The above quantities of starch continued at the Bull Porters' warehouse in the name and at the expense of the defendant till they were weighed and delivered; and the residue also afterwards continued there in like manner unweighed, in his name, and charged to his expense. On the 8th of February, 1801, Wallace and Hawes became bankrupts. It was admitted that the defendant, after the bankruptcy, took away the remainder of the starch that had not been so weighed. The question for the opinion of the court was, whether the defendant was entitled to the above verdict. If the court should be of opinion that he was, then the verdict was to stand; if not, then a new trial was to be granted upon such terms as the court should direct.

Humphreys, for the plaintiffs.

Holroyd, contra. *Cur. adv. vult.*

LORD ELLENBOROUGH, C. J., now delivered judgment.

By the terms of the bargain formed by the broker of the bankrupts on their behalf, two things, in the nature of conditions or preliminary acts on their part, necessarily preceded the absolute vesting in them of the property contracted for; the first of them is one which does so according to the generally received rule of law in contracts of sale, viz., the payment of the agreed price or consideration for the sale. The second, which is the act of weighing, does so in consequence of the particular terms of this contract, by which the price is made to depend upon the weight. The weight therefore must be ascertained in order that the price may be known and paid; and unless the weighing precede the delivery it can never, for these purposes, effectually take place at all. In this case a partial weighing and delivery of several quantities of the starch contracted for had taken place; the remainder of it was unweighed and undelivered; and of course no such bill of two months for the price so depending on the weight could yet be given. The question is, What is the legal effect of such part delivery of the starch on the right of property in the undelivered residue thereof? On the part of the plaintiffs it is contended that a delivery of part of an entire quantity of goods contracted for is a virtual delivery of the whole, so as to vest in the vendee the entire property in the whole; although the price for the same should not have been paid. This proposition was denied on the part of the defendant; and many authorities have been cited on both sides. But, without deciding at present what might be the legal effect of such part delivery in a case where the payment of price was the only act necessary to be performed in order to vest the property, in this case another act, it will be remembered, was necessary to precede both payment of price and delivery of the goods bargained for, viz., weighing. This preliminary act of weighing it certainly never was in the contemplation of the sellers to waive in respect of any part of the commodity contracted for. The order stated in the case from the defendant to the Bull Porters, his agents, is to weigh and deliver all his starch. Till it was weighed, they as his agents were not authorized to deliver it; still less were the buyers themselves, or the present plaintiffs, their assignees, authorized to take it by their own act from the Bull Porters' warehouse; and if they could not so take it, neither can they maintain this action of trover founded on such a supposed right to take, or, in other words, founded on such a supposed right of property in the subject-matter of this action. If anything remain to be done on the part of the seller as between him and the buyer, before the commodity purchased is to be delivered, a complete present right of property has not attached in the buyer; and of course this action, which is accommodated to and depends upon such supposed perfect right of property, is not maintainable. The action failing, therefore, on this ground, it is unnecessary to consider what would have been the effect of non-payment of price on the right to the undelivered residue of the starch, if the case had stood merely on that ground, as it did in the case of Hammond and others against Anderson, 1 New Rep. 69; where the bacon sold in that case was sold for a certain fixed price, and where the weighing mentioned in that case was merely for the buyer's own satisfaction, and formed no ingredient in the contract between him and the seller; though it formed a very important circumstance in the case, being an unequivocal act of possession and ownership as to the whole quantity sold on the part of the buyer; in like manner as the taking 800 bushels of wheat out of the whole quantity sold, and then on board the ship, was holden to be in the case of Slubey *v.* Heyward, 2 H. Bl. 504. Without, therefore, touching the question which has been the main subject of argument in this case, and upon which my opinion at *nisi prius* principally turned, and without in any degree questioning the authority of the above-mentioned two cases from the Common Pleas, this verdict may be sustained, on the ground that the weighing which was indispensably necessary to precede the delivery of the goods, inasmuch as it was necessary to ascertain the price to be paid for them, had not been performed at the time when the action was brought. The verdict therefore must stand, and judgment be entered for the defendant.

RUGG AND OTHERS *v.* MINETT AND OTHERS.

IN THE KING'S BENCH, MAY 9, 1809.

[*Reported in* 11 *East*, 210]

IN an action for money had and received by the defendants to the use of the plaintiffs, a verdict was found for the plaintiffs for £1415, subject to the opinion of the court upon the following case: —

On the 28th of April, 1808, the defendants, as prize agents to the commissioners for the care and disposal of Danish property, put up to public sale by auction, at Dover, the cargo of a Danish ship in lots, and the lots No. 28 to 54 inclusive consisted of turpentine in casks. The quantity contained in each lot being marked on the catalogue thus, 10 cwt. 3 qrs. 26 lbs., the mode of bidding was this: each lot (except the two last, which were sold at uncertain quantities) was to be taken at the weight at which it was marked, and the bidding was to be at so much per hundred-weight on that quantity. The plaintiffs employed one Acres, the warehouseman of the defendants, to bid for them, and all the lots of turpentine (with the exception of three lots, which were sold to other bidders) were knocked down to Acres so acting for the plaintiffs. No conditions of sale were distributed prior to the sale; but the auctioneer, before the bidding commenced, read aloud the following conditions: 1st. The highest bidder to be the buyer; but if any dispute should arise, the lot to be put up again. 2d. £25 per cent is to be paid to the auctioneer as a deposit immediately after the sale, and the remainder in thirty days. The remainder of the purchase-money is to be paid on the goods being delivered. Should the goods remain after the limited time, the warehouse rent from that time to be paid, a' the rate of 2*s.* per ton per month, by the purchaser. 3d. The goods to be taken at the net weight printed in the catalogue. 4th. The goods to be taken away in twelve months, or resold to pay the warehouse rent. Upon failure of complying with these conditions, the deposit-money is to be forfeited, and the commissioners to be at liberty to resell any lots belonging to defaulters, by whom all charges attending the same shall be made good. 1*s.* per lot under £10; 1*s.* 6*d.* from £10 to £25; and 2*s.* above £25, — lot-money to be paid by the buyer to the auctioneer. Tare allowed for turpentine 1*s.* 5*d.* Upon the turpentine being put up to sale, the auctioneer, by the direction of one of the defendants present, announced to the bidders that the casks of turpentine were to be filled up before they were delivered to the purchasers, and that in order to effect this, the two last lots would be sold at uncertain quantities, and the preceding lots would be filled from them. The whole of the turpentine, with the exception of the three lots before mentioned, were sold to the plaintiffs; and they also were the purchasers of the two last lots, from which all the lots without exception were to be filled up; and those two last lots were accordingly marked by the auctioneer in his catalogue, with the words "more or less." Immediately after the sale £200 was paid by the plaintiffs to the auctioneer as their deposit; and on the 9th of May, 1808, the plaintiffs paid to the defendants £1715 upon account of the turpentine, and the duties payable thereon. The turpentine remained in the warehouses of the defendants as before the sale, but was entered at the custom-house at Dover, in the name of the plaintiffs, on the morning of the 10th of May, 1808, before the fire, by Acres, who paid on behalf of the plaintiffs £450 as a deposit for the duties. On the same morning the cooper, who had been employed by the defendants to make up all the casks previous to the sale of the 28th of April, was sent for by Acres, who was warehouseman to the defendants, and who acted as agent for the plaintiffs, to fill up the casks of turpentine, and he had filled all of them except eight or ten; leaving them with the bungs out to enable the custom-house officer, who was expected every minute to take his gauge in order to ascertain the duties. The two last lots, which were sold at uncertain quantities, and marked "more or less," contained more turpentine than was sufficient to fill up all those bought by the plaintiffs, and also those bought by the buyers of the three lots. In filling the casks sold to the plaintiffs one of the two last lots was used, and instead of the other of the two last lots, a preceding cask in point of number, which had been found to be an ullage cask, was substituted by the cooper, and from one of the two last lots, the lots sold to the other buyers had been previously filled up. All the lots sold to the other buyers had been taken away before the cooper came on the 10th; and while the cooper was employed in filling up the plaintiffs' lots, and placing them ready with the bungs of the casks out for the custom-house officer to gauge, but before he had filled up all the casks, or bunged any of them, a fire took place in the defendants' warehouse, which consumed the whole of the turpentine knocked down to the plaintiffs, — the casks not having been weighed again by the plaintiffs, or gauged by the custom-house officer. While the money paid by the plaintiffs to the defendants on account of the turpentine remained in their hands, they received notice from the plaintiffs not to pay it over; and the present verdict is composed of that sum, deducting the £450 paid on account of the duty, which has been restored to the plaintiffs by the commissioners of customs. The question for the opinion of the court was, whether the plaintiffs were entitled to recover back the money so paid to the defendants. If they were, the verdict was to stand; if not, a nonsuit was to be entered.

Puller, for the plaintiffs.

Carr, for the defendants.

Lord Ellenborough, C. J. The court have already intimated their opinion as to those casks in the first lots which were filled up, and on which nothing remained to be done on the part of the sellers, but only the casks were left to remain for thirty days at the option of the purchasers in the warehouse at the charge of the sellers; the payment of the warehouse rent, however, is not material in this case; and when the casks were filled up everything was done which remained to be done by the sellers. It was necessary, however, that they should be gauged before they were removed, and the bungs were left out for the purpose of the gauger's doing his office, which it was the buyer's business to have performed; and therefore, according to the case of Hanson *v.* Meyer, and the other cases, everything having been done by the sellers which lay upon them to perform, in order to put the goods in a deliverable state in the place from whence they were to be taken by the buyers, the goods remained there at the risk of the latter. But with respect to the other ten casks, as the filling them up according to the contract remained to be done by the sellers, the property did not pass to the buyers; and therefore they are not bound to pay for them.

Le Blanc, J. The case is to be considered as involving so many distinct contracts as there were distinct lots bought by the plaintiffs. The turpentine was purchased at so much per cwt., and it was to be taken according to the weight marked on each lot; but the casks were to be filled up by the sellers out of turpentine belonging to them, in order to make the weights agree with the marks. I say belonging to the sellers, because the two last casks were only sold according as their actual weights should turn out to be, after filling up the rest; and if more turpentine had been wanted than those casks could have supplied for filling up the rest, it must have been settled which of the respective purchasers was to take less than his calculated quantity. Till the several casks therefore were filled up, I consider the property as remaining in the sellers. But a certain number of casks were filled up, and with respect to them nothing further remained to be done by the sellers But it was necessary that the custom-house officer should gauge them before they could be removed. Then the warehouseman who was acting as the common agent of the buyers and sellers, having filled up those casks on the part of the sellers, left them unbunged for the purpose of the officer's gauging them and ascertaining the duties, which was an act to be done on the part of the buyers, to entitle them to remove the goods. Then, as nothing more remained to be done by the sellers on those casks which were filled up, they were from that time at the risk of the buyers; but those which were not filled up continued at the risk of the sellers.

Bayley, J. In many cases it happens, where every thing has been done by the sellers which they contracted to do, that the property passes to the buyers, though the goods may still continue in the actual possession of the sellers. It lies upon the plaintiff then to make out that something still remained to be done to the goods by the sellers at the time when the loss happened. But with respect to those casks which had been filled up, nothing remained to be done but the gauging by the officer; and as that was to be procured to be done by the buyers, Acres, who left out the bungs for the purpose of enabling the officer to gauge, must be taken to have acted as the agent of the buyers for that purpose; and therefore, nothing more remaining to be done by the sellers, the property passed. But with respect to the other casks, something did remain to be done by the sellers, namely, the filling them up; and it is not sufficient for them to say that they were not called upon to do so by the buyers; for if they meant to relieve themselves from all further responsibility, they should have done what remained for them to do, and until that was done the property continued in them.

Upon this it was agreed that the proportion to be allowed to the plaintiffs on the ten casks should be settled out of court; and that the verdict should be entered accordingly.

HAWES and Another *v.* WATSON and Another.

In the King's Bench, January 28, 1824.

[*Reported in* 2 *Barnewall & Cresswell*, 540.]

Trover for a quantity of tallow. Plea, not guilty.

At the trial before Abbott, C. J., at the London sittings after Michaelmas term, the following facts were proved for the plaintiffs. The plaintiffs on the 25th of September, 1823, purchased by contract, of Messrs. Moberly & Bell, 300 casks of tallow at 40*s.* per cwt. On the 27th of September, in part execution of their contract. Moberly & Bell sent to the plaintiffs the following transfer note, signed by the defendants, who were wharfingers: —

Messrs. J. & B. HAWES, — We have this day transferred to your account (by virtue of an order from Messrs. Moberly & Bell), 100 casks tallow, ex Matilda, with charges from October 10, 1823. H. & M. 100 casks.

The plaintiffs then gave Moberly & Bell their acceptance for £2880 the price of the tallow, which was duly paid, and afterwards sold 21 casks of this tallow, which the defendants delivered, pursuant to their order. Moberly & Bell stopped payment on the 11th October, and on the 14th the defendants received notice from Raikes & Co., the original vendors of the tallow, not to deliver the remaining casks to Moberly & Bell, or their order; and the defendants in consequence, refused to deliver the remainder of the tallow to the plaintiffs, upon their demanding the same. On the part of the defendants it was proved that Moberly & Bell, on the 26th September, had purchased of Raikes & Co. 100 casks of tallow (the same that were afterwards sold to the plaintiffs) landed out of the Matilda, lying at Watson's wharf, at £2 1*s*. per cwt. to be paid for in money, allowing 2½ per cent discount, and fourteen days for delivery; and on the same day Raikes & Co. gave a written order upon the defendants to weigh, deliver, transfer, or rehouse the tallow. Moberly & Bell had not paid for the same, nor had it been weighed subsequently to this order. Upon these facts it was contended at the trial, on the part of the defendants, that they were not bound to deliver to the plaintiffs the remaining seventy-nine casks of tallow, inasmuch as Raikes & Co. had, as between them and Moberly & Bell, a right to stop them *in transitu*, the delivery to Moberly & Bell not being perfect, inasmuch as the tallow had not been weighed. The Lord Chief Justice, however, was of opinion that whatever the question might be as between buyer and seller, the defendants having, by their note of the 27th of September, acknowledged that they held the tallow on account of the plaintiffs, could not now dispute their title; and the plaintiffs had a verdict.

The Attorney-General now moved for a new trial, upon the ground taken at the trial. Hanson *v.* Meyer, 6 East, 614, is an authority to show that the absolute property in the tallow would not vest in Moberly & Bell, the first vendee, until it was weighed. The contract in that case was in terms similar to the contract made between the original vendors and Moberly & Bell. The weighing must precede the delivery, in order that the price may be ascertained. In that case too, part of the goods had been weighed and delivered, yet it was held that the vendor might retain the remainder, which continued unweighed, in his possession; and Shepley *v.* Davis, 5 Taunt. 617, is also an authority to the same effect.

ABBOTT, C. J. The plaintiffs in this case paid their money upon the faith of the transfer note, signed by the defendants, by which they acknowledged that they held the tallow as their agents. If we were now to hold that, notwithstanding that acknowledgment and that payment, the plaintiffs are not entitled to recover, we should enable the defendants to cause an innocent man to lose his money. To hold that the doctrine of stoppage *in transitu* applied to such a case as the present, would have the effect of putting an end to a very large portion of the commerce of the city of London.

BAYLEY, J. This appears to me very different from the ordinary case of vendor and vendee. In such cases justice requires that the vendee shall not have the goods unless he pays the price. If he cannot pay the price the vendor ought to have his goods back; but if the question arises, not between the original vendor and the original vendee, but between the original vendor and a purchaser from the vendee, that purchaser having paid the full price for the goods, what is the honesty and justice and equity of the case? Surely, that the vendee who has paid the price, shall be entitled to the possession of the goods. I am of opinion that when Messrs. Raikes & Co. signed the order to transfer, weigh, and deliver, that, according to the settled course and usage of trade, enabled Moberly & Bell to sell the goods again. There are many cases in which it has been held that if the first vendor does anything which can be considered as sanctioning the sale by his vendee, that destroys all right of the former to stop *in transitu.* Stoveld *v.* Hughes, 14 East, 308; Harman *v.* Anderson, 2 Campb. 243.

HOLROYD, J. I think that the note given by the defendants makes an end of the present question. When that note was given, the tallow became the property of the plaintiffs, and is to be considered from that time as kept by the defendants as the agents of the plaintiffs, and the latter were to be liable from the 10th October for all charges. This case is very different from that of Hanson *v.* Meyer. There, there was a sale of all the vendor's starch (the quantity not being ascertained) at £6 per cwt. The order was to weigh and deliver all the vendor's starch, and a part having been weighed and delivered, but not the residue, the main question before the court was, whether the weighing and delivery of part did or did not in point of law operate as a transfer of the property as to the whole. The court held, rightly, that it did not, because there the price of the whole which was to be paid for by bills could not be ascertained before it was weighed. The delivery of part, therefore, was not a delivery of the whole, but the order was complied with only as to the part which was weighed and delivered, and the property in the residue remained unchanged until something further was done. It was not a delivery of part for the whole, and therefore it did not operate in law as a delivery of the whole so as to devest the vendor of his right to stop *in transitu;* but here, the wharfingers, upon the receipt of the order directing them to weigh and deliver, sent an acknowledgment that they, the wharfingers, had transferred the goods to the vendees, and that they would be considered as subject to charges from a certain period. I think, therefore, that the wharfinger then held the tallow as the goods of the plaintiffs and as their agents, although there was not any actual weighing of them; and that the plaintiffs were then in possession by the defendants as their agents, they having acknowledged themselves as such by their note. For these reasons I am of opinion that the plaintiffs are entitled to recover.

BEST, J. I am also of opinion that the acknowledgment which has been given in evidence puts an end to all question in this case. . . . It appears to me, too, that if we consider the principle upon which the right of stoppage *in transitu* is founded, it cannot extend to such a case as the present. The vendee has the legal right to the goods the moment the contract is executed, but there still exists in the vendor an equitable right to stop them *in transitu*, which he may exercise at any time before the goods get actually into the possession of the vendee, provided the exercise of that right does not interfere with the rights of third persons. Now it appears to me impossible that it can be exercised in this case without disturbing the rights of third persons, for the property has not only been transferred to the purchaser in the books of the wharfingers, but there has been an acknowledgment by them that they hold it for the purchaser, who has paid the price of it. It has been said that there has been no change of property. If there has not, I do not see how there can be any until the tallow is actually melted down and converted into candles. If the argument on the part of the defendants be valid, the vendor, if he is not fully paid, has a right, if the goods are not weighed, to stop *in transitu*, even though they have passed through the hands of a hundred different purchasers and been paid for by all except the first. It appears to me that we should disturb an established principle if we held that this could be done in such a case as the present. I think the right of stoppage *in transitu* is an equitable right, to be exercised by the vendor only when it can be done without disturbing the rights of third persons. Here, that cannot be done, and therefore I think that Raikes & Co. had not any right to stop *in transitu*, and that the plaintiffs are therefore entitled to recover. *Rule discharged.*

HENRY SIMMONS *v.* HEZEKIAH SWIFT.

IN THE KING'S BENCH, TRINITY TERM, 1826.

[*Reported in* 5 *Barnewall & Cresswell*, 857.]

INDEBITATUS assumpsit for bark sold and delivered; the usual money counts, and a count upon an account stated. At the trial before Littledale, J., at the spring assizes for the county of Monmouth, 1826, the jury found a verdict for the plaintiff for the sum of £106 3*s.* 8*d.*, subject to the opinion of this court upon the following case: The plaintiff and defendant were both dealers in timber and bark, the plaintiff residing at Whitebrook in Monmouthshire, and the defendant in the town of Monmouth. Previously to the 23d of October, 1824, the plaintiff was possessed of a quantity of oak bark, which was stacked at a place called Redbrook, on the banks of the river Wye, about two miles below the town of Monmouth, and which, in July preceding, weighed twenty tons. Upon the 23d of October, the following agreement for the sale of the said bark was signed by the plaintiff and the defendant: "I have this day sold the bark stacked at Redbrook, at £9 5*s.* per ton of twenty-one hundred-weight, to Hezekiah Swift, which he agrees to take, and pay for it on the 30th of November."

It was afterwards verbally agreed between the parties that one William Simmons, a brother of the plaintiff, should see the bark weighed on behalf of the plaintiff, and one James Diggett should see it weighed on behalf of the defendant. Within five days after the signing of this agreement, the defendant sent several of his barges and his servants to Redbrook, and took a quantity of the bark, amounting to 8 tons 14 cwt. He sent for William Simmons who was at work in a wood near to Redbrook, to see the bark weighed on behalf of his brother, which William Simmons accordingly did, and was paid for his trouble by his brother's wife. William Simmons said he was not directed by his brother to see the bark weighed, and did not know that it had been sold until he was fetched from the wood by the defendant's messenger. James Diggett attended the weighing on the part of the defendant. The bark so taken by the defendant was carried by his barges down the river Wye to Chepstow. The remainder of the stack was covered with a tarpaulin belonging to the defendant, but which tarpaulin had been upon the premises at Redbrook, having been lent by the defendant for that purpose to the person who sold the bark to the plaintiff; and had been used to cover a part of the stack before the signing of the agreement by the plaintiff and defendant. About eight or nine days after part of the bark had been so removed by the defendant, a Mr. James Madley, upon whose premises at Redbrook the bark was stacked, met the defendant, and asked him when he intended to take the remainder of the bark away, as it was stacked over part of a saw-pit which he, Madley, wanted to use; the defendant answered that he should have it taken away in a few days. The defendant did not at any time take away the remainder of the bark, nor was it weighed. Towards the latter end of November there was an extraordinary flood, which overflowed the banks of the river Wye, and rose nearly to the height of five feet around the remainder of the stack of bark, and did it very considerable injury. There was sufficient time for the defendant to have removed the whole of the bark before the flood happened. The defendant was seen examining the remainder of the bark after it had been injured by the flood, and the tarpaulin before mentioned remained upon the bark until the 28th of January, 1825, when it was removed by some of the defendant's servants who were passing up the river in a barge. On the fourth day of December, 1824, the plaintiff called at the defendant's counting-house, and the defendant said he was ready to pay for the bark which had been removed, viz., 8 tons 14 cwt., and by the plaintiff's direction an account was made out of the bark which the defendant had taken away as aforesaid, and the defendant paid the amount by a check, which was duly honored. The plaintiff signed the account as settled, but at the same time said that no advantage should be taken of his so doing, and required the defendant to take and pay for the rest of the bark, which he refused to do. Bark is an article which varies very considerably in weight according as the air is moist or dry, and according to the season of the year. The question at the trial was, whether the plaintiff was entitled to recover in this action for the bark which remained standing at Redbrook. According to the weight of the bark in July preceding, a quantity remained which, at the price mentioned in the agreement of 23d of October, 1824, amounted to the sum of £106 5*s.* 8*d.*, for which the verdict was taken.

Oldnall Russell, for the plaintiff.

Campbell, contra.

BAYLEY, J. Two questions are involved in this case: first, whether the property in the bark was vested in the defendant, so as to throw all risks upon him; secondly, whether there had been such a delivery of the bark as would support this form of action. It is not, perhaps, necessary to give any opinion upon the first point, but I think it right to do so, as it is most satisfactory to determine the case upon the main ground taken in argument. I think that the property did not vest in the defendant so as to make him liable to bear the loss which has occurred. Generally speaking, where a bargain is made for the purchase of goods, and nothing is said about payment or delivery, the property passes immediately, so as to cast upon the purchaser all future risk, if nothing further remains to be done to the goods; although he cannot take them away without paying the price. If anything remains to be done on the part of the seller, until that is done the property is not changed. In Rugg *v.* Minett, 11 East, 210, and Wallace *v.* Breeds, 13 East, 522, the thing which remained to be done was to vary the nature or quantity of the commodity before delivery; that was to be done by the seller. In other cases the thing sold was to be separated from a larger quantity of the same commodity. This case was different; the subject-matter of the sale was clearly ascertained. The defendant agreed to buy the bark stacked at Redbrook, meaning of course all the bark stacked there; but it was to be paid for at a certain price per ton. The bargain does not specify the mode in which the weight was to be ascertained, but it was necessary that it should be ascertained before the price could be calculated, and the concurrence of the seller in the act of weighing was necessary. He might insist upon keeping possession until the bark had been weighed. If he was anxious to get rid of the liability to accidental loss, he might give notice to the buyer that he should at a certain time weigh the bark, but until that act was done it remained at his risk. In Hanson *v.* Meyer, 6 East, 614, weighing was the only thing that remained to be done; there was not any express stipulation in the contract that the starch (the subject-matter of that contract) should be weighed; that was introduced in the delivery order, but the nature of the contract made it necessary. So here the contract made weighing necessary, for without that the price could not be ascertained. Suppose the plaintiff had declared specially upon this contract, he must have alleged and proved that he sold the bark at a certain sum per ton, that it weighed so many tons, and that the price in the whole amounted to such a certain sum. The case of Hanson *v.* Meyer differs from this in one particular; viz., that the assignees of the vendee, who had become bankrupt, were seeking to recover the goods sold; but the language of Lord Ellenborough as to the necessity of weighing in order to ascertain the price before the property could be changed is applicable to the present case, and decides it. I therefore think that the bark which remained unweighed at the time of the loss was at the risk of the seller; and even if the property had vested in the defendant, I should have thought that it had not been delivered, and consequently that the price could not be recovered on a count for goods sold and delivered.

HOLROYD, J. I also think that the plaintiff cannot recover. By a contract for the sale of specific goods, it is true, as a general position, that the property is changed, although the seller has a lien for the price, unless the contract is for a sale upon credit; then the goods remain at the risk of the buyer. But Hanson *v.* Meyer is a direct authority that in such cases as the present the seller does not part with the goods until the weighing has been accomplished. Secondly, I think that the bark was not delivered. If there was a delivery the seller could have no lien for the price, even if the contract did not make the bark deliverable until the 30th of November; there was neither a performance of the weighing nor an offer to perform it.

LITTLEDALE, J. I entertain some doubt whether the property did not pass by this contract; and that doubt, as it seems to me, is not inconsistent with the decision in Hanson *v.* Meyer. The question there was, whether the assignees of the purchaser had a right to call for a delivery of the goods sold. Lord Ellenborough said payment of the price and the weighing of the goods necessarily preceded the absolute vesting of the property; which expression I take to have been used with reference to the then question, viz., whether the property had so vested in the purchaser as to entitle his assignees to claim the delivery. So in this case, although the property might vest in the purchaser, it would not follow that he could enforce a delivery until the weight of the bark had been ascertained and the price paid. Here there was not a delivery in fact, nor was the delivery of part a constructive delivery of the whole. This differs from the cases of lien or stoppage *in transitu*, in which it may be considered that a delivery of part is in the nature of a waiver of the lien, or right to stop *in transitu*. I think further that an action for goods bargained and sold would not lie merely because the property passed. The mere bargain would not suffice, because no specific price was fixed; nor could the plaintiff recover on a *quantum valebat*, for the contract was to pay by weight; and therefore, until the commodity was weighed, there would be nothing to guide the jury in the amount of damages to be given. The seller was at all events bound to offer to weigh the bark, but he never did so. For these reasons I think he cannot recover.

Postea to the defendant.

SWANWICK AND ANOTHER *v.* SOTHERN AND OTHERS.

IN THE QUEEN'S BENCH, FEBRUARY 6, 1839.

[*Reported in* 9 *Adolphus & Ellis,* 895.]

TROVER for 1028 bushels of oats. Pleas: 1. Not guilty; 2. That the oats were not the property of the plaintiffs, in manner and form, &c. Issues thereon. On the trial before Patteson, J., at the Liverpool Spring Assizes, 1837, the material facts appeared to be as follows: The plaintiffs were corn dealers at Manchester; the defendants carried on the business of wharfingers at the Duke's Quay, in the same town. The oats in question being in a warehouse of the defendants were sold by Turner & Co., the owners, to John Marsden, and the following delivery order given, addressed to the warehouse-keeper: —

MR. WM. EATON, Duke's Quay:

Deliver Mr. John Marsden 1028¼⅖ bushels oats, bin 40, O. W., and you will please weigh them over and charge us the expense.

JOSEPH TURNER & CO.

OCTOBER 3d, 1836.

The warehouse-keeper entered this order in his book, and on October 5th he received the following order from John Marsden: —

MR. WM. EATON, Duke's Quay:

Deliver Messrs. Swanwick & Hall 1028¼⅖ bushel oats, in bin 40, O. Warehouse; and let them be weighed over and send a note up. I will see it paid.

FR. & JNO. MARSDEN.

MANCHESTER, 5th Oct., 1836.

Swanwick and Hall, the plaintiffs, accepted a bill drawn by Marsden, October 7, 1836, for the value of the oats, which was duly honored. Eaton entered the order of October 5 in his book, and said to the party delivering it that all would be right, and he would attend to the order. The oats were transferred to the plaintiffs in the defendant's books, but without weighing over. There were no oats in bin 40 but the quantity mentioned in the order. Eaton stated, at the trial. that from the 5th to the 12th of October the oats would have been delivered to the plaintiffs if required. Marsden becoming insolvent, Turner, on October 12, gave the defendants notice not to part with the oats; and on the 14th the defendants gave them up to Turner on an indemnity. At that time, and not before, they were weighed over, and they were found to be two bushels short of the weight mentioned in the orders. It was proved at the trial that the defendants did not consider themselves bound to weigh, and were not used to weigh, till delivery, when the grain was weighed to ascertain any loss of quantity. The question was, whether, without weighing, the property was sufficiently transferred to vest in the plaintiffs; or whether, on October 14, Turner still had a right to stop *in transitu.* Patteson, J., thought that, on the above state of facts, the plaintiffs were entitled to recover, but he gave leave to move for a nonsuit; and the plaintiffs had a verdict. In Easter term, 1837, a rule *nisi* was obtained for a nonsuit or a new trial. In Hilary term, 1839,

Cresswell and *Tomlinson* showed cause.

Wightman and *W. H. Watson*, contra. *Cur. adv. vult.*

LORD DENMAN, C. J., now delivered the judgment of the court.

The question in this case turns upon the construction of two delivery orders. [His Lordship then read the orders set out, p. 47, *ante.*] The oats were all that were in bin 40. They were transferred to the plaintiffs in the defendants' books, but never weighed over. The plaintiffs had accepted a bill for the price, which they duly honored. On Marsden's failure, Messieurs Turner sought to stop them; and the only question is, whether weighing over was in this case necessary in order to vest the property in the plaintiffs and defeat the stoppage *in transitu.* Neither of the contracts of sale was given in evidence.

The cases on this subject establish the principle that wherever any thing remains to be done by the seller which is essential to the completion of the contract, a symbolical delivery by transfer in the wharfinger's books will not defeat the right of stoppage *in transitu* as between buyer and seller. Hanson *v.* Meyer, 6 East, 614, Shepley *v.* Davis, 5 Taunt. 617, Busk *v.* Davis, 2 M. & S. 397, abundantly show this. Therefore, if part of a bulk be sold, so that weighing or separation is necessary to determine the identity or individuality (as Lord Ellenborough expresses it in Busk *v.* Davis, 2 M. & S. 397) of the article, or if the whole of a commodity be sold, but weighing is necessary to ascertain the price, because the quantity is unknown, the weighing or measuring must precede the delivery, and the symbolical delivery without such weighing will not be sufficient.

But where the identity of the goods and the quantity are known, the weighing can only be for the satisfaction of the buyer, as was held in Hammond *v.* Anderson, 1 New Rep. 69; and in such case the transfer in the book of the wharfinger is sufficient. We are of opinion that the present case is of the latter description, and that this property passed as between buyer and seller. We have therefore no occasion to resort to the doctrine of estoppel, which is strongly enforced in Hawes *v.* Watson, 2 B. & C. 540; but we do not mean, in so saying, to cast any doubt upon the authority of that case. Under these circumstances the rule for a nonsuit must be discharged.

Rule discharged.

TURLEY *v.* BATES.

In the Exchequer, June 6, 1863.

[*Reported in* 2 *Hurlstone & Coltman*, 200.]

The declaration contained a special count, alleging that the plaintiff bargained and sold, and the defendant bought from the plaintiff, a quantity of fire-clay then deposited on certain land of the plaintiff, at the price of two shillings per ton, upon the terms that the defendant should take away the goods, and pay for the same within a reasonable time. It then, after averring that all conditions had been fulfilled to entitle the plaintiff to have the goods taken away and accepted by the defendant, and that the defendant took away and accepted a part of the goods under the contract, alleged as a breach that the defendant would not take away and accept the residue of the said goods, or pay for the same, whereby the plaintiff lost the price and profit he would have made.

The declaration also contained counts for goods bargained and sold, goods sold and delivered, and on an account stated.

The defendant, as to the first count, pleaded a denial of the buying and selling, and of the plaintiff's readiness to deliver and suffer the defendant to take away the residue. To the rest of the declaration he pleaded never indebted and a set-off.

The cause was tried, before Channell, B., at the Middlesex sittings after last Easter term, when the following facts appeared, as stated in the judgment. The plaintiff was an iron and coal master at Cosely, in Staffordshire. In the year 1854, and between that and the year 1857, he excavated and raised from his colliery, the Cosely Moore Colliery, a quantity of fire-clay. This clay was stacked in a heap on land of the plaintiff near to the bank of his colliery. Before December, 1860, a portion of this heap had been sold and removed. In that month a quantity, estimated by the plaintiff at about 1,500 tons, still remained stacked in the heap. The defendant had before this time bought of the plaintiff, and carted and carried away, portions of the heap. On several occasions, in December, 1860, the plaintiff and defendant met, and a bargain was come to with respect to the clay. This bargain was on some points differently represented by the evidence for the plaintiff and by that of the defendant.

According to the case for the plaintiff, the bargain concluded was for the sale and purchase of the entire heap as then stacked, at the price of two shillings per ton, — the plaintiff being willing to take that price, instead of a higher one which he had demanded, provided the whole heap was taken away, so that the ground might be cleared; that the defendant was, at his own expense, to load and cart it away; and that the clay, when on its way to the defendant's premises, was to be weighed at a weighing machine belonging to one Johnson, which machine the defendant's carts would pass on their way; and that the defendant was to pay for the weighing.

It was not denied, on the part of the defendant, that a bargain was made to pay for such clay as he might take away at the rate of two shillings per ton, nor that such clay was to be carted and weighed at his own expense; but it was contended by the defendant that the bargain was not for the whole heap as it stood, but only for such portion of the clay as the defendant chose to send for and cart away, and, after having it weighed at Johnson's machine, to pay for it at the rate aforesaid. No point was made on the Statute of Frauds, that the contract was not in writing: whether the verbal bargain was for the whole or for only a portion of the stack was the principal question in the cause. It was, however, further contended by the defendant that, whatever the quantity contracted to be bought, it was bought on a warranty by the plaintiff that the clay would stand a red heat.

After the bargain the defendant at different times, as he thought fit, carted away portions of the clay, in the whole about 270 tons. On the three or four first occasions of carting away, the clay was weighed at Johnson's machine. On one occasion, the last, and without any notice to the plaintiff, clay was loaded by the defendant's servants and carted away in an opposite direction to the weighing machine, and such clay was taken to a canal, where it was loaded into a boat and taken by water carriage to Liverpool. The plaintiff, whilst the defendant's men were carting this last clay, saw them and followed them, and the clay was gauged on the barge in the plaintiff's presence at twenty-two tons.

Evidence was given, on the part of the defendant, that the clay which had been taken away by him had been used in his business, and did not answer the warranty alleged to have been given. On this ground also he denied his liability to take or pay for more than had been removed. This evidence became immaterial, as the learned judge ruled there was no evidence of a warranty.

All the clay so taken away by the defendant had either been paid for before action brought or was covered by a set-off.

The learned judge left to the jury the question what was the bargain; and they found for the plaintiff, that the bargain was a bargain for the whole. It was then further objected by the defendant, that, assuming that the verbal bargain was for the sale of the whole of the stack of clay, and further that there was no defence on the ground of warranty, yet, as the clay sought to be recovered for had never been weighed at Johnson's machine, the count for goods bargained and sold could not be maintained; and that, in the absence of any evidence of any fall in the value of clay or other loss by reason of not taking it away, the plaintiff could, at most, recover only nominal damages.

No evidence of any actual loss or damage was given, and a verdict was then entered for the plaintiff, by consent, for the sum of £112 10*s.* 6*d.*, as the estimated value of the clay not removed, at the contract price of two shillings per ton, — leave being reserved to the defendant to limit the verdict to the first count, and to nominal damages on that count in case this court should be of opinion that the plaintiff was only entitled to recover on that count.

In last Easter term a rule for a new trial, on the ground of misdirection on the point of warranty, was applied for and refused; but a rule *nisi* was granted, pursuant to the leave reserved, to limit the verdict to the first count and reduce the damages to nominal damages; against which

Pigott, Serjt., and *H. James* showed cause in the present term (June 6).

Overend and *Quain*, in support of the rule.

Cur. adv. vult.

The judgment of the court was delivered, in the following Michaelmas vacation (December 6), by

CHANNELL, B. This was an action tried before me at the Middlesex sittings, in last Easter term. (His Lordship then stated the pleadings, and proceeded.) At the trial a verdict was found for the plaintiff, damages £112 10*s.* 6*d.*, with leave reserved to the defendant to move to reduce the verdict to nominal damages on the ground hereinafter mentioned. (His Lordship then stated the facts as above set forth.) This rule was argued before the Lord Chief Baron, my brother Bramwell, and myself.

For the plaintiff it was contended that where full authority was given to the buyer to remove the clay sold, and all that the seller had to do according to the contract was complete, and where everything that remained to be done was to be done by the buyer at his own expense; viz., as, in this case, to cart away and have the clay weighed at his own expense, it must be taken as if there had been such a bargain and sale as to pass the property, though the clay had not been removed and weighed, and that the contract price might be recoverable on the count for goods bargained and sold.

For the defendant it was contended that, taking the case on the plaintiff's evidence, and as found by the jury, that there had been a removal and weighing of part of the clay, yet no property passed in any clay until the clay had been weighed at Johnson's machine, and the quantity and price thus ascertained, so as to entitle the plaintiff to recover on the count for goods bargained and sold.

In the course of the argument for the defendant we were referred to several cases decided in our courts, which were said to govern the question, and to a passage from my brother Blackburn's Treatise on Contract of Sale, part 2, ch. 2, p. 152. It was argued that the rule deducible from these authorities was, that so long as a price had been agreed upon according to quantity, to be ascertained by weighing, that until the goods had been weighed, and the price so ascertained, the contract was incomplete; which rule it was said was in accordance with the rule given in Pothier, *Contr. de Vente*, with Kent's Commentaries, vol. 2, p. 496, New York edition, 1848, the *Code Civil*, *liv.* iii., *tit.* vi., *ch.* 1, *art.* 1585, 1586, 1587.

The rule as stated in Blackburn on Contract of Sale, p. 152, is, "that where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of these things, also, shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they ought to be accepted."

After adverting to the rule as one wholly adopted from the civil law, the learned author (at page 153) says: "In general, the weighing, &c., must from the nature of things be intended to be done before the buyer takes possession of the goods, but that is quite a different thing from intending it to be done before the vesting of the property; and as it must in general be intended that both the parties shall concur in the act of weighing when the price is to depend on the weight, there seems little reason why, in cases where the specific goods are agreed upon it should be supposed to be the intention of the parties to render the delay of that act, in which the buyer is to concur, beneficial to him. Whilst the price remains unascertained, the sale is clearly not for a certain sum of money, and therefore does not come within the civilian's definition of a perfect sale, transferring the risk and gain of the thing sold; but the English law does not require that the consideration for a bargain and sale should be in moneys numbered, provided it be of value."

The learned author, however, considered the rule he mentions to prevail here, and to rest upon the authority of the English decided cases. Several cases are then cited in the treatise: Hanson *v.* Meyer, 6 East, 614; Hinde *v.* Whitehouse, 7 East, 558; Rugg *v.* Minett, 11 East, 210; Zagury *v.* Furnell, 2 Campb. 240; Simmons *v.* Swift, 5 B. & C. 857; Laidler *v.* Burlinson, 2 M. & W. 602; Tripp *v.* Armitage, 4 M. & W. 687.

The author further observes that "if it appear from the agreement that the intention of the parties is that the property shall pass presently, the property does pass, though there remain acts to be done by the vendor before the goods are deliverable;" citing Woods *v.* Russell, 5 B. & A. 942; Clarke *v.* Spence, 4 A. & E. 448.

It is very doubtful whether in stating the rule to be that where anything remains to be done to the goods for ascertaining the price, as weighing, &c., the performance was a condition precedent to the transfer of the property, it was meant by the learned author to include a case where all that remained to be done was to be done by the buyer, with full authority from the seller to do the act.

In Hanson v. Meyer the weighing was to precede the delivery, and was a condition precedent to the purchaser's right to take possession, and to a complete present right of property. In Hinde v. Whitehouse, which was a case of a sale by auction, it was held that though the duties to the crown remained to be paid by the seller, before possession could be had by the buyer, the property passed from the time of sale; the words of the condition showing that intention. In Rugg v. Minett, a duty remained to be performed by the sellers; and Lord Ellenborough stated the test to be, "whether everything had been done by the sellers which lay upon them to perform in order to put the goods in a deliverable state;" and Mr. Justice Bayley, in effect, adopted the same test. Zagury v. Furnell is an authority to the same effect. There it was the duty of the seller to count the skins in each bale, and the price was for a certain sum per dozen skins. In Simmons v. Swift, the authority most in point for the defendant, it was a part of the contract there for the sale of a stack of bark at £9 per ton, that the bark should be weighed, and the concurrence of the seller in the act of weighing was necessary. Bayley, J., after stating the general principle says: "If anything remains to be done on the part of the seller, until that is done the property is not changed."

From a consideration of these cases, it appears that the principle involved in the rule above quoted is, that something remains to be done by the seller. It is, therefore, very doubtful, as before stated, whether the present case comes within the principle of the rule. But, however that may be, it is clear that this rule does not apply if the parties have made it sufficiently clear whether or not they intend that the property shall pass at once, and that their intention must be looked at in every case. This is clearly laid down in the case of Logan v. Le Mesurier, 6 Moo. P. C. C. 116, and in Hinde v. Whitehouse, 7 East, 558, cited *supra*, and in Blackburn on Contract of Sale, p. 151.

In the present case the jury have, in effect, adopted the plaintiff's version of the bargain, by their finding that it was for the whole heap. And, taking that view of the case, it seems to us clear that the intention of the parties was that the property in the whole heap should pass, notwithstanding the clay was to be weighed at Johnson's machine; and we, therefore, think that the rule to reduce the damages must be discharged. *Rule discharged.*[1]

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[1] Graff v. Fitch, 58 Ill. 373; Hagins v. Combs, 102 Ky. 165; *acc.*; McFadden v. Henderson, 128 Ala. 221; Ballantyne v. Appleton, 82 Me. 570; Pinkham v. Appleton, 82 Me. 574; Ward v. Shaw, 7 Wend. 404; Andrew v. Dieterich, 14 Wend. 31, *contra*. See also Hoffman v. Culver, 7 Ill. App. 450.

pp. p 1076

MARTINEAU *v.* KITCHING.

In the Queen's Bench, May 3, 1872.

[*Reported in Law Reports,* 7 *Queen's Bench,* 436.]

The plaintiffs, sugar refiners, were in the habit of selling to brokers the whole of each filling of sugar, consisting of from 200 to 300 loaves or "titlers" each, the terms always being "Prompt at one month; goods at seller's risk for two months," the "prompt" day being the Saturday next after the expiration of one month from the sale. The titlers in each filling were stored on the plaintiffs' premises, and were from time to time fetched away by the purchasers or their sub-vendees, being weighed on their removal, each titler weighing from thirty-eight to forty-two pounds. If the whole of the lots contained in one sale-note had not (which was frequently the case) been taken away on the "prompt" day payment was made by the purchaser (by bill or cash) at an approximate sum calculated on the probable weight, the actual price being afterwards adjusted on the whole filling being cleared.

The defendant, who was an old customer of the plaintiffs, had bought four fillings, consisting of specific titlers, each marked, on the above terms, and had paid the approximate price of the four lots, and had fetched some of each lot away. A fire occurred on the plaintiffs' premises after the expiration of the two months from the dates of sale to the defendant, destroying the whole contents of the warehouses. At the time of the fire the plaintiffs had floating policies of insurance which covered goods on the premises "sold and paid for, but not removed," but they had no agreement or understanding with their customers as to any insurance; and the amount insured, which the plaintiffs received from the underwriters, was not sufficient to cover the loss of their own goods, exclusive of the titlers, undelivered, which they had sold to the defendant.

Cockburn, C. J. This is an action brought to recover the price of certain sugar alleged to have been sold by the plaintiffs to the defendant. The sugar perished by fire while it was still upon the premises of the sellers, and the defence raised is twofold: first, that the property in the sugar had not passed from the plaintiffs, the sellers, to the defendant, the buyer, and consequently the loss must fall upon the sellers; secondly, that, even supposing that were decided against the defendant, inasmuch as these goods were covered by an insurance effected by the plaintiffs, and the plaintiffs had received the amount insured with respect to these goods, the defendant is entitled to have what the plaintiffs have so received in respect of the goods set off in his favor against the price.

The first question is, whether at the time these goods perished by fire they were the property of the sellers, the plaintiffs, or the property of the buyer, the defendant. In order to decide that, as well as to decide the second question in dispute, we must look to see what was the course of dealing which existed between these parties. [The Lord Chief Justice stated the facts.]

Now, that being the state of things existing between these parties, the first question is, whether, the contract between them being in conformity with the general course of dealing to which I have adverted, when these goods perished by fire the property had passed from the sellers to the buyer. In my opinion it had, both upon general principles and more especially with reference to the particular facts of this case and the terms of the contract between the parties. In dealing with the case of a contract we must bear in mind that the seller engages to do two main things, first, to pass the property in the thing sold; secondly, to deliver possession of it. The buyer engages to take the thing which he has contracted to buy, and to pay the price; and, undoubtedly, in such a contract, one of the essential elements to constitute a contract of sale is that the price shall be agreed upon. But there is nothing, as it seems to me, to prevent the parties from agreeing that the property shall pass, and that the price shall afterwards be ascertained, that which is capable of being reduced to a certainty being for practical purposes a thing already certain or ascertained.

Now the question here is, whether the property passed. It appears that the price had not been finally adjusted, but it is equally clear that the parties had agreed upon a price estimated between them as the sum to be taken provisionally as the price for the goods. The question which presents itself to my mind is whether, independently of the question how far, when the price is still to be ascertained on the sale of a specific chattel, the property passes, the parties having agreed that provisionally a given sum shall be taken as the price, that does not show a clear intention on the part of both buyer and seller that the property shall pass.

It is very true, as has been ably contended by Mr. Brown, that there are authorities for saying that, where the price remains to be ascertained, the property will not pass. But I think it is equally clear, upon the authorities, that, according to the view now taken of this branch of the law, the question is one of intention between the parties. I take it now to be perfectly clear, especially after the case of Turley *v.* Bates, 2 H. & C. 200, 33 L. J. (Ex.) 43, that the real question in all these cases is, whether the parties did intend that the property should pass; and I take it that in this respect no fault can be found with the law of England if a distinction exists between our law and the civil law in this respect. It is perfectly true that where anything remains to be done with a view to the appropriation of the thing agreed to be sold by the seller to the buyer, it is plain that the property will not have been intended by him to pass to the buyer, and the property will not have passed. But it is equally clear that, in point of principle, and in point of common-sense and practical wisdom, there is nothing to prevent a man from passing the property in the thing which he proposes to sell and the buyer proposes to buy, although the price may remain to be ascertained afterwards. We are dealing with the case of a specific chattel. I agree to sell to a man a specific thing — say a stack of hay, or a stack of corn. I agree to sell him that specific thing, and he agrees to buy it; the price undoubtedly remains an element of the contract, but we agree, instead of fixing upon a precise sum, that the sum shall be ascertained by a subsequent measurement. What is there to prevent the parties from agreeing that the property shall pass from one to the other, although the price is afterwards to be ascertained by measurement. I take it that is the broad substantial distinction. If, with a view to the appropriation of the thing, the measurement is to be made as well as the price ascertained, the passing of the property being a question of intention between the parties, it did not pass because the parties did not intend it to pass. But if you can gather from the whole circumstances of the transaction that they intended that the property should pass, and the price should afterwards be ascertained, what is there in principle, what is there in common-sense or practical convenience which should prevent that intention from having effect? I protest I can see none, and unless there are authorities absolutely conclusive upon the point, I will not give way to a rule which appears to me to militate against principle, and to be inconsistent with common-sense and convenience. In this particular case it is not necessary to say what would be the law applicable, if we had now to consider, for the first time, or as a court of error, which we are not, the question in the case of Simmons *v.* Swift, 5 B. & C. 857. But this case, I think, is plainly distinguishable from Simmons *v.* Swift, by reason of more than one circumstance. The first to which I shall advert is, that the price is agreed upon between the parties provisionally, according to their estimate of the quantity which the titlers contain. Can it be said that after that price has been paid at the prompt, although there is a further term in the contract between the parties that they shall eventually ascertain by an accurate weighing whether more or less than the price which the parties intended has been paid, — can it be said that it was intended after the price provisionally agreed upon has been paid at the prompt, that the property is still to remain in the sellers and not to be transferred to the buyer? I do not think it is possible to hold anything which would be so inconsistent with what is obviously the intention of the parties. All that they intended to do by the final weighing was to see whether they had accurately ascertained the amount which, according to the terms of the contract, they intended that the one party should pay and the other should receive. Then there is a further circumstance which appears to me of importance in this case, and which brings it clearly within the principle, as I think, of the case of Castle *v.* Playford, Law Rep. 7 Ex. 98, the recent case in the Exchequer Chamber, that is. that by the terms of this contract, the goods, while they remained in their possession — or in their custody is the more proper term — in their warehouse during the two months, were to be at the risk of the sellers, the plaintiffs. As I pointed out in the course of the argument, what would be the necessity, what would be the object or purpose of such a stipulation that the goods should be at their risk during the two months if the property still remained in them? Of course it would then be at their risk. Moreover, according to the course of dealing between the parties, at the expiration of the two months, notice is given to the buyer, which notice the buyer accepts, and which notice the present defendant in his dealings with the plaintiffs had invariably accepted without remonstrance or objection, that upon the expiration of the two months the goods, though still remaining in the custody of the plaintiffs, should stand at the buyer's risk. That brings the case at once within the principle of the decision in Castle *v.* Playford, Law Rep. 7 Ex. 98, and shows that at that time, at all events, the property in the goods was intended by common consent of both buyer and sellers to be in the defendant, the buyer.

I think, therefore, looking at all the circumstances of the case, it is impossible to doubt that the true intention of the parties, as well as by contemplation and effect of the law, was that the property was in the buyer and no longer in the sellers at the time of the fire, and therefore the thing, having perished, perishes to the dominus, namely, the buyer, and not to the sellers, who had ceased to have anything to do with it.

Blackburn, J. I am also of opinion that our judgment must be in favor of the plaintiffs. The case arises in this way. [The learned judge stated the facts.] The difficulty which is raised is, that these goods had perished before they were actually weighed; and two points were made by Mr. Brown; he contended that because they had not been weighed the property had not passed, and that it therefore followed, as an inexorable rule of law, that they were not to be paid for, because they were still the property of the plaintiffs. This, however, I do not think is the correct way of putting the case, and I do not think that we need decide whether the property passed or not. As a general rule, *res perit domino,* the old civil law maxim, is a maxim of our law; and when you can show that the property passed the risk of the loss, *primâ facie,* is in the person in whom the property is. If, on the other hand, you go beyond that, and show that the risk attached to the one person or the other, it is a very strong argument for showing that the property was meant to be in him. But the two are not inseparable. It may be very well that the property shall be in the one and the risk in the other. In the present case I think all that is necessary to decide is, that the risk was not in the sellers. When the first month had elapsed, and payment had been made, still the buyers had, from their express stipulation, a right to have the goods remain a month at the refiners' warehouse at the refiners' risk. Let us suppose that the refiners had become bankrupt. If in consequence of the risk being in the refiners, which by this stipulation it clearly would be during the two months, the property was still in the refiners, their assignees in bankruptcy would take the entire property, and the buyers, who had paid the approximate price, would be obliged to come in and prove, and get so many shillings in the pound as they might be able to prove for. That would be a monstrous hardship, and in such a case as that I should be very much inclined to struggle very hard to find any legal reason for saying that, though the risk remained in the sellers, yet the property had passed to the buyers as soon as they had made the payment. If the question arose in such a case as that, I am rather inclined to think it would be necessary to look carefully into Simmons *v.* Swift, 5 B. & C. 857, and some other cases, to see if one could decide that the property had passed. But in this case that does not arise; the second of the two months had elapsed, during which the stipulation was that the goods were to be at the sellers' risk. I think *expressio unius est exclusio alterius.* I cannot construe that stipulation, except as implying that at the expiration of the two months the goods are to be at the buyer's risk. That construction would be greatly fortified, if it required fortification, by the fact that at the end of the two months the sellers did send a note to remind the buyer that the goods are at his risk; and this being a stipulation between two parties, who are both *sui juris*, that they are to be at the buyer's risk after the two months, the question is, is that effectual at law?

Mr. Brown's argument was, that the goods must be at the sellers' risk, because, as he contended, the property had not passed to the buyer. I have already intimated that, if it were necessary, I should consider very long before I said that. However, assume that it had not passed. If the agreement between the parties was, "I contract that when you pay the price I will deliver the goods to you, but the property shall not be yours, they shall still be my property so that I may have dominion over them; but though they shall not be yours, I stipulate and agree that if I keep them beyond the month the risk shall be upon you;" and then the goods perish; to say that the buyer could then set up this defence and say, "Although I stipulated that the risk should be mine, yet, inasmuch as an accident has happened which has destroyed them, I will have no part of that risk, but will throw it entirely upon you because the property did not pass to me," is a proposition which, stated in that way, appears to be absolutely a *reductio ad absurdum;* and that is really what the argument amounts to. If the parties have stipulated that, if after the two months the goods remain in the sellers' warehouse, they shall, nevertheless, remain there at the buyer's risk, it would be a manifest absurdity to say that he is not to pay for them; and I think the case of Castle *v.* Playford, Law Rep. 7 Ex. 98, is a clear authority of the Court of Exchequer Chamber, that where the parties have stipulated that the risk shall be on one side, it matters not whether the property had passed or not. The parties here have by their express stipulation impliedly said, after the two months the goods shall be at the risk of the buyer, consequently it is the buyer who must bear the loss.

Then Mr. Brown said, "But how can the buyer pay when he was to pay at 47*s.* per cwt., and the goods have never been weighed, and therefore it would never be known with certain precision how many cwt. there were?" I answer to that, in the first place, that the point is concluded by the authority of Alexander *v.* Gardner, 1 Bing. N. C. 671; Turley *v.* Bates, 2 H. & C. 200, 33 L. J. (Ex.) 43; and the recent case of Castle *v.* Playford, Law Rep. 7 Ex. 98, in the Exchequer Chamber, — which all go to show that where the price is not ascertained, and it could not be ascertained with precision in consequence of the thing perishing, nevertheless the seller may recover the price, if the risk is clearly thrown on the purchaser, by ascertaining the amount as nearly as you can.

There is another reason which in this case would clearly apply, — the delay in weighing is quite as much the fault of the purchaser as of the sellers. When the prompt day comes the sellers have a right to require that the goods should be weighed at once, so as to ascertain the price, and to have it paid to the last farthing. It may be for the mutual convenience of both parties; but still it is the buyer, in effect, who requests that, as he is going to leave them longer, the weighing should be postponed for a time. Therefore it is in consequence of his delay that the weighing does not take place. Now by the civil law it always was considered that, if there was any weighing, or anything of the sort which prevented the contract being *perfecta emptio*, whenever that was occasioned by one of the parties being in *morâ*, and it was his default, though the *emptio* is not *perfecta*, yet if it is clearly shown that the party was in *morâ*, he shall have the risk just as if the *emptio* was *perfecta.* That is perfectly good sense and justice, though it is not necessary to the decision of the present case, that, when the weighing is delayed in consequence of the interference of the buyer, so that the property did not pass, even if there were no express stipulation about risk, yet because the non-completion of the bargain and sale, which would absolutely transfer the property, was owing to the delay of the purchaser, the purchaser should bear the risk just as much as if the property had passed. The inclination of my opinion is, as I have said, that the property is in the purchaser, but we need not decide that at all to-day, and it might require some consideration to see how far the case of Simmons *v.* Swift, 5 B. & C. 857, really governs the case.

Judgment for the plaintiffs.[1]

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[1] The statement of facts has been abbreviated, and portions of the opinions holding that the defendant was not entitled to the benefit of the insurance have been omitted. LUSH and QUAIN, JJ., delivered concurring opinions.

The case came before the court on a case stated by an arbitrator pursuant to an order of nisi prius. The court was to have power to draw inferences of fact, and to make any amendments in the pleadings which it might think necessary or proper.

See further in regard to the transfer of risk, irrespective of transfer of title, Inglis *v.* Stock, 10 A. C. 263.

SHERWIN *v.* MUDGE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH 14, 1878 — OCT. 24, 1879.

[*Reported in* 127 *Massachusetts*, 547.]

CONTRACT by the collector of the city of Boston against the administratrix of the estate of Andrew C. Mudge, deceased, for the amount of a tax assessed on May 1, 1875, on a stock of merchandise. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court on appeal, on an agreed statement of facts, in substance as follows: —

By the terms of a written agreement entered into before May 1, A. "sells" and B. "buys" the stock of goods in A.'s shop; the price to be a certain percentage of the invoice price of the goods, according to an inventory in the possession of A., "subject to corrections as to quantities; delivery to be made and price paid as soon as the quantities can be verified." The agreement also stated the price according to the inventory, and the amount to be paid, "subject as above." As soon as the agreement was signed B. paid A. a certain sum. An examination was then made by B. to verify the inventory, which was not finished until after May 1, when the goods were delivered and the balance found due paid

H. W. Putnam, for the plaintiff.

J. H. Young, for the defendant.

GRAY, C. J. By a contract for the sale of specific goods, the title doubtless passes as between the parties, without any actual or constructive delivery, or payment of the price, unless it can be shown that their intention is different. Tarling *v.* Baxter, 6 B. & C. 360; s. c. 9 D. & R. 272; Dixon *v.* Yates, 5 B. & Ad. 313, 340; s. c. 2 Nev. & Man. 177, 202; Gilmour *v.* Supple, 11 Moore P. C. 551; Parsons *v.* Dickinson, 11 Pick. 352, 354; Pratt *v.* Parkman, 24 Pick. 42, 46; Morse *v.* Sherman, 106 Mass. 430; Dempsey *v.* Gardner, *ante*, 381.

But in the present case the terms of the written contract manifest the intention of the parties that the title shall not pass immediately. The implication of an immediate transfer of title, suggested by the use, at the outset, of the words in the present tense, by which the defendant "sells," and Jordan, Marsh, & Co. "buy," an entire stock of goods in a particular shop, is controlled by the subsequent provisions. The contract not only requires a comparison of the actual quantities of the goods with the inventory in the possession of the defendant, in order to fix the price; but the stipulation "delivery to be made and price paid as soon as the quantities can be verified" shows that the parties contemplated and intended that the transfer of the title and the payment of the price should be simultaneous, and that both should be postponed until the quantities of the goods were verified and the amount of the purchase money thereby ascertained. Higgins v. Chessman, 9 Pick. 7, 10; Dresser Manuf. Co. v. Waterston, 3 Met. 9, 17; Macomber v. Parker, 13 Pick. 175; Mason v. Thompson, 18 Pick. 305; Riddle v. Varnum, 20 Pick. 280; Foster v. Ropes, 111 Mass. 10, 16.

The defendant, therefore, was the owner of the goods on the first of May, and is liable for the tax assessed thereon.

Judgment for the plaintiff.[1]

LINGHAM v. EGGLESTON.

SUPREME COURT OF MICHIGAN, APRIL 17, 18 — JULY 11, 1873.

[*Reported in 27 Michigan, 324.*]

COOLEY, J. The contest in this case relates to a sale of lumber by Eggleston to Lingham and Osborne, and the question involved is, whether the contract between the parties amounted to a sale *in presenti* and passed the title, or merely to an executory contract of sale. The lumber, subsequent to the contract and before actual delivery to the purchasers, was accidentally destroyed by fire, and the purchasers now refuse to pay for it on the ground that it never became their property. The action was brought by Eggleston for goods bargained and sold, and in the court below he recovered judgment.

There appears to be very little dispute about the facts. The lumber was piled in Eggleston's mill yard at Birch Run. In September, 1871, he sold his mill to a Mr. Thayer, reserving the right to leave the lumber in the yard until he disposed of it. To most of the lumber the plaintiff had an exclusive title; but there were four or five piles which he owned jointly with one Robinson. The whole amount was from 200,000 to 250,000, excluding Robinson's share in the four or five piles. The defendants went to the mill yard September 23, 1871, and proposed to buy the lumber. Plaintiff went through the yard with them, pointed out the several piles, and designated those in which Robinson had an undivided interest, and also some piles of shingles which they proposed to take with the lumber. After examining the whole to their satisfaction, the defendants agreed upon a purchase, and the following written contract was entered into: —

Flint, September 23, 1871. Lingham and Osborne bought from C. Eggleston this day, all the pine lumber on his yard at Birch Run at the following prices: For all common, eleven dollars, and to include all better at the same price; and for all culls, five dollars and fifty cents per M., to be paid for as follows: five hundred dollars to-day, and five hundred dollars on the 10th of October next; the balance, one half on 1st day of January, A. D. 1872, and the rest on the 1st day of February following; said lumber to be delivered by said Eggleston on board of cars when requested by said Lingham and Osborne, which shall not be later than 10th of November next. Also some shingles at two dollars per M. for No. 2, and four dollars for No. 1.

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[1] The statement of the case has been abbreviated.

(Signed) LINGHAM & OSBORNE.
CHAUNCEY EGGLESTON, JR.

The five hundred dollars mentioned in this contract to be paid at the time of its execution was paid. A few days later defendants went to the mill yard in plaintiff's absence and loaded two cars with the lumber. He returned before they had taken them away, and helped them count the pieces on the cars, but left them to measure them afterwards. At this time the lumber in the piles had not been assorted, inspected, or measured. There was disagreement between the parties as to whether they had fixed upon a person to inspect the lumber, — the defendants claiming that such was the fact. On the 9th day of October, 1871, Lingham met plaintiff on the cars at Flint, and told him the fires were raging near Birch Run; that the lumber yard was safe yet, but that there were eight cars standing on the side track, and he had better go up to Birch Run and load what were there, and get what lumber he could away; plaintiff took the first train for the purpose, and while on the train the train boy gave him the following note from Lingham: —

Holly. Mr. Eggleston: You may load, say ten thousand, if you think best, on each car, and we can have it inspected as it is unloaded. I will try and come up to-morrow.

When plaintiff reached Birch Run the fire was raging all about the mill, and that, with all the lumber in the yard, was soon totally destroyed by fire. Such are the undisputed facts in the case; and upon these the jury were instructed in substance that a completed contract of sale was made out, and the plaintiff was entitled to recover the purchase price.

Where no question arises under the statute of frauds, and the rights of creditors do not intervene, the question whether a sale is completed or only executory, must usually be determined upon the intent of the parties to be ascertained from their contract, the situation of the thing sold, and the circumstances surrounding the sale. The parties may settle this by the express words of their contract, but if they fail to do so we must determine from their acts whether the sale is complete. If the goods sold are sufficiently designated so that no question can arise as to the thing intended, it is not absolutely essential that there should be a delivery, or that the goods should be in deliverable condition, or that the quantity or quality, when the price depends upon either or both, should be determined. All these are circumstances having an important bearing when we are seeking to arrive at the intention of the parties, but no one of them, nor all combined, are conclusive.

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In Blackburn on Sales, 120, the rule on this subject is very clearly and correctly stated as follows: The question, the author says, is "a question depending upon the construction of the agreement; for the law professes to carry into effect the intention of the parties as appearing from the agreement, and to transfer the property when such is the intention of the agreement; not before. In this, as in other cases, the parties are apt to express their intentions obscurely; very often because the circumstances rendering the point of importance are not present to their minds, so that they really had no intention to express. The consequence is, that without absolutely losing sight of the fundamental point to be ascertained, the courts have adopted certain rules of construction which, in their nature, are more or less technical. Some of them seem very well fitted to aid the court in discovering the intention of the parties; the substantial sense of others may be questioned. The parties do not contemplate a bargain and sale till the specific goods on which their contract is to attach are agreed upon. Where the goods are ascertained, the parties are taken to contemplate an immediate bargain and sale of the goods, unless there be something to indicate an intention to postpone the transference of the property till the fulfilment of any conditions; and when by the agreement the seller is to do anything to the goods for the purpose of putting them into a deliverable shape, or when anything is to be done to them to ascertain the price, it is presumed that the parties mean to make the performance of those things a condition precedent to the transfer of the property. But as these are only rules for the construction of the agreement, they must yield to anything in the agreement which clearly shows a contrary intention. The parties may lawfully agree to an immediate transference of the property in the goods, although the seller is to do many things to them before they are to be delivered; and, on the other hand, they may agree to postpone the vesting of the property till after the fulfilment of any conditions they please." In Benjamin on Sales, 214, 215, the same doctrine is laid down, and it is said that "nothing prevents the parties from agreeing that the property in a specific thing sold and ready for delivery is not to pass till certain conditions are accomplished, or that the property shall pass in a thing which remains in the vendor's possession, and is not ready for delivery, as an unfinished ship, or which has not yet been weighed or measured, as a cargo of corn in bulk, sold at a certain price per pound or per bushel." And see ib., 221 *et seq.*

Upon this general principle there is no difficulty in reconciling most of the reported decisions. And even without express words to that effect, a contract has often been held to be a completed sale, where many circumstances were wanting and many things to be done by one or both the parties to fix conclusively the sum to be paid or to determine some other fact material to their respective rights.

The most important fact indicative of an intent that title shall pass is generally that of delivery. If the goods be completely delivered to the purchaser, it is usually very strong if not conclusive evidence of intent that the property shall vest in him and be at his risk, notwithstanding weighing, measuring, inspection, or some other act is to be done afterwards. A striking case in illustration is that of Young *v.* Mathews, Law R., 2 Exch. 127, where a large quantity of bricks was purchased in kilns. Only a part of them were burned, and none of them were counted out from the rest; but they were paid for, and such delivery as in the nature of the case was practicable was made. The court held that the question was one of intention merely, and that it was evident the parties intended the title to pass. To the same effect are Woods *v.* Russell, 5 B. & Ald. 942; Riddle *v.* Varnum, 20 Pick. 280; Bates *v.* Conklin, 10 Wend 389; Olyphant *v.* Baker, 5 Denio, 379; Bogy *v.* Rhodes, 4 Greene (Iowa), 133; Crofoot *v.* Bennett, 2 N. Y. 258; Cunningham *v.* Ashbrook, 20 Mo. 553.

So, if the goods are specified, and all that was to be done by the vendor in respect thereto has been done, the title may pass, though the quantity and quality, and consequently the price to be paid, are still to be determined by the vendee. Turley *v.* Bates, 2 H. & C. 200; Kohl *v.* Lindley, 39 Ill. 195.

And even if something is to be done by the vendor, but only when directed by the vendee, and for his convenience, as, for instance, to load the goods upon a vessel for transportation, the property may pass by the contract of sale notwithstanding. Whitcomb *v.* Whitney, 24 Mich. 486; Terry *v.* Wheeler, 25 N. Y. 520.

But the authorities are too numerous and too uniform to justify citation, which hold that where anything is to be done by the vendor, or by the mutual concurrence of both parties, for the purpose of ascertaining the price of the goods, as by weighing, testing, or measuring them, where the price is to depend upon the quantity or quality of the goods, the performance of those things is to be deemed presumptively a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they may and ought to be accepted.

A learned author from whom we have already quoted, says of this, that "the rule seems to be somewhat hastily adopted from the civil law, without adverting to the great distinction made by the civilians between a sale for a certain price in money, and an exchange for anything else. The English law makes no such distinction, but, as it seems, has adopted the rule of the civil law, which seems to have no foundation except in the distinction. In general the weighing, &c., must, in the nature of things, be intended to be done before the buyer takes possession of the goods; but that is quite a different thing from intending it to be done before the vesting of the property; and as it must in general be intended that both the parties shall concur in the act of weighing, when the price is to depend upon the weight, there seems little reason why, in cases in which the specific goods are agreed upon, it should be supposed to be the intention of the parties to render the delay of that act, in which the buyer is to concur, beneficial to him. Whilst the price remains unascertained, the sale is clearly not for a certain sum of money, and therefore does not come within the civilian's definition of a perfect sale, transferring the risk and gain of the thing sold; but the English law does not require that the consideration for a bargain and sale should be in moneys numbered, provided they be of value." But the same writer, with candor and justice, adds that this rule is now "firmly established as English law." Blackburn on Sales, 153. And see Turley *v.* Bates, 2 H. & C. 200, in which this passage is quoted and the conclusion treated as unquestionable.

What, then, are the facts in this case from which the intent of the parties is to be inferred? The lumber was specifically designated, so that no question of identity could arise. It was not delivered, and the vendor was to place it on board the cars, if desired to do so within a time specified; but as in any event the vendees were to take it at Birch Run, and it was optional with them to load it on the cars themselves or to have the vendor do it for them, and they had no right to require that he should do so after the day named, we think the circumstance that actual delivery was not made is not one of very much importance in the present discussion. What is of more importance is, that neither the quality nor the quantity was determined; and the evidence in the case shows that as to these there might very well be, and actually were, great differences of opinion. The price to be paid was consequently not ascertained, and could not be until the qualities were separated and measurement had.

It will be observed that the contract did not provide how or by whom the inspection and measurement should be made. It was certainly not the right of either party to bind the other party by an inspection and measurement of his own; it was the right of both to participate, and we must suppose such was the intent, unless something clearly appears in the case to show the contrary. Nothing of that nature appears in the record except the disputed evidence of defendants, that a person was agreed upon for the purpose. The note sent by Lingham to Eggleston, proposing that the eight cars be loaded and that the vendees make the proper inspection, was a mere proposition, and never acted upon. It is very evident Eggleston was under no obligation to trust this important transaction exclusively to the vendees, and we have no right to infer that he would have done so. It follows that something of high importance remained to be done by the vendor to ascertain the price to be paid; and as this, under all the authorities, was presumptively a condition precedent to the transference of the title, — nothing to the contrary appearing, — the court should have so instructed the jury. The instructions given were in substance directly to the contrary.

It follows that the judgment must be reversed, with costs, and a new trial ordered.

The other justices concurred.

J. C. ALLEN *v.* MIKE ELMORE, APPELLANT.

SUPREME COURT OF IOWA, OCTOBER 13, 1903.

[*Reported in* 121 *Iowa*, 241.]

McCLAIN, J. At an auction sale of plaintiff's stock and farm produce certain hay in a mow was offered, with an announcement that it would be sold in five-ton lots, with the privilege to the successful bidder for any lot of taking a larger quantity at the same price, if he should see fit. Under this arrangement defendant was the successful bidder for the first lot, and announced his election to take all of the hay offered at the same price. Some question was raised as to how the quantity should be ascertained, and it was agreed that it might be weighed, as taken away, on a neighbor's scales, and, further, that the buyer might allow it to remain in plaintiff's mow until the same was needed for the storing of the next crop. The buyer paid a portion of the purchase price in cash, and by the terms of the sale he was to have time for payment of the balance. Before any of the hay was removed it was destroyed by accidental fire, without any fault on the part of plaintiff. Under these facts, the simple question was whether the title to the hay had passed, so that the defendant as purchaser became liable for the price.

The only objection made by counsel for appellant with reference to his liability is based on the fact that the quantity of hay had not been ascertained at the time of its destruction, and that weighing was still necessary to determine the purchase price to be paid. It is true that, so long as anything remains to be done between the parties to ascertain and identify the particular property which is to pass, the sale is not complete. McClung *v.* Kelley, 21 Iowa, 508; Snyder *v.* Tibbals, 32 Iowa, 447; Welch *v.* Spies, 103 Iowa, 389. But, as explained in Welch *v.* Spies, *supra*, which discusses the earlier Iowa cases on the subject, if the property has been identified so that the transaction relates to a specific and ascertained chattel, then the question is one of intent, and the fact that something remains to be done by the buyer, such as weighing or measuring, for the purpose of determining the price to be paid, does not prevent the transaction being a completed sale, under which the title passes to the buyer, accompanied with the risk of the loss or destruction of the property without the seller's fault. The rule supposed to have been recognized in some of the earlier English cases, to the effect that there could be no passing of title until the purchase price had been definitely determined by weighing or measuring, when necessary, based, as it was, apparently on the idea that the action for the purchase price must be for a specific sum, definitely ascertained, has not been generally approved by the courts in this country, and it has been held by the great weight of authority that where the payment of the purchase price is not a condition to the passing of title — that is, where credit for the price is given — the fact that weighing or measuring still remains necessary to determine the price will not indicate an intention that the title shall not pass until such acts are done; it being assumed, of course, for the purpose of applying this rule, that the specific goods are definitely ascertained and agreed upon. Riddle *v.* Varnum, 20 Pick. 280; Crofoot *v.* Bennett, 2 N. Y. 258; Cunningham *v.* Ashbrook, 20 Mo. 553; Upson *v.* Holmes, 51 Conn. 500; Sanger *v.* Waterbury, 116 N. Y. 371 (22 N. E. Rep. 404); Adams Mining Co. *v.* Senter, 26 Mich. 73; Ober *v.* Carson's Executor, 62 Mo. 209; Haxall *v.* Willis, 15 Grat. 434; Sedgwick *v.* Cottingham, 54 Iowa, 512. And, whatever may have been the earlier views of the English judges, that is now the rule in England. Martineau *v.* Kitching, L. R. 7 Q. B. 436. This is the view stated by the American text-books. See Mechem on Sales, sections 519–524; Burdick on Sales, page 55.

Even if, as is stated in some cases, the question is one of intent, for the jury, we have in this case the conclusion of the trial court, entitled to the same weight as the verdict of a jury, that such was the intent, and the finding is amply supported by the evidence. It is perfectly clear from the record that the hay was allowed to remain in the plaintiff's mow for the convenience of the defendant; that the defendant had the right to take it away whenever he saw fit; that he might, under the terms of the contract, have taken it away before its destruction and before payment of the balance of the price; and that weighing to ascertain the amount to be paid was to be done by him as the hay was removed. It is true that, by the destruction of the hay before its removal and weighing, the ascertainment of the quantity by weighing was rendered impracticable; but, the sole question being as to the amount to be paid, the quantity must be ascertained by the best evidence available, and there was evidence from which the trial court was able to determine the quantity and fix the amount to be paid.

The judgment of the trial court was correct, and it is

Affirmed.

SANGER *v.* WATERBURY.

NEW YORK COURT OF APPEALS, OCTOBER 8-22, 1889.

[*Reported in* 116 *New York*, 371.]

APPEAL from judgment of the General Term of the Supreme Court in the second judicial department, entered upon an order made December 14, 1886, which affirmed a judgment in favor of the defendants, entered upon a verdict directed by the court.

This was an action of replevin, brought to recover the possession of two hundred and thirty-eight bags of coffee, identified and described in the complaint as follows: —

"89 bags, marked No. 6, H. L. B. & Co., D. B. & Co.
32 bags, marked No. 8, H. L. B. & Co., D. B. & Co.
14 bags, marked No. 10, H. L. B. & Co., D. B. & Co.
29 bags, marked No. 12, H. L. B. & Co., D. B. & Co.
68 bags, marked No. 14, H. L. B. & Co., D. B. & Co.
6 bags, marked No. 16, H. L. B. & Co., D. B. & Co."

The complaint alleged, and the answer admitted, "that on or about the 22d day of July, 1885, the said goods . . . were sold by the plaintiffs to the defendants John K. Huston and James E. Huston, . . . on the credit of sixty days for one-half thereof, and of ninety days for the balance thereof." It appeared that the plaintiffs on the 6th day of July, 1885, purchased of Boulton, Bliss, & Dallet 605 bags of coffee, then stored with E. B. Bartlett & Co. On the twenty-second day of July the plaintiffs sold the two hundred and thirty-eight bags of coffee hereinbefore referred to, to J. K. Huston & Co., of Philadelphia. That firm, on the 24th day of July, upon the security of the coffee thus purchased, borrowed from the defendants Waterbury & Force $2,300, and then transferred the coffee to them. On July twenty-seventh following, said firm failed, making a general assignment. On the next day the plaintiffs commenced this action, by means of which the coffee was taken from the possession of Waterbury & Force. The coffee then was, as it had been from the time of the purchase by the plaintiffs, actually deposited in the warehouse of E. B. Bartlett & Co., and had not, as yet, been weighed.

William W. Goodrich, for appellants.

Edward M. Shepard, for respondents.

PARKER, J. The appellant contends that the title to the coffee in controversy did not pass to J. K. Huston & Co., and that, therefore, the transfer to Waterbury & Force did not vest in them the title or the possession. The sale is admitted. But as the coffee had to be weighed in order to ascertain the amount to be paid to plaintiffs, it is insisted that the title remained in the plaintiffs. In aid of this contention is invoked the rule that where something remains to be done by the seller to ascertain the identity, quantity, or quality of the article sold, or to put it in the condition which the contract requires, the title remains in the vendor until the condition be complied with. The appellant cites a number of authorities which, he urges, so apply this rule as to make it applicable to the case here presented. It is said in Groat et al. *v.* Gile, 51 N. Y. 451, that "this rule has reference to a sale, not of *specific* property clearly ascertained, but of such as is to be separated from a larger quantity, and is necessary to be identified before it is susceptible of delivery. The rule or principle does not apply where the number of the particular articles sold is to be ascertained for the sole purpose of determining the total value thereof at certain specified rates or a designated fixed price." This distinction is recognized and enforced in Crofoot *v.* Bennett, 2 N. Y. 258; Kimberly *v.* Patchin, 19 N. Y. 330; Bradley *v.* Wheeler, 44 id. 495. In Crofoot *v.* Bennett (*supra*), the court say: "If the goods sold are clearly identified, then, although it may be necessary to number, weigh, or measure them, in order to ascertain what would be the price of the whole at a rate agreed upon between the parties, the title will pass." This expression of the court is cited with approval in Burrows *v.* Whitaker, 71 N. Y. 291, in which case, after a full discussion of the authorities, the court approved the rule as laid down in Groat *v.* Gile (*supra*).

Now, applying that rule to the facts in this case, nothing remained to be done in order to identify the goods sold, because, while out of a larger lot two hundred and thirty-eight bags of coffee were disposed of, nevertheless, as appears from the complaint and the testimony adduced, the bags were so marked that there was no difficulty about identifying the particular bags sold. There remained, therefore, nothing to be done except to weigh the coffee for the purpose of ascertaining the purchase-price. For whether the two hundred and thirty-eight bags of coffee should prove to weigh more or less than the parties anticipated was not of any consequence. Whatever should prove to be for that number of pounds, J. K. Huston & Co. had agreed to pay.

This case, therefore, does not come within the rule contended for by the appellant, but instead is governed by the principle enunciated in Groat *v.* Gile.

Having reached the conclusion that the title and the possession passed to J. K. Huston & Co., it becomes unnecessary to consider any of the other questions discussed, for the plaintiff is without title upon which to found the right to maintain an action.

The judgment appealed from should be affirmed.

All concur. *Judgment affirmed.*[1]

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[1] Blackwood *v.* Cutting Packing Co., 76 Cal. 212, 218; Lassing *v.* James, 107 Cal. 348; Farmers' Phosphate Co. *v.* Gill, 69 Md. 537; Cleveland *v.* Williams, 29 Tex. 204; Boaz *v.* Schneider, 69 Tex. 128, *acc.*

SECTION III.

SALES OF SPECIFIC GOODS, CONDITIONAL UPON PAYING OR SECURING THE PRICE.

BISHOP *v.* SHILLITO.

IN THE KING'S BENCH, HILARY TERM, 1819.

[*Reported in 2 Barnewall & Alderson*, 329, *n.* (*a*).]

TROVER for iron. The iron was to be delivered under a contract that certain bills outstanding against the plaintiff should be taken out of circulation. After a part of the iron had been delivered, and no bills had been taken out of circulation, the plaintiff stopped the farther delivery, and brought trover for what had been delivered. *Scarlett*, for defendant, contended that trover would not lie, and that the only remedy for the plaintiff was to bring an action for the breach of the contract by the defendant. But the court held that this was only a conditional delivery, and the condition being broken, the plaintiff might bring trover. ABBOTT, C. J., said he had left it to the jury to say whether the delivery of the iron and the redelivery of the bills were to be contemporary, and that the jury found that fact in the affirmative; and BAYLEY, J., added, that if a tradesman sold goods to be paid for on delivery, and his servant by mistake delivers them without receiving the money, he may, after demand and refusal to deliver or pay, bring trover for his goods against the purchaser.[1]

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[1] *Yaxley*. . . . If I come to another to buy a piece of cloth, and ask the price, and he says that I may have it for 20 sh., then I cannot take it, unless I pay him the 20 sh., and this is the reason, if I take the cloth on the strength of this bargain, the other cannot take the money from me, and perhaps I am not worth the money; so that it is implied in the bargain that he will pay the money now for the cloth, or otherwise he shall not have it. But if it be on time, it is a good bargain, because I have given him express liberty to pay on such a day. And in case I buy a horse for an ox, there the bargain is good without giving a day or making immediate delivery; for if I can take the horse, he can take the ox, and the property is in him now; but of money it is otherwise, for I cannot take it; so that if it be called a bargain in law, peradventure the party may be without remedy for the money. Wherefore the law will not adjudge it a bargain until the money be paid or day given as above. TREMAILE. I say if one whom I know sells me a horse for 20 sh. and delivers it, now the property of the horse is in me, although I do not pay him, and no day is given when payment shall be made, if the sale be outside a market between persons known to each other; but in a market between those who are strangers, and not known to each other, there the money ought to be delivered immediately as well as the horse, or otherwise it is only a communication; but there was here between them a sale, and the vendor can have action of debt for this sum. . . . FINEUX, CHIEF JUSTICE. If one buy a piece of cloth, and ask the price of the merchant, and he says 20 sh., and the party says that he will give it, and takes the cloth, I say that it is in the election of the merchant to treat this as a bargain or not; for if he wish he may have an action of debt, and he may if he

BUSSEY *v.* BARNETT.

In the Exchequer, January 14, 1842.

[*Reported in* 9 *Meeson & Welsby*, 312.]

Debt for goods sold and delivered, and on an account stated. The particulars of demand claimed the sum of £3 5*s.* 6*d.*, being the balance of an account for goods sold and delivered by the plaintiff to the defendant. Pleas, except as to the sum of 4*s.* 6*d.*, parcel, &c., *nunquam indebitatus ;* as to that sum, a tender , which was denied by the replication. At the trial before the under-sheriff of Middlesex, it appeared that the action was brought to recover an alleged balance of a disputed account for goods bought by the defendant, for ready money, at the plaintiff's shop. The defendant produced evidence to prove that, within ten minutes after the delivery of the goods at his house, he paid for them in full, with the exception of the 4*s.* 6*d.*, as to which the tender was pleaded. It was objected for the plaintiff, that it was not competent to the defendant to give evidence of this payment, there being no plea of payment on the record ; but the under-sheriff thought that, under the circumstances, no debt ever arose between the parties, and therefore the evidence was admissible under the plea of *nunquam indebitatus*, and he accordingly received it ; and the tender being also proved to the satisfaction of the jury, the defendant had a verdict on both issues.

C. Jones now moved for a new trial, on the ground of misdirection, and contended that the defence was inadmissible without a plea of payment. [Alderson, B. The plea of *nunquam indebitatus* means that there never was a sale of goods to the defendant on credit. This was a mere exchange of goods for money, and a debt never arose. Lord Abinger, C. B. There was no contract whereby the defendant became indebted to the plaintiff.] In Goodchild *v.* Pledge, 1 M. & W. 363, where to a count in debt for £20 for goods sold and delivered, the defendant pleaded that before the commencement of the suit, and when the said sum of £20 became due and payable, to wit, on, &c., the defendant paid the plaintiff the said sum of £20, according to the defendant's said contract and liability ; this plea was held bad on demurrer for concluding to the country, and not with a verification ; and Parke, B.,

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wish retain the property until he receives the other's money. And if the other take the cloth by reason of that bargain against the vendor's will, he may have an action of trespass. . . . Y. B. 21 Hy. VII. 6, 4. (1505–6).

Brian. If I sell you my horse for £10, it is lawful for me to retain the horse until I am paid, and yet I have no action of debt on the contract until the horse is delivered ; and it is clear that by the bargain the property was in him who bought the horse, but if the buyer offers him the money, and he refuses, then he may seize the horse, or have action of detinue or action of trespass at his pleasure, &c. Y. B. 18 Edw. IV. 21, 1. (1478–9).

there says: "The moment the goods are delivered, is there not a cause of action, throwing the proof of its discharge on the defendant?" And he adds, "The new general issue, that the defendant never was indebted, that is, at no instant of time, was framed for the express purpose of making all these defences pleadable by way of discharge." [ALDERSON, B. What the learned judge there means is, that the moment goods are delivered on credit, a contract arises whereby the defendant becomes indebted. No doubt that was a proper case for a plea of payment.] This was a defence in the nature of confession and avoidance.

LORD ABINGER, C. B. In this case the goods were not delivered upon a contract out of which a debt arose; there was no promise to pay, but immediate payment.

ALDERSON, B. Where there is a contract for the sale and delivery of goods for ready money, and ready money is paid, there is no debt.

GURNEY, B., concurred. *Rule refused.*

PAUL *v.* REED.

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE, JUNE, 1872.

[*Reported in* 52 *New Hampshire*, 136.]

THE substance of the disclosure of the trustee in Azor Paul against Dexter G. Reed, and Dana R. Moody, trustee, was as follows: I moved into Mr. Edes's boarding-house on the 30th day of October last. Said Reed had been keeping the house for Mr. Edes as boarding-master; he furnished breakfast that morning as such, and I furnished the dinner. Soon after breakfast we examined the hog, butter, sugar, tea, and other articles. Agreed upon the price of each item. I put the sugar in with other sugar of mine. We changed the hog, at my request, from one pen to another, to have him where I wanted to keep him. We figured up what the articles at the prices agreed upon amounted to, and found they came to thirty dollars and thirty cents. I took out my wallet to pay him for the articles, but before I could get the money ready to deliver him, I was trusteed. The articles were these: hog, $10.50; flour, $7; butter, $10; bedstead, $1; sugar and salt, $1.80. I was moving in, — had got one load in the house; he was moving out at the time of said occurrence. Mr. Reed kept a memorandum, and carried out the price of each article as it was agreed upon. Sheriff Barton served the process as Mr. Reed was figuring up the account. I think the amount of the bill had not been announced by Reed before the writ was served. I had the money to pay the bill in my pocket-book, and the pocket-book in my hand, looking over the figures, when the writ was served. We understood I was to pay cash right in his fingers; I did not ask any time for him to wait. Reed asked me to give up the articles to him after service of process. I think he said, We can call it no sale, and I can take my stuff. He gave as a reason, that I had not paid him for it. I told him I would ask Esquire Bowers and Esquire Edes, and if they said I was safe to give it up, I had no objections to giving it up. Edes told me to let it stand; it would be a question.

The court held the trustee chargeable for $30.30. The principal defendant, claiming the property described in the disclosure, excepted, and the question was reserved.

Bowers, for the plaintiff.

S. H. Edes, for the defendant and trustee.

BELLOWS, C. J. Unless the principal defendant had another hog and other provisions or fuel, so that the value of his provisions and fuel exceeded twenty dollars, all the articles sold to the trustee were exempt from attachment. As there is no proof that he had another hog, or more provisions, or fuel, the court cannot find that he had such; and, therefore, unless the title in these goods had vested in the trustee so that he became indebted for them, the trustee must be discharged.

The question then is, whether the goods were delivered so as to vest the title in the trustee.

The proof tends to show that the sale was for cash, and not on credit; so the trustee testifies, and this is just what would have been intended had no time of payment been stipulated. 2 Kent's Com. *496, *497; Story on Con., sec. 796; Noy's Maxims, 87; Ins. Co. *v.* De Wolf, 2 Cow. 105. The case, then, stands before us as a contract of sale for cash on delivery: in such case the delivery and payment are to be concurrent acts; and therefore, if the goods are put into the possession of the buyer in the expectation that he will immediately pay the price, and he does not do it, the seller is at liberty to regard the delivery as conditional, and may at once reclaim the goods. In such a case the contract of sale is not consummated, and the title does not vest in the buyer. The seller may, to be sure, waive the payment of the price, and agree to postpone it to a future day, and proceed to complete the delivery; in which case it would be absolute, and the title would vest in the buyer. But in order to have this effect, it must appear that the goods were put into the buyer's possession with the intention of vesting the title in him.

If, however, the delivery and payment were to be simultaneous, and the goods were delivered in the expectation that the price would be immediately paid, the refusal to make payment would be such a failure on the part of the buyer to perform the contract as to entitle the seller to put an end to it and reclaim the goods.

This is not only eminently just, but it is in accordance with the great current of authorities, which treat the delivery, under such circumstances, as conditional upon the immediate payment of the price. 2 Kent's Com. *497; Chitty on Con., 9th Am. ed., *350, note 1 and cases; Story on Con., secs. 796, 804; Palmer *v.* Hand, 13 Johns. 434; Marston *v.* Baldwin, 17 Mass. 605; Leven *v.* Smith, 1 Denio, 573, and cases cited. So the doctrine was fully recognized in Russell *v.* Minor, 22 Wend. 659, where, on the sale of paper, it was agreed that the buyer should give his notes for it on delivery, and the delivery was in several parcels. On delivery of the first, the seller asked for a note; but the buyer answered that he would give his note for the whole when the remainder was delivered, and the parcel now delivered could remain until then. When the rest was delivered, the defendant refused to give his note; and the court held that the delivery of all the goods was conditional, and that the seller might maintain replevin for all the goods. The general doctrine is fully recognized in this State in Lucy *v.* Bundy, 9 N. H. 298, and more especially in Ferguson *v.* Clifford, 37 N. H. 86, where it is laid down that if the delivery takes place when payment is expected simultaneously therewith, it is in law made upon the condition precedent that the price shall forthwith be paid. If this condition be not performed, the delivery is inoperative to pass the title to the property, and it may be instantly reclaimed by the vendor.

The question then is, whether the delivery here was absolute, intending to pass the title to the vendee and trust him for the price, or whether it was made with the expectation that the cash would be paid immediately on the delivery. This is a question of fact, but it is submitted to the court for decision. Ordinarily it should be passed upon at the trial term; but where the question is a mixed one of law and fact, as it is here, it may not be irregular, if the judge thinks it best, to reserve the entire question for the whole court. Assuming that the questions both of law and fact are reserved, we find that the goods were sold for cash, and of course that the delivery of the goods and the payment of the price were to be simultaneous; and accordingly, when a part had been delivered, and the seller was figuring up the amount, and the buyer had taken out his money to pay the price, the act was arrested by the service of this process.

The evidence relied upon to prove the delivery to be absolute and intended to pass the title at all events, is simply and solely the changing of the hog into another pen, and mixing the sugar with other sugar of the buyer. Without this mixing of the sugar, the case would be just the ordinary one of a delivery of the goods with the expectation that the buyer would at once pay the price; and we think that circumstance is not enough to show a purpose to make the delivery absolute, but rather a confident expectation that the buyer would do as he had agreed, and pay the price at once. The case of Henderson *v.* Lauck, 21 Penn. St. 359, was very much like this. There was a sale of corn, to be paid for on the delivery of the last load; and as the loads were delivered, the corn was placed in a heap with other corn of the buyer, in the presence of both parties. On the delivery of the last lot, the buyer failed to pay, and the seller gave notice that he claimed the corn, and brought replevin, which was held to lie, — the court regarding the delivery as conditional, and the plaintiff in no fault for the intermingling of the corn. It is very clear that the intermingling of the sugar does not, as matter of law, make the delivery absolute; and I think, as matter of fact, it is not sufficient to prove an intention to pass the title absolutely. When the buyer declined to pay the price, the seller at once reclaimed the goods, and so notified the buyer, who did not object to giving up the sale if he could safely do so.

In respect to the question now before us, it is not material for what reason the buyer declined to pay for the goods, although the service of the trustee process might shield him from damages in a suit by the seller for not taking and paying for the goods. For the purposes of this question, it is enough that the buyer did not pay the price, and thus gave the seller a right to reclaim the goods, which he did at once. The goods themselves were exempt from attachment; and the fact that the trustee process was designed to intercept the price of those goods, could not affect his right to reclaim them when the buyer declined to pay the price.

The exception must therefore be sustained, and the

Trustee discharged.

HARKNESS *v.* RUSSELL.

SUPREME COURT OF THE UNITED STATES, NOVEMBER 17, 1885–NOVEMBER 8, 1886.

[*Reported in* 118 *United States*, 663.]

THIS was an appeal from the Supreme Court of Utah. The action was brought in the District Court for Weber County, to recover the value of two steam-engines and boilers, and a portable saw-mill connected with each engine. A jury being waived, the court found the facts and rendered judgment for the plaintiff, Russell & Co. The plaintiff is an Ohio corporation, and by its agent in Idaho, on the 2d of October, 1882, agreed with a partnership firm by the name of Phelan & Ferguson, residents of Idaho, to sell to them the said engines, boilers, and saw-mills for the price of $4988, nearly all of which was secured by certain promissory notes, which severally contained the terms of the agreement between the parties. One of the notes (the others being in the same form) was as follows, to wit:

SALT LAKE CITY, Oct. 2, 1882.

On or before the first day of May, 1883, for value received in one sixteen-horse portable engine, No. 1026, and one portable saw-mill, No. 128, all complete, bought of L. B. Mattison, agent of Russell & Co., we, or either of us, promise to pay to the order of Russell & Co., Massillon, Ohio, $300, payable at Wells, Fargo & Co.'s bank, Salt Lake City, Utah Territory, with ten per cent interest per annum from October 1, 1882, until paid, and reasonable attorney's fees, or any costs that may be paid or incurred in any action or proceeding instituted for the collection of this note or enforcement of this covenant. The express condition of this transaction is such that the title, ownership, or possession of said engine and saw-mill does not pass from the said Russell & Co. until this note and interest shall have been paid in full, and the said Russell & Co. or his agent has full power to declare this note due and take possession of said engine and saw-mill when they may deem themselves insecure, even before the maturity of this note; and it is further agreed by the makers hereof, that if said note is not paid at maturity, that the interest shall be two per cent per month from maturity hereof till paid, both before and after judgment, if any should be rendered. In case said saw-mill and engine shall be taken back, Russell & Co. may sell the same at public or private sale without notice, or they may without sale endorse the true value of the property on this note, and we agree to pay on the note any balance due thereon after such endorsement, as damages and rental for said machinery. As to this debt we waive the right to exempt or claim as exempt any property, real or personal, we now own, or may hereafter acquire, by virtue of any homestead or exemption law, State or Federal, now in force, or that hereafter may be enacted.

P. O., Oxford, Oneida County, Idaho Territory.
$300. PHELAN & FERGUSON.

Some of the notes were given for the price of one of the engines with its accompanying boiler and mill, and the others for the price of the other. Some of the notes were paid; and the present suit was brought on those that were not paid. The property was delivered to Phelan & Ferguson, on the execution of the notes, and subsequently they sold it to the defendant Harkness, in part payment of a debt due from them to him and one Langsdorf. The defendant, at the time of the sale to him, knew that the purchase-price of the property had not been paid to the plaintiff, and that the plaintiff claimed title thereto until such payment was made. The unpaid notes given for each engine and mill exceeded in amount the value of such engine and mill when the action was commenced.

The Territory of Idaho has a law relating to chattel mortgages [Act of January 12, 1875], requiring that every such mortgage shall set out certain particulars as to parties, time, amount, &c., with an affidavit attached, that it is *bona fide*, and made without any design to defraud and delay creditors; and requiring the mortgage and affidavit to be recorded in the county where the mortgagor lives, and in that where the property is located; and it is declared that no chattel mortgage shall be valid (except as between the parties thereto) without compliance with these requisites, unless the mortgagee shall have actual possession of the property mortgaged. In the present case no affidavit was attached to the notes, nor were they recorded.

The court found that it was the intention of Phelan & Ferguson, and of Russell & Co., that the title to the said property should not pass from Russell & Co. until all the notes were paid.

Upon these facts the court found, as conclusions of law, that the transaction between Phelan & Ferguson and Russell & Co. was a conditional, or executory sale, and not an absolute sale with a lien reserved, and that the title did not pass to Phelan & Ferguson, or from them to the defendant; and gave judgment for the plaintiff. The Supreme Court of the Territory affirmed this judgment. This appeal was taken from that judgment.

Mr. Parley L. Williams (*Mr. James N. Kimball* and *Mr. Abbot R Heywood* were with him on the brief), for appellant.

Mr. Charles W. Bennett, for appellee.

MR. JUSTICE BRADLEY, after stating the facts as above reported, delivered the opinion of the court.

The first question to be considered is, whether the transaction in question was a conditional sale or a mortgage; that is, whether it was a mere agreement to sell upon a condition to be performed, or an absolute sale, with a reservation of a lien or mortgage to secure the purchase-money. If it was the latter, it is conceded that the lien or mortgage was void as against third persons because not verified by affidavit and not recorded as required by the law of Idaho. But, so far as words and the express intent of the parties can go, it is perfectly evident that it was not an absolute sale, but only an agreement to sell upon condition that the purchasers should pay their notes at maturity. The language is: "The express condition of this transaction is such that the title . . . does not pass . . . until this note and interest shall have been paid in full." If the vendees should fail in this, or if the vendors should deem themselves insecure before the maturity of the notes, the latter were authorized to repossess themselves of the machinery, and credit the then value of it, or the proceeds of it if they should sell it, upon the unpaid notes. If this did not pay the notes, the balance was still to be paid by the makers by way of "damages and rental for said machinery." This stipulation was strictly in accordance with the rule of damages in such cases. Upon an agreement to sell, if the purchaser fails to execute his contract, the true measure of damages for its breach is the difference between the price of the goods agreed on and their value at the time of the breach or trial, which may fairly be stipulated to be the price they bring on a re-sale. It cannot be said, therefore, that the stipulations of the contract were inconsistent with, or repugnant to, what the parties declared their intention to be, namely, to make an executory and conditional contract of sale. Such contracts are well known in the law and often recognized; and when free from any fraudulent intent are not repugnant to any principle of justice or equity, even though possession of the property be given to the proposed purchaser. The rule is formulated in the text-books and in many adjudged cases. In Lord Blackburn's Treatise on the Contract of Sale, published forty years ago, two rules are laid down as established: (1) That where by the agreement the vendor is to do anything to the goods before delivery, it is a condition precedent to the vesting of the property. (2) That where anything remains to be done to the goods for ascertaining the price, such as weighing, testing, &c., this is a condition precedent to the transfer of the property. Blackburn on Sales, 152. And it is subsequently added, that "the parties may indicate an intention, by their agreement, to make any condition precedent to the vesting of the property, and, if they do so, their intention is fulfilled." Blackburn on Sales, 167. Mr. Benjamin, in his Treatise on Sales of Personal Property, adds to the two formulated rules of Lord Blackburn a third rule, which is supported by many authorities, to wit: (3) "Where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer." Benjamin on Sales, 2d ed., p. 236; 3d ed., § 320. The author cites for this proposition Bishop *v.* Shillito, 2 B. & Ald. 329, note (a); Brandt *v.* Bowlby, 2 Barn. & Adolph. 932; Barrow *v.* Coles (Lord Ellenborough), 3 Campbell, 92; Swain *v.* Shepherd (Baron Parke), 1 Mood. & Rob. 223; Mires *v.* Solebay, 2 Mod. 243. In the last case, decided in the time of Charles II., one Alston took sheep to pasture for a certain time, with an agreement that if at the end of that time he should pay the owner a certain sum he should have the sheep. Before the time expired the owner sold them to another person; and it was *held,* that the sale was valid, and that the agreement to sell the sheep to Alston, if he would pay for them at a certain day, did not amount to a sale, but only to an agreement. The other cases were instances of sales of goods to be paid for in cash or securities on delivery. It was held that the sales were conditional only, and that the vendors were entitled to retake the goods, even after delivery, if the condition was not performed, the delivery being considered as conditional. This often happens in cases of sales by auction, when certain terms of payment are prescribed, with a condition that if they are not complied with the goods may be re-sold for account of the buyer, who is to account for any deficiency between the second sale and the first. Such was the case of Lamond *v.* Davall, 9 Q. B. 1030, and many more cases could be cited. In Crawcour *v.* Robertson, 9 Ch. Div. 419, certain furniture dealers let Robertson have a lot of furniture upon his paying £10 in cash and signing an agreement to pay £5 per month (for which notes were given) until the whole price of the furniture should be paid, and when all the instalments were paid, and not before, the furniture was to be the property of Robertson; but if he failed to pay any of the instalments, the owners were authorized to take possession of the property, and all prior payments actually made were to be forfeited. The Court of Appeal held that the property did not pass by this agreement, and could not be taken as Robertson's property by his trustee under a liquidation proceeding. The same conclusion was reached in the subsequent case of Crawcour *v.* Salter, 18 Ch. Div. 30. In these cases, it is true, support of the transaction was sought from a custom which prevails in the places where the transactions took place, of hotel-keepers holding their furniture on hire. But they show that the intent of the parties will be recognized and sanctioned where it is not contrary to the policy of the law. This policy, in England, is declared by statute. It has long been a provision of the English bankrupt laws, beginning with 21 James I., c. 19, that if any person becoming bankrupt has in his possession, order, or disposition, by consent of the owner, any goods or chattels of which he is the reputed owner, or takes upon himself the sale, alteration, or disposition thereof as owner, such goods are to be sold for the benefit of his creditors. This law has had the effect of preventing or defeating conditional sales accompanied by voluntary delivery of possession, except in cases like those before referred to; so that very few decisions are to be found in the English books directly in point on the question under consideration. The following case presents a fair illustration of the English law as based upon the statutes of bankruptcy. In Horn *v.* Baker, 9 East, 215, the owner of a term in a distillery, and of the apparatus and utensils employed therein, demised the same to J & S., in consideration of an annuity to be paid to the owner and his wife during their several lives, and upon their death the lessees to have the liberty of purchasing the residue of the term and the apparatus and utensils; with a proviso for re-entry if the annuity should at any time be two months in arrear. The annuity having become in arrear for that period, instead of making entry for condition broken, the wife and administrator of the owner brought suit to recover the arrears, which was stopped by the bankruptcy of J. & S. The question then arose whether the utensils passed to the assignees of J. & S. under the Bankrupt Act, as being in their possession, order, and disposition as reputed owners; and the court held that they did; but that if there had been a usage in the trade of letting utensils with a distillery, the case would have admitted a different consideration, since such a custom might have rebutted the presumption of ownership arising from the possession and apparent order and disposition of the goods. This case was followed in Holroyd *v.* Gwynne, 2 Taunt. 176.

This presumption of property in a bankrupt, arising from his possession and reputed ownership, became so deeply embedded in the English law, that, in process of time many persons in the profession, not adverting to its origin in the statute of bankruptcy, were led to regard it as a doctrine of the common law; and hence, in some States in this country, where no such statute exists, the principles of the statute have been followed, and conditional sales of the kind now under consideration have been condemned, either as being fraudulent and void as against creditors, or as amounting, in effect, to absolute sales with a reserved lien or mortgage to secure the payment of the purchase-money. This view is based on the notion that such sales are not allowed by law, and that the intent of the parties, however honestly formed, cannot legally be carried out. The insufficiency of this argument is demonstrated by the fact that conditional sales are admissible in several acknowledged cases, and, therefore, there cannot be any rule of law against them as such. They may sometimes be used as a cover for fraud, and, when this is charged, all the circumstances of the case, this included, will be open for the consideration of a jury. Where no fraud is intended, but the honest purpose of the parties is that the vendee shall not have the ownership of the goods until he has paid for them, there is no general principle of law to prevent their purpose from having effect.

In this country, in States where no such statute as the English act referred to is in force, many decisions have been rendered sustaining conditional sales accompanied by delivery of possession, both as between the parties themselves and as to third persons.

In Hussey *v.* Thornton, 4 Mass. 404, decided in 1808, where goods were delivered on board of a vessel for the vendee upon an agreement for a sale, subject to the condition that the goods should remain the property of the vendors until they received security for payment, it was held (Chief Justice Parsons delivering the opinion) that the property did not pass, and that the goods could not be attached by the creditors of the vendee. This case was followed in 1822 by that of Marston *v.* Baldwin, 17 Mass. 606, which was replevin against a sheriff for taking goods which the plaintiff had agreed to sell to one Holt, the defendant in the attachment; but by the agreement the property was not to vest in Holt until he should pay $100 (part of the price), which condition was not performed, though the goods were delivered. Holt had paid $75, which the plaintiff did not tender back. The court held that it was sufficient for the plaintiff to be ready to repay the money when he should be requested, and a verdict for the plaintiff was sustained. In Barrett *v.* Pritchard, 2 Pick. 512, 515–16, the court said: "It is impossible to raise a doubt as to the intention of the parties in this case, for it is expressly stipulated that 'the wool before manufactured, after being manufactured, or in any stage of manufacturing, shall be the property of the plaintiff until the price be paid.' It is difficult to imagine any good reason why this agreement should not bind the parties. . . . The case from Taunton, Holroyd *v.* Gwynne, was a case of a conditional sale; but the condition was void as against the policy of the statute 21 Jac. I., ch. 19, § 11. It would not have changed the decision in that case if there had been no sale; for, by that statute, if the true owner of goods and chattels suffers another to exercise such control and management over them as to give him the appearance of being the real owner, and he becomes bankrupt, the goods and chattels shall be treated as his property, and shall be assigned by the commissioners for the benefit of his creditors. The case of Horn *v.* Baker, 9 East, 215, also turned on the same point, and nothing in either of these cases has any bearing on the present question." In Coggill *v.* Hartford & New Haven Railroad, 3 Gray, 545–547, the rights of a *bona fide* purchaser from one in possession under a conditional sale of goods were specifically discussed, and the court held, in an able opinion delivered by Mr. Justice Bigelow, that a sale and delivery of goods on condition that the title shall not vest in the vendee until payment of the price, passes no title until the condition is performed, and the vendor, if guilty of no laches, may reclaim the property, even from one who has purchased from his vendee in good faith, and without notice. The learned justice commenced his opinion in the following terms: "It has long been the settled rule of law in this commonwealth that a sale and delivery of goods on condition that the property is not to vest until the purchase-money is paid or secured, does not pass the title to the vendee, and that the vendor, in case the condition is not fulfilled, has a right to repossess himself of the goods, both against the vendee and against his creditors claiming to hold them under attachments." He then addresses himself to a consideration of the rights of a *bona fide* purchaser from the vendee, purchasing without notice of the condition on which the latter holds the goods in his possession; and he concludes that they are no greater than those of a creditor. He says: "All the cases turn on the principle that the compliance with the conditions of sale and delivery is, by the terms of the contract, precedent to the transfer of the property from the vendor to the vendee. The vendee in such cases acquires no property in the goods. He is only a bailee for a specific purpose. The delivery which in ordinary cases passes the title to the vendee must take effect according to the agreement of the parties, and can operate to vest the property only when the contingency contemplated by the contract arises. The vendee, therefore, in such cases, having no title to the property, can pass none to others. He has only a bare right of possession; and those who claim under him, either as creditors or purchasers, can acquire no higher or better title. Such is the necessary result of carrying into effect the intention of the parties to a conditional sale and delivery. Any other rule would be equivalent to the denial of the validity of such contracts. But they certainly violate no rule of law, nor are they contrary to sound policy."

This case was followed in Sargent *v.* Metcalf, 5 Gray, 306; Deshon *v.* Bigelow, 8 Gray, 159; Whitney *v.* Eaton, 15 Gray, 225; Hirschorn *v.* Canney, 98 Mass. 149; and Chase *v.* Ingalls, 122 Mass. 381; and is believed to express the settled law of Massachusetts.

The same doctrine prevails in Connecticut, and was sustained in an able and learned opinion of Chief Justice Williams, in the case of Forbes *v.* Marsh, 15 Conn. 384, decided in 1843, in which the principal authorities are reviewed. The decision in this case was followed in the subsequent case of Hart *v.* Carpenter, 24 Conn. 427, where the question arose upon the claim of a *bona fide* purchaser.

In New York the law is the same, at least, so far as relates to the vendee in a conditional sale, and to his creditors; though there has been some diversity of opinion in its application to *bona fide* purchasers from such vendee. As early as 1822, in the case of Haggerty *v.* Palmer, 6

Johns. Ch. 437, where an auctioneer had delivered to the purchaser goods sold at auction, it being one of the conditions of sale that endorsed notes should be given in payment, which the purchaser failed to give, Chancellor Kent held that it was a conditional sale and delivery, and gave no title which the vendee could transfer to an assignee for the benefit of creditors; and he said that the cases under the English Bankrupt Act did not apply here. The Chancellor remarked, however, that "if the goods had been fairly sold by P. (the conditional vendee), or if the proceeds had been actually appropriated by the assignees, before notice of this suit, and of the injunction, the remedy would have been gone." In Strong *v.* Taylor, 2 Hill, 326, Nelson, C. J., pronouncing the opinion, it was held to be a conditional sale where the agreement was to sell a canal-boat for a certain sum to be paid in freighting flour and wheat, as directed by the vendor, he to have half the freight until paid in full with interest. Before the money was all paid the boat was seized under an execution against the vendee; and in a suit by the vendor against the sheriff, a verdict was found for the plaintiff, under the instruction of the court, and was sustained in banc, upon the authority of the Massachusetts case of Barrett *v.* Pritchard, 2 Pick. 512. In Herring *v.* Hoppock, 15 N. Y. 409, 411, 414, the same doctrine was followed. In that case there was an agreement in writing for the sale of an iron safe, which was delivered to the vendee and a note at six months given therefor; but it was expressly understood that no title was to pass until the note was paid; and if not paid, Herring, the vendor, was authorized to retake the safe and collect all reasonable charges for its use. The sheriff levied on the safe as the property of the vendee, with notice of the plaintiff's claim. The Court of Appeals held that the title did not pass out of Herring. Paige, J., said: "Whenever there is a condition precedent attached to a contract of sale, which is not waived by an absolute and unconditional delivery, no title passes to the vendee until he performs the condition, or the seller waives it." Comstock, J., said that if the question were new, it might be more in accordance with the analogies of the law to regard the writing given on the sale as a mere security for the debt, in the nature of a personal mortgage; but he considered the law as having been settled by the previous cases, and the court unanimously concurred in the decision.

In the cases of Smyth *v.* Lynes, 1 Seld. (5 N. Y.) 41, and Wait *v.* Green, 36 Barb. 585; s. c. on appeal, 36 N. Y. 556, it was held that a *bona fide* purchaser, without notice, from a vendee who is in possession under a conditional sale, will be protected as against the original vendor. These cases were reviewed, and, we think, substantially overruled, in the subsequent case of Ballard *v.* Burgett, 40 N. Y. 314, in which separate elaborate opinions were delivered by Judges Grover and Lott. This decision was concurred in by Chief Judge Hunt and Judges Woodruff, Mason, and Daniels; Judges James and Murray dissenting. In that case Ballard agreed to sell to one France a yoke of oxen for a price agreed on, but the contract had the condition "that the oxen were to remain the property of Ballard until they should be paid for." The oxen were delivered to France, and he subsequently sold them to the defendant Burgett, who purchased and received them without notice that the plaintiff had any claim to them. The court sustained Ballard's claim; and subsequent cases in New York are in harmony with this decision. See Cole *v.* Mann, 62 N. Y. 1; Bean *v.* Edge, 84 N. Y. 510.

We do not perceive that the case of Dows *v.* Kidder, 84 N. Y. 121, is adverse to the ruling in Ballard *v.* Burgett. There, although the plaintiffs stipulated that the title to the corn should not pass until payment of the price (which was to be cash, the same day), yet they endorsed and delivered to the purchaser the evidence of title, namely, the weigher's return, to enable him to take out the bill of lading in his own name, and use it in raising funds to pay the plaintiff. The purchaser misappropriated the funds, and did not pay for the corn. Here the intent of both parties was that the purchaser might dispose of the corn, and he was merely the trustee of the plaintiff, invested by him with the legal title. Of course the innocent party who purchased the corn from the first purchaser was not bound by the equities between him and the plaintiff.

The later case of Parker *v.* Baxter, 86 N. Y. 586, was precisely similar to Dows *v.* Kidder; and the same principle was involved in Farwell *v.* Importers' and Traders' Bank, 90 N. Y. 483, where the plaintiff delivered his own note to a broker to get it discounted, and the latter pledged it as collateral for a loan made to himself: the legal title passed, and although, as between the plaintiff and the broker, the former was the owner of the note and its proceeds, yet that was an equity which was not binding on the innocent holder.

The decisions in Maine, New Hampshire, and Vermont are understood to be substantially to the same effect as those of Massachusetts and New York; though by recent statutes in Maine and Vermont, as also in Iowa, where the same ruling prevailed, it is declared in effect that no agreements that personal property bargained and delivered to another shall remain the property of the vendor, shall be valid against third persons without notice. George *v.* Stubbs, 26 Maine, 243; Sawyer *v.* Fisher, 32 Maine, 28; Brown *v.* Haines, 52 Maine, 578; Boynton *v.* Libby, 62 Maine, 253; Rogers *v.* Whitehouse, 71 Maine, 222; Sargent *v.* Gile, 8 N. H. 325; McFarland *v.* Farmer, 42 N. H. 386; King *v.* Bates, 57 N. H. 446; Hefflin *v.* Bell, 30 Vt. 134; Armington *v.* Houston, 38 Vt. 448; Fales *v.* Roberts, 38 Vt. 503; Duncans *v.* Stone, 45 Vt. 118; Moseley *v.* Shattuck, 43 Iowa, 540; Thorpe *v.* Fowler, 57 Iowa, 541.

The same view of the law has been taken in several other States. In New Jersey, in the case of Cole *v.* Berry, 13 Vroom (42 N. J. Law), 308, it was held that a contract for the sale of a sewing-machine to be delivered and paid for by instalments, and to remain the property of the vendor until paid for, was a conditional sale, and gave the vendee no title until the condition was performed; and the cases are very fully discussed and distinguished.

In Pennsylvania the law is understood to be somewhat different. It is thus summarized by Judge Depue, in the opinion delivered in Cole *v.* Berry, where he says: "In Pennsylvania a distinction is taken between delivery under a bailment, with an option in the bailee to purchase at a named price, and a delivery under a contract of sale containing a reservation of title in the vendor until the contract price be paid; it being held that, in the former instance, property does not pass, as in favor of creditors and purchasers of the bailee, but that, in the latter instance, delivery to the vendee subjects the property to execution at the suit of his creditors, and makes it transferable to *bona fide* purchasers. Chamberlain *v.* Smith, 44 Penn. St. 431; Rose *v.* Story, 1 Penn. St. 190; Marsh *v.* Mathiot, 14 S. & R. 214, Haak *v.* Linderman, 64 Penn. St. 499." But, as the learned judge adds, "This distinction is discredited by the great weight of authority, which puts possession under a conditional contract of sale and possession under a bailment on the same footing — liable to be assailed by creditors and purchasers for actual fraud, but not fraudulent *per se.*"

In this connection see the case of Copland *v.* Bosquet, 4 Wash. C. C. 588, where Mr. Justice Washington and Judge Peters (the former delivering the opinion of the court) sustained a conditional sale and delivery against a purchaser from the vendee, who claimed to be a *bona fide* purchaser without notice.

In Ohio the validity of conditional sales accompanied by delivery of possession is fully sustained. The latest reported case brought to our attention is that of Call *v.* Seymour, 40 Ohio St. 670, which arose upon a written contract contained in several promissory notes given for instalments of the purchase-money of a machine, and resembling very much the contract in the case now under consideration. Following the note, and as a part of the same document, is this condition: "The express conditions of the sale and purchase of the Separator and Horse-Power for which this note is given, is such, that the title, ownership, or possession does not pass from the said Seymour, Sabin & Co. until this note, with interest, is paid in full. The said Seymour, Sabin & Co. have full power to declare this note due and take possession of said Separator and Horse-Power at any time they may deem this note insecure, even before the maturity of the note, and to sell the said machine at public or private sale, the proceeds to be applied upon the unpaid balance of the purchase-price." The machine was seized under an attachment issued against the vendee, and the action was brought by the vendor against the constable who served the attachment. The case was fully argued, and the authorities *pro* and *con* duly considered by the court, which sustained the condition expressed in the contract and affirmed the judgment for the plaintiff. See also Sanders *v.* Keber, 28 Ohio St. 630.

The same law prevails in Indiana: Shireman *v.* Jackson, 14 Ind. 459; Dunbar *v.* Rawles, 28 Ind. 225; Bradshaw *v.* Warner, 54 Ind. 58; Hodson *v.* Warner, 60 Ind. 214; McGirr *v.* Sells, 60 Ind. 249.

The same in Michigan: Whitney *v.* McConnell, 29 Mich. 12; Smith *v.* Lozo, 42 Mich. 6; Marquette Manufacturing Co. *v.* Jefferey, 49 Mich. 283.

The same in Missouri: Ridgeway *v.* Kennedy, 52 Missouri, 24; Wangler *v.* Franklin, 70 Missouri, 650; Sumner *v.* Cottey, 71 Missouri, 121.

The same in Alabama: Fairbanks *v.* Eureka Co., 67 Ala. 109; Sumner *v.* Woods, 67 Ala. 139.

The same in several other States. For a very elaborate collection of cases on the subject, see Mr. Bennett's note to Benjamin on Sales, 4th ed., § 320, pp. 329–336; and Mr. Freeman's note to Kanaga *v.* Taylor, 7 Ohio St. 134, in 70 Am. Dec. 62. It is unnecessary to quote further from the decisions; the quotations already made show the grounds and reasons of the rule.

The law has been held differently in Illinois, and very nearly in conformity with the English decisions under the operation of the bankrupt law. The doctrine of the Supreme Court of that State is, that if a person agrees to sell to another a chattel on condition that the price shall be paid within a certain time, retaining the title in himself in the meantime, and delivers the chattel to the vendee so as to clothe him with the apparent ownership, a *bona fide* purchaser or an execution creditor of the latter is entitled to protection as against the claim of the original vendor. Brundage *v.* Camp, 21 Ill. 330; McCormick *v.* Hadden, 37 Ill. 370; Murch *v.* Wright, 46 Ill. 487; Mich. Central Railroad *v.* Phillips, 60 Ill. 190; Lucas *v.* Campbell, 88 Ill. 447; Van Duzor *v.* Allen, 90 Ill. 499. Perhaps the statute of Illinois on the subject of chattel mortgages has influenced some of these decisions. This statute declares that "no mortgage, trust deed, or other conveyance of personal property, having the effect of a mortgage or lien upon such property, is valid as against the rights and interests of any third person, unless the possession thereof be delivered to and remain with the grantee, or the instrument provide that the possession of the property may remain with the grantor, and the instrument be acknowledged and recorded." It has been supposed that this statute indicates a rule of public policy condemning secret liens and reservations of title on the part of vendors, and making void all agreements for such liens or reservations unless registered in the manner required for chattel mortgages. At all events, the doctrine above referred to has become a rule of property in Illinois, and we have felt bound to observe it as such. In the case of Hervey *v.* Rhode Island Locomotive Works, 93 U. S. 664, 671, where a Rhode Island company leased to certain Illinois railroad contractors a locomotive engine and tender at a certain rent, payable at stated times during the ensuing year, with an agreement that if the rent was duly paid the engine and tender should become the property of the lessees, and possession was delivered to them, this court, being satisfied that the transaction was a conditional sale, and that, by the law of Illinois, the reservation of title by the lessors was void as against third persons, unless the agreement was recorded (which it was not in proper time), decided that a levy and sale of the property in Illinois, under a judgment against the lessees, were valid, and that the Locomotive Works could not reclaim it. Mr. Justice Davis, delivering the opinion of the court, said: "It was decided by this court in Green *v.* Van Buskirk, 5 Wall. 307, and 7 Wall. 139, that the liability of property to be sold under legal process, issuing from the courts of the State where it is situated, must be determined by the law there rather than that of the jurisdiction where the owner lives. These decisions rest on the ground that every State has the right to regulate the transfer of property within its limits, and that whoever sends property to it impliedly submits to the regulations concerning its transfer in force there, although a different rule of transfer prevails in the jurisdiction where he resides. . . . The policy of the law in Illinois will not permit the owner of personal property to sell it, either absolutely or conditionally, and still continue in possession of it. Possession is one of the strongest evidences of title to this class of property, and cannot be rightfully separated from the title, except in the manner pointed out by the statute. The courts of Illinois say that to suffer, without notice to the world, the real ownership to be in one person, and the ostensible ownership in another, gives a false credit to the latter, and, in this way, works an injury to third persons. Accordingly, the actual owner of personal property creating an interest in another to whom it is delivered, if desirous of preserving a lien on it, must comply with the provisions of the Chattel Mortgage Act. Rev. Stat. Ill. 1874, 711, 712." The Illinois cases are then referred to by the learned justice to show the precise condition of the law of that State on the subject under consideration.

The case of Hervey *v.* Rhode-Island Locomotive Works is relied on by the appellants in the present case as a decision in their favor; but this is not a correct conclusion; for it is apparent that the only points decided in that case were, first, that it was to be governed by the law of Illinois, the place where the property was situated; secondly, that by the law of Illinois the agreement for continuing the title of the property in the vendors, after its delivery to the vendees, whereby the latter became the ostensible owner, was void as against third persons. This is all that was decided, and it does not aid the appellants, unless they can show that the law as held in Illinois, contrary to the great weight of authority in England and this country, is that which should govern the present case. And this we think they cannot do. We do not mean to say that the Illinois doctrine is not supported by some decisions in other States. There are such decisions; but they are few in number compared with those in which it is held that conditional sales are valid and lawful, as well against third persons as against the parties to the contract.

The appellants, however, rely with much confidence on the decision of this court in Heryford *v.* Davis, 102 U. S. 235, 243, a case coming from Missouri, where the law allows and sustains conditional sales. But we do not think that this case, any more than that of Hervey *v.*

Rhode Island Locomotive Works, will be found to support their views. The whole question in Heryford *v.* Davis was as to the construction of the contract. This was in the form of a lease; but it contained provisions so irreconcilable with the idea of its being really a lease, and so demonstrable that it was an absolute sale with a reservation of a mortgage lien, that the latter interpretation was given to it by the court. This interpretation rendered it obnoxious to the statute of Missouri requiring mortgages of personal property to be recorded in order to be valid as against third persons. It was conceded by the court, in the opinion delivered by Mr. Justice Strong, that if the agreement had really amounted to a lease, with an agreement for a conditional sale, the claim of the vendors would have been valid. The first two or three sentences of the opinion furnish a key to the whole effect of the decision. Mr. Justice Strong says: "The correct determination of this case depends altogether upon the construction that must be given to the contract between the Jackson & Sharp company and the railroad company, against which the defendants below recovered their judgment and obtained their execution. If that contract was a mere lease of the cars to the railroad company, or if it was only a conditional sale, which did not pass the ownership until the condition should be performed, the property was not subject to levy and sale under execution at the suit of the defendant against the company. But if, on the other hand, the title passed by the contract, and what was reserved by the Jackson & Sharp company was a lien or security for the payment of the price, or what is called, sometimes, a mortgage back to the vendors, the cars were subject to levy and sale as the property of the railroad company."

The whole residue of the opinion is occupied with the discussion of the true construction of the contract, and, as we have stated, the conclusion was reached that it was not really a lease, nor a conditional sale, but an absolute sale, with the reservation of a lien or security for the payment of the price. This ended the case; for, thus interpreted, the instrument inured as a mortgage in favor of the vendors, and ought to have been recorded in order to protect them against third persons.

But whatever the law may be with regard to a *bona fide* purchaser from the vendee in a conditional sale, there is a circumstance in the present case which makes it clear of all difficulty. The appellant in the present case was not a *bona fide* purchaser without notice. The court below find that at the time of and prior to the sale he knew the purchase-price of the property had not been paid, and that Russell & Co. claimed title thereto until such payment was made. Under such circumstances, it is almost the unanimous opinion of all the courts that he cannot hold the property as against the true owners. But as the rulings of this court have been, as we think, somewhat misunderstood, we have thought it proper to examine the subject with some care, and to state what we regard as the general rule of law, where it is not affected by local statutes or local decisions to the contrary.

It is only necessary to add that there is nothing either in the statute or adjudged law of Idaho to prevent, in this case, the operation of the general rule, which we consider to be established by overwhelming authority, namely, that, in the absence of fraud, an agreement for a conditional sale is good and valid, as well against third persons as against the parties to the transaction; and the further rule, that a bailee of personal property cannot convey the title, or subject it to execution for his own debts, until the condition on which the agreement to sell was made has been performed.

The judgment of the Supreme Court of the Territory of Utah is

Affirmed.

SPOONER *v.* CUMMINGS.

Supreme Judicial Court of Massachusetts, January 15, 16 – March 11, 1890.

[*Reported in* 151 *Massachusetts*, 313.]

Two actions of replevin, of a horse and of a mare respectively. The answer in each case contained a general denial, and that in the second case also set up fraud and laches on the part of the plaintiff, and an authority from him to sell the mare to the defendant. Trial in the Superior Court, before *Aldrich*, J., who allowed a bill of exceptions in each case.

In the first case there was evidence that on May 26, 1888, the plaintiff, who then owned the horse in question, sold it to one Pope, who bought and received it upon an agreement in writing signed by him, which recited that the horse was to be and remain the entire and absolute property of the plaintiff until paid for in full by Pope; that the plaintiff was a dealer in horses, and had sold horses to Pope for several years; and that Pope, before paying the plaintiff for the horse in question, resold it to the defendant, on June 2, 1888, and received payment for it from him.

The plaintiff contended, and asked the judge to rule, that the defendant, under his answer, could only be permitted to show that the conditional agreement was not made, or that the horse had been paid for by Pope. The judge declined so to rule, but ruled that the defendant might be permitted to show that the plaintiff gave to Pope authority, express or implied, by the course of dealing between them, to sell the horse before payment; and the plaintiff excepted.

The defendant thereupon introduced evidence which showed that for a long period the plaintiff and Pope had engaged in similar transactions, and that, according to the course of dealing between them, Pope purchased horses from the plaintiff, and gave him similar conditional agreements in writing; and that the plaintiff would urge Pope to sell such horses, and the latter, before paying for them, would resell them and send money to the plaintiff, which the latter would apply as he saw fit on any of the agreements. One Trull was permitted to testify against the plaintiff's objection, that about the middle of June, 1888, the plaintiff told him to tell Pope that he had a carload of horses coming, and to sell as many horses as he could.

The judge gave an instruction among others to the jury, which permitted them to find, from the course of dealing between the parties, that the plaintiff had given Pope implied authority to sell the horse in question; and further instructed them, that, if the plaintiff, notwithstanding the conditional agreement between the parties, consented that Pope might sell the horse to the defendant, trusting that Pope would send him the money in payment for it, he could not set up the conditional agreement with Pope as against the defendant.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

F. A. Gaskill and *C. W. Wood*, for the plaintiff.

J. W. McDonald, for the defendant.

KNOWLTON, J. Under the answer of the defendant, any evidence was competent which tended to contradict the contention of the plaintiff, that the title to the horse and the right of possession were in him. Verry v. Small, 16 Gray, 121, 122; Whitcher v. Shattuck, 3 Allen, 319.

The defendant was not a party to the written contract between the plaintiff and Pope, but claimed outside of it, and in support of his own title he might show by parol what was the real arrangement between them, even if it differed from that contained in the writing. Kellogg v. Tompson, 142 Mass. 76. If the plaintiff expressly or impliedly authorized the sale by Pope to him, he, having bought in good faith from the apparent owner, acquired a good title. It is immaterial whether his right depends upon an actual authority to make the sale, or upon facts which estop the plaintiff from denying the validity of the sale. Burbank v. Crooker, 7 Gray, 158, 159; Haskins v. Warren, 115 Mass. 514, 538. Fall River National Bank v. Buffinton, 97 Mass. 498; Fowler v. Parsons, 143 Mass. 401; Tracy v. Lincoln, 145 Mass. 357.

The testimony as to the course of dealing between the plaintiff and Pope, involving a long series of transactions, all of the same kind and conducted generally in the same way, was competent, as tending to show an expectation and understanding on the part of both that Pope would sell the horses which he bought of the plaintiff as he had opportunity, and that he was impliedly authorized to sell this horse to the defendant. Hubbell v. Flint, 13 Gray, 277; Bragg v. Boston & Worcester Railroad, 9 Allen, 54; Lynde v. McGregor, 13 Allen, 172; First National Bank v. Goodsell, 107 Mass. 149. The testimony of Trull as to the message sent to Pope by the plaintiff, about the middle of June, was of a conversation so soon after the sale of June 2 to the defendant, that the judge might well admit it in his discretion. It related to the general course of dealing of which the sale to Pope of the horse replevied was a part.

The jury were rightly permitted to find that the plaintiff impliedly authorized the sale by Pope to the defendant, and that he was estopped to deny the validity of the title which the defendant acquired, relying on Pope's possession and apparent ownership.

Exceptions overruled.

NOTE. — Statutes have been passed, regulating conditional sales in Alabama, Arizona, Colorado, Connecticut, Florida, Georgia, Iowa, Kansas, Kentucky, Maine, Massachusetts (as to household furniture only), Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming. Such statutes usually require the terms of the sale to be in writing and recorded in order to make the conditions effectual as to third parties.

SECTION IV.

SALE OF GOODS NOT SPECIFIED.

ANONYMOUS.

IN THE KING'S BENCH, MICHAELMAS TERM, 1505.

[*Reported in Keilwey*, 77, *pl.* 25.]

IN an action of trespass on the case the plaintiff declared that he had bought of the defendant twenty quarters of malt for a certain sum of money paid beforehand, which he left with the defendant to keep safely to his use until a certain day had passed, and the defendant took upon himself to do this. Before the day for delivery the defendant converted the said malt to his own use to the wrong and damage of the plaintiff, &c. MORE. The plaintiff has declared that he bought twenty quarters of malt, and has not shown that it was in sacks, so that by the purchase the property was not changed, for the plaintiff could [not] take this malt from the defendant's storehouse, by virtue of such a sale of unascertained malt, nor can he have an action of detinue; but if it was in sacks or in another manner severed from the rest of the malt, there the purchase alters the property so that the vendee can take it or have detinue, and for the same reason an action on the case; but as the case is here he is put to his action of debt for the malt. And the matter was considered at the bar and then by the whole bench. Upon which FROWIKE said, truly the case is good, and many good cases touching the matter have been put, nevertheless the words at the time of the purchase govern the whole matter. If a man sells me one of the horses in his stable, and grants further that he will deliver the horse to me by a certain day, I may not take the horse without his delivery; but if he sells me one of the horses in his stable for a certain sum of money paid beforehand, I may take the horse, — whatever horse pleases me without any delivery; and in both cases if a third party converts all the horses to his own use so that I cannot secure my bargain, I shall have an action on the case against him because of the payment of the money. . . . And if I covenant with a carpenter to make a house by a certain day, and he does not make the house by the day, I shall have a good action on the case because of the payment of my money, and yet it sounds only in covenant, and without payment of money in this case no remedy, and yet if he makes the house, and makes it badly, action on the case lies, and also for nonfeasance if the money be paid, action on the case lies. So that it seems to me in the case at bar the payment of the money is the cause of the action on the case without any alteration of any property.[1]

WHITEHOUSE and Others, Assignees of Townsend, a Bankrupt, *v.* J. FROST and L. FROST, DUTTON, and BANCROFT.

In the King's Bench, July 6, 1810.

[*Reported in* 12 *East*, 614.]

In trover to recover the value of some oil, the property of the bankrupt, which was tried at Lancaster, in March last, a verdict was found for the plaintiffs for £390, subject to the opinion of the court on the following case: —

The plaintiffs are assignees of John Townsend, late a merchant at Liverpool; the two Frosts are merchants and partners in Liverpool; and the other defendants, Dutton & Bancroft, are also merchants and partners in the same town. On the 7th of February, 1809, Townsend purchased from the defendants, J. & L. Frost, ten tons of oil, at £39 per ton, amounting to £390, for which Townsend was to give his acceptance payable four months after date; and a bill of parcels was rendered to Townsend by the Frosts, a copy of which is as follows: —

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[1] This case is also reported in Keilwey, 69, pl. 2, and in Y. B. 20 Hy. VII. 8, 18. In the latter report Kingsmil, Justice, said: "This action does not lie, but debt should be brought, for the property is not changed by the bargain, because it is not ascertained, and that must be done by the delivery of the defendant. And it is at his pleasure to pay whatever grains he will, for if he buys twenty quarters of another he may pay the plaintiff with them, which proves that the property is not in the plaintiff, no more than the money which the plaintiff shall pay to the defendant."

In 18 Edw. IV. 14, the justices agreed that a grant to take a deer in the grantor's park did not pass property in any deer. Brian, C. J., added: "But if I have a black deer among others in my park, I can grant him and the grant is good; and if I have two among others known, and I grant one or both of them, the grant is good, for this reason, that it is ascertained what thing is granted."

In Heywood's Case, 2 Rep. 36, 37 *a*, it was resolved "If I give you one of my horses in my stable, there you shall have an election, for you shall be the first agent by taking or seisure of one of them."

LIVERPOOL, 7th February, 1809.

MR. JOHN TOWNSEND, Bought of J. & L. FROST,

Ten tons Greenland whale oil in Mr. Staniforth's cisterns, at your risk, at £39 . . . . £390

Cr.

1809. February 14. By acceptance £390

For J. & L. F., WM. PEMBERTON.

The said ten tons of oil at the time of his purchase were part of forty tons of oil lying in one of the cisterns in the oil-house at Liverpool, the key of which cistern was in the custody of the other defendants, Dutton & Bancroft, who had before that time purchased from J. R. & J. Freme, of Liverpool, merchants, the said forty tons of oil in the same cistern; and upon such purchase received from the Fremes the key of the cistern. Afterwards Dutton & Bancroft sold ten of the forty tons they had so bought (being the ten tons in question) to the defendants, the Frosts, who sold the same in the manner before stated to Townsend. On the 7th of February, the day on which Townsend bought the ten tons of oil, he received from the defendants, Frosts, an order on Dutton & Bancroft, who held the key of such cistern, they having other interest therein as aforesaid, to deliver to him, Townsend, the said ten tons of oil; a copy of which is as follows: —

Messrs. DUTTON & BANCROFT, —

Please to deliver the bearer, Mr. John Townsend, ten tons Greenland whale oil, we purchased from you 8th November last.

(Signed) J. & L. FROST.

The order was taken to Dutton & Bancroft by Townsend, and accepted by them upon the face of the order as follows: "1809. Accepted, 14th February. Dutton & Bancroft." Townsend, according to the terms of the bill of parcels, namely, on the 14th of February, 1809, gave to the defendants, Frosts, his acceptance for the amount of the oil, payable four months after date; but which acceptance has not been paid. Townsend never demanded the oil from Dutton & Bancroft, who had the custody of it. The oil was not subject to any rent; the original importer having paid the rent for twelve months, and sold it rent free for that time, which was not expired at Townsend's bankruptcy. On the 23d of May, 1809, about three months after the purchase of the ten tons of oil, a commission of bankrupt issued against Townsend, under which he was duly declared a bankrupt, and the plaintiffs appointed his assignees. At the time of the purchase, and also at the time of Townsend's being declared a bankrupt, the oil was lying in the cistern mixed with other oil in the same; and some time afterwards the defendants refused to deliver the same to the plaintiffs, notwithstanding a demand was made for the same by the assignees, and a tender of any charges due in respect thereof. When the whole of the oil lying in any of the cisterns in the oil-house is sold to one person, the purchaser receives the key of the cistern; but when a small parcel is sold, the key remains with the original owner; and the purchaser is charged in proportion to the quantity of oil sold, with rent for the same, until delivered out of the oil-house, unless such rent be paid by the original importer, as was the fact in the present case. If the plaintiffs were entitled to recover, the verdict was to stand; if not, a nonsuit was to be entered.

There was a similar action by the same plaintiffs against J. R. Freme and J. Freme, Dutton, and Bancroft, the circumstances of which were in substance the same.

J. Clarke, for the plaintiffs.

Scarlett, contra.

LORD ELLENBOROUGH, C. J. This case presents a difference from the ordinary cases which have occurred where the sale has been of chattels in their nature several, and where the transfer of the property from the vendor by means of an order for delivery addressed to the wharfinger or other person in whose keeping they were, and accepted by him, has been held to be equivalent to an actual delivery; the goods being at the time capable of being delivered. Here, however, there is this distinguishing circumstance, that the ten tons of oil till measured off from the rest was not capable of a separate delivery; and the question is, whether that be a distinction in substance or in semblance only. The whole forty tons were at one time the property of Dutton & Bancroft, who had the key of the cistern which contained them; and they sold ten tons to the Frosts, who sold the same to Townsend, the bankrupt, and gave him at the same time an order on Dutton & Bancroft for the delivery to him of the ten tons. To that order Dutton & Bancroft attorn, as I may say; for they accept the order, by writing upon it "Accepted, 14th of February, 1809," and signing their names to it. From that moment they became the bailees of Townsend, the vendee; the goods had arrived at their journey's end, and were not *in transitu;* all the right then of the sellers was gone by the transfer, and they could no longer control that delivery to which they had virtually acceded by means of their order on Dutton & Bancroft accepted by the latter. The question of stopping *in transitu* does not arise, taking the Frosts to be the original sellers, as between them and the bankrupt; the oil had never been in the hands of the Frosts; they only assigned a right to it in the hands of the common bailees, which before had been assigned to them.

GROSE, J. There can be no doubt that at the time of Townsend's bankruptcy the ten tons of oil in the cistern were at the risk of the bankrupt. All the delivery which could take place between these parties had taken place. Dutton & Bancroft, who had the custody of the whole in their cistern, had accepted the order of the sellers for the delivery to the bankrupt, and it only remained for Townsend, together with Dutton & Bancroft, to draw off the ten tons from the rest.

LE BLANC, J. Dutton & Bancroft had sold the ten tons of oil in question (which was part of a larger quantity, the whole of which was under their lock and key) to the Frosts, who sold the same to Townsend; and there is no claim on the part of the defendants, Dutton & Bancroft, to detain the oil for warehouse rent. The Frosts never had any other possession of the oil than through Dutton & Bancroft; but they gave to Townsend an order on these latter to deliver it to him; and after the acceptance of that order Dutton & Bancroft held it for his use. But something, it is said, still remained to be done, namely, the measuring off of the ten tons from the rest of the oil. Nothing, however, remained to be done in order to complete the sale. The objection only applies where something remains to be done as between the buyer and seller, or for the purpose of ascertaining either the quantity or the price, neither of which remained to be done in this case; for it was admitted by the persons who were to make the delivery to Townsend, that the quantity mentioned in the order was in the cistern in their custody, for they had before sold that quantity to the Frosts, of whom Townsend purchased it, and had received the price. Therefore, though something remained to be done as between the vendee and the persons who retained the custody of the oil, before the vendee could be put into separate possession of the part sold, yet as between him and his vendors nothing remained to perfect the sale.

BAYLEY, J. There is no question of *transitus* here; the goods were at their journey's end. When, therefore, Dutton & Bancroft, who were then the owners of the whole, sold ten tons of the oil to the Frosts, those ten tons became the property of the Frosts; and when they sold the same to Townsend, and gave him an order upon Dutton & Bancroft for the delivery of the ten tons purchased of them, the effect of that order was to direct Dutton & Bancroft to consider as the property of Townsend the ten tons in their possession, which before was considered as the property of the Frosts; and by the acceptance of that order Dutton & Bancroft admitted that they held the ten tons for Townsend, as his property; and he had a right to go and take it, without the interference of the Frosts. *Postea to the plaintiffs.*

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larged, p 107

AUSTEN *v.* CRAVEN AND ANOTHER.

IN THE COMMON PLEAS, NOVEMBER 10, 1812.

[*Reported in* 4 *Taunton*, 644.]

THE plaintiff's declaration contained two counts in case, founded on a breach of the duty which he averred to arise out of a sale made of sugars by the defendants to Kruse, and a further sale by Kruse to the plaintiff; and also a count in trover for sugars. Upon the trial of the cause at the sittings after Hilary Term, 1812, at Guildhall, before Mansfield, Ch. J., it appeared that the plaintiff had in his two first counts incorrectly described the contract; it therefore became a question, whether the plaintiff could recover in trover under the following circumstances: On the 7th of December, 1809, the defendants, who were sugar-refiners, entered into a contract to sell to Renold Dresden (who was clerk of, and bought for the use of Kruse) 50 hogsheads of sugar, the quality of which was described as being double loaves, at 100*s.* per cwt., 50 hogsheads of the quality described as Turkey B. at 85*s.*, 50 hogsheads of the quality called Turkey C. at 75*s.*, and 50 others of the quality called Turkey A. at 108*s.*, to be delivered free on board a British ship. They were to be paid for at the expiration of four months, allowing two months' interest, the seller paying all expenses up to the 1st day of April, 1810; after that time, if not shipped, the buyer was to pay expenses; and it was agreed that Kruse should give the defendants his guaranty in writing for R. Dresden. The seller of sugars, upon delivering them on board a British ship for exportation, becomes entitled to receive a considerable drawback, which is paid him by the government. The appellations given to the several parcels of sugar denoted certain qualities of sugar known in the trade. Kruse being in embarrassed circumstances, on the 30th of January, not having then named any British ship on board of which the sugars or any of them should be delivered, nor having paid for them, and no part of them having been delivered, he resold to the defendants, at an advanced price, the 150 hogsheads lastly named in the original contract, and shortly after he contracted to sell to the plaintiff the 50 hogsheads of double loaves, and gave the defendants an order to deliver them to the plaintiff. The plaintiff gave notice to the defendants of his intended contract, and inquired whether they had 50 hogsheads of sugar belonging to Kruse, and whether he, the plaintiff, might safely purchase them of Kruse, and pay him the price, to which they answered in the affirmative, and said that they had the 50 hogsheads and would deliver them. The plaintiff thereupon paid Kruse the price at which he had contracted for them, and required the defendants to deliver them, which they, being unable to obtain payment from Kruse, refused to do, whereupon the plaintiff brought this action; and it was urged for him that, although ordinarily a vendor has the right to detain the goods which he contracts to sell until he is paid for them, yet that these defendants, having told the plaintiff that he might safely buy and pay Kruse, could not afterwards set up that lien. For the defendants it was objected that no specific 50 hogsheads had been so separated from the defendants' stock as to enable the plaintiff to recover in trover. The jury found a verdict for the plaintiff, subject to this objection, which was reserved by the chief justice; and in Easter term, *Shepherd*, Serjt., obtained a rule *nisi* to set aside the verdict, and enter a nonsuit, against which

Vaughan, Serjt., now showed cause.

Shepherd and *Best*, Serjts., in support of the rule.

MANSFIELD, C. J. What the plaintiff's counsel says would have been an answer to the objection, if there had been a specific quantity of loaves *in esse;* although it was part of the contract that they were to be delivered on board a British ship, there would have been conversion enough. But certainly, upon the evidence, there is no answering the objection. Trover cannot be maintained but for specific goods. Any sugars of required quality would have satisfied this contract. It is a contract for a certain quantity of a specified quality of sugars. I say nothing on the case of the oil; there it is held that trover will lie for a specific quantity of a liquid, mixed with a certain other quantity of the same liquid, without its ever having been separated; how it is to be distinguished from the mass, I know not; but that case stands quite on its own bottom; it is unlike other cases.

Gibbs, J. We need say nothing on that case; suffice it that it is very distinguishable from this. *Rule absolute.*

GILLETT *v.* HILL AND ANOTHER.

IN THE EXCHEQUER, HILARY TERM, 1834.

[*Reported in* 2 *Crompton & Meeson,* 530.]

Trover to recover the value of fifteen sacks of flour.

At the trial before Lord Lyndhurst, C. B., at the London sittings after last Trinity term, it appeared that one Orbell, a miller, had given the plaintiff an order on the defendants, who were his (Orbell's) wharfingers, for the delivery of twenty sacks of flour, which order was in the following terms: —

Mrs. E. Hill & Son,
Please to deliver to Mr. Gillett twenty sacks of households.
Richard Orbell.

This order was presented by the plaintiff's carman at the defendants' counting-house, but the defendants' foreman said that they had not more than five sacks to spare, but he might have that quantity. The carman then went away leaving the delivery order with the defendants' foreman, and it was filed by the clerk in the usual way. On the same day the carman brought an order from the plaintiff "to deliver five sacks ex 20," which were accordingly delivered. Application was made the next day for the remainder of the flour mentioned in the order, when the defendants' foreman said that the plaintiff should have it as soon as they got any. Shortly after this, another application was made, to which the answer was, that the defendants had not any flour of Orbell's to deliver. The delivery order for twenty sacks signed by Orbell was, pursuant to notice for that purpose, produced at the trial; but the defendants not having produced the order from the plaintiff to deliver "five sacks ex 20," the carman proved the delivery of an order from the plaintiff to that effect, and that the five sacks were accordingly delivered. The case on behalf of the defendants was, that they had no flour of Orbell's to deliver; but their clerk on being cross-examined would not swear that there were not fifty sacks of Orbell's flour on the defendants' wharf at the time that the order was lodged; but said that, if there were, they were appropriated to prior orders. But no such orders were produced by the defendants. It was objected for the defendants, that, as no specific fifteen sacks of flour had been selected or appropriated by the wharfingers, so as to vest the property in the vendee, trover was not maintainable. The plaintiff contended that the acceptance of the delivery order for twenty sacks was a virtual appropriation of that quantity to the plaintiff's use, and that the subsequent demand and refusal were evidence of a conversion. Lord Lyndhurst, C. B., left it as a question to the jury, whether there had been an acceptance by the defendants of the order for the delivery of the twenty sacks, and the jury found in the affirmative, and gave a verdict for the plaintiff for the value of the fifteen sacks. Bompas, Serjt., in Michaelmas term last, obtained a rule for a new trial, against which

J. Williams was to have shown cause, but the court called on *Bompas*, Serjt., and *Hoggins*, in support of the rule.

LORD LYNDHURST, C. B. I am of opinion that there ought not to be a new trial in this case. A point of law has been attempted to be raised, but the case was decided by the verdict of the jury on the facts. The order was in these terms: "Mrs. E. Hill & Son, please to deliver to Mr. Gillett twenty sacks of households." That order, on being presented, was accepted, and accepted generally; at least there was no evidence of any qualification of the acceptance. There was no indorsement of a partial acceptance, and it was filed by the defendants in the way in which it was proved that orders accepted generally were filed by them in the course of their business. That view of the case was confirmed by the evidence of the plaintiff's carman, who stated that, after leaving the first order for twenty sacks, he had afterwards brought an order from the plaintiff "for five sacks ex 20," and that five sacks were delivered according to that order. The jury were of opinion that the order for twenty sacks was accepted generally; and if that were so, it was an admission that there were twenty sacks of Orbell's flour in the defendants' possession. The case has been argued, however, on the ground of there having been more than twenty sacks of flour belonging to Orbell in the defendants' possession; but there is no distinct proof on the part of the defendants that they had more of Orbell's flour in their possession than those twenty sacks, or that the plaintiff knew that the defendants had more in their possession. I think, therefore, that the verdict was right, and that trover is maintainable. There must, therefore, be no rule.

BAYLEY, B. I am of the same opinion. There is no doubt that there was originally an order signed by Orbell, and addressed to the defendants, requesting them to deliver twenty sacks of flour to the plaintiff. The order does not say twenty sacks *ex* a greater quantity, to be selected by the defendants, but twenty sacks specifically. The defendants knew what quantity of flour belonging to Orbell they had, and they might have indorsed on the back of the order that they had so many only; and, from the circumstance of there being no indorsement that they accepted the order to a limited extent, and to a limited extent only, I should have thought that the jury would act upon a safe principle in believing that the defendants had twenty sacks belonging to Orbell in their possession, and the verdict of the jury therefore appears to me consistent with the evidence. It appears to me, that, looking at the form of the order, trover was the proper form of action, and that the cases which have been cited do not apply to this case. Those cases may be divided into two classes: one in which there has been a sale of goods, and something remains to be done by the vendor, and until that is done the property does not pass to the vendee so as to entitle him to maintain trover. The other class of cases is, where there is a bargain for a certain quantity *ex* a greater quantity, and there is a power of selection in the vendor to deliver which he thinks fit; then the right to them does not pass to the vendee until the vendor has made his selection, and trover is not maintainable before that is done. If I agree to deliver a certain quantity of oil, as ten out of eighteen tons, no one can say which part of the whole quantity I have agreed to deliver until a selection is made. There is no individuality until it has been divided. But those cases do not apply here. This was an order to deliver twenty sacks of flour, not out of a greater quantity, but twenty sacks specifically; and when the defendants accept that order without restriction, they admit that they have twenty sacks, which they will appropriate to that order, and the defendants have no right afterwards to say that they have not twenty sacks unappropriated. The defendants should not have accepted the order generally, unless they meant to be bound by it; but having accepted the order generally, it seems to me that the property in the flour passed to the plaintiff, and that the verdict is right.

VAUGHAN, B. I think that the verdict was warranted both in law and in fact. The action of trover is founded upon a right of property, and to maintain the action it is essentially necessary to show property in the plaintiff, and possession and a conversion by the defendant. All those requisites are in my opinion complied with in this case. Attending to the facts of the case, the delivery order is taken to the wharfinger to see if the party giving the order has the articles mentioned in it in the wharfinger's possession. The defendants in this instance attorn as it were to the delivery order, and admit the plaintiff's right to call upon them to deliver twenty sacks of flour. Having received that order, it is binding on them. If they were not in a condition to comply with the order, they should have communicated that fact when the order was delivered; and if they had only five sacks they should have limited their acceptance of it to that amount, by indorsing it on the order. Instead of that, they receive the order generally, they file it, and they produce it on the trial. But then it is said that the defendants have not appropriated any particular fifteen sacks to this order; and in support of that objection several cases have been cited. In all those cases, however, if they are examined, it will appear that it was held essential that certain acts should be done, as weighing, &c., before the property vested; and as those acts had not been done, the plaintiff failed to prove an absolute property in him. Here, however, the defendants admitted that they had twenty sacks in their possession (the property of Orbell), and they afterwards refused to deliver fifteen of that number. Upon the authority of the cases, I think there is sufficient evidence of property, possession, and conversion, to warrant the jury in finding their verdict for the plaintiff, and to sustain this form of action.

GURNEY, B., concurred. *Rule discharged.*

KNIGHTS v. WIFFEN.

IN THE QUEEN'S BENCH, JUNE 18, 1870.

[*Reported in Law Reports,* 5 *Queen's Bench,* 660.]

DECLARATION for conversion of sixty quarters of barley of the plaintiff.

Pleas: 1. Not guilty. 2. That the barley was not the property of the plaintiff.

Issue thereon.

At the trial before Keating, J., at the Surrey Spring Assizes, it appeared that the defendant, a corn-merchant, had a large quantity of barley, in sacks, lying in his granary, which adjoined the Stanstead Station of the Great Eastern Railway. He sold eighty quarters of this barley to one Maris, but no particular sacks were appropriated to the purchaser. While the barley remained in the defendant's granary, subject to the orders of Maris, the latter sold sixty quarters of it to the plaintiff, who paid him for them, and received from him the following delivery order, addressed, as was usual in similar transactions, to the

STATION-MASTER, Stanstead: —

SIR, — Deliver Mr. T. Knights sixty quarters of barley to my order.

R. W. MARIS, Jr.

JUNE 27, 1868.

Underneath was written, —

THOMAS KNIGHTS, JR.,
Hemingford Gray, near St. Ives,
Huntingdonshire.

The plaintiff sent this document to the station-master, and wrote with it: —

Sir, — I enclose Mr. R. W. Maris, Jr.'s transfer of sixty quarters of barley to my account. Please confirm this transfer, and send me a sample, and say what weight is in due course.

On receipt of this letter and the delivery order, the station-master showed them both to the defendant, who said, "All right; when you get the forwarding note I will put the barley on the line." Samples were afterwards given to the station-master, which were sent by him to the plaintiff. Three sacks were weighed. The plaintiff ultimately gave an order, or forwarding note, to the station-master, for the sixty quarters of barley to be sent to Cambridge, which he presented to the defendant, but Maris had then become bankrupt, and the defendant, as unpaid vendor, refused to part with the barley.

The learned judge directed a verdict for the defendant, giving the plaintiff leave to move to enter a verdict for £53 18*s.* 7*d.*, the amount claimed.

A rule was obtained pursuant to the leave reserved, on the ground that there was evidence which ought to have been submitted to the jury to prove that the defendant had accepted and agreed to act upon the delivery order of the vendee (Maris), and thus passed the property in the sixty sacks of barley; or for a new trial on the ground that the judge ought to have directed a verdict for the plaintiff for three sacks at least.

Wood Hill (*Day* with him) showed cause.

Ingham (with him *Parry*, Serjt., and *Kemp*) in support of the rule.

Blackburn, J. I think that the plaintiff is entitled to the verdict, and the rule should be made absolute to enter a verdict for him. I will state shortly what I consider to be the facts upon which the case seems to turn. The defendant Wiffen had in his own warehouse a large quantity of barley, and he sold to Maris eighty quarters, which, on the contract between him and Maris, remained in his possession as unpaid vendor. No particular sacks of the barley were appropriated as between Maris and Wiffen; but at the time the contract was made Maris had a right to have eighty quarters out of that barley appropriated to him; and at the same time Wiffen, as the unpaid vendor, had a right to insist on payment of the price before any part of the grain was given up. Maris afterwards entered into a contract with the plaintiff, Knights, by which he sold him sixty sacks of the barley, and Knights paid him for them. A document was given by Maris to Knights in the shape of a delivery order addressed to a station-master of the Great Eastern Railway, instructing him to deliver to Knights' order sixty quarters of barley on his, Maris', account. Knights forwarded it to the station-master, enclosed in a letter authorizing the station-master to hold for him. The station-master went to Wiffen, and showed him the delivery order and letter, and Wiffen said, "All right; when you receive the forwarding note, I will place the barley on the line." What does that mean? It amounts to this, that Maris having given the order to enable Knights to obtain the barley, Wiffen recognized Knights as the person entitled to the possession of it. Knights had handed the delivery order to the station-master, and Wiffen, when the document was shown to him, said, in effect, "It is quite right; I have sixty quarters of barley to Maris's order; I will hold it for you; and when the forwarding-note comes I will put it on the railway for you." Upon that statement Knights rested assured, and Wiffen, by accepting the transfer which had been informally addressed to the station-master, bound himself to Knights. The latter accordingly, when he did not get the goods, brought an action of trover against Wiffen, saying, as it were, "You said that you had the sixty quarters of barley, and that you would hold the goods for me. You cannot refuse to deliver to me; if you do refuse it will be a conversion." And Wiffen now says, "It is all true, but I do refuse to deliver the barley. Granted that I previously said I would hold sixty quarters of barley for you, yet I had none to hold for you. I had no quarters belonging to Maris, for I never severed them from the bulk, and I am entitled to hold the whole quantity as against Maris, until I am paid the full price." No doubt the law is that until an appropriation from a bulk is made, so that the vendor has said what portion belongs to him, and what portion belongs to the buyer, the goods remain *in solido*, and no property passes. But can Wiffen here be permitted to say, "I never set aside any quarters"? As to that, Woodley *v.* Coventry, 2 H. & C. 164; 32 L. J. (Ex.) 185, is very much in point; with this difference only, that there the plaintiff acted on the statement of the warehouseman, and altered his position by paying the vendee a part of the price, and so the doctrine of estoppel applied; which doctrine is that where one states a thing to another, with a view to the other altering his position, or knowing that, as a reasonable man, he will alter his position, then the person to whom the statement is made is entitled to hold the other bound, and the matter is regulated by the state of facts imported by the statement. Woodley had altered his position by paying part of the price, but Coventry did not know of it. In Stonard *v.* Dunkin, 2 Campb. 344, it is patent that the defendant knew the money was paid. In Hawes *v.* Watson, 2 B. & C. 540, it appears that payment had been made, but the defendant did not know of it, although, as a reasonable man, he might have known it was likely. But in neither of those cases did the defendants know that money was going to be paid. In the present case the money had been paid before the presentation of the delivery order; but I think, nevertheless, that the position of the plaintiff was altered through the defendant's conduct. The defendant knew that, when he assented to the delivery order, the plaintiff, as a reasonable man, would rest satisfied. If the plaintiff had been met by a refusal on the part of the defendant, he could have gone to Maris, and have demanded back his money, very likely he might not have derived much benefit if he had done so; but he had a right to do it. The plaintiff did rest satisfied in the belief, as a reasonable man, that the property had been passed to him. If once the fact is established that the plaintiff's position is altered by relying on the statement and taking no steps further, the case becomes identical with Woodley *v.* Coventry, 2 H. & C. 164; 32 L. J. (Ex.) 185, and Hawes *v.* Watson, 2 B. & C. 540. It is to be observed, moreover, that the judgment of the court in Woodley *v.* Coventry, *supra*, did not rest on the fact of the payment of the price. It will be noticed there that, although the fact did exist of payment of price, Martin, B., seems to found his decision on the assenting to hold, and the fact that when that assent was communicated to the plaintiffs, they altered their position. In Gillett *v.* Hill, 2 C. & M. 530, there was no payment of the price, and the Court of Exchequer gave judgment against the wharfingers, on the ground that they were estopped from denying the facts, after the other party had altered his position, relying on their conduct when the delivery order was presented. In the present case the plaintiff altered his position, relying on the defendant's conduct when the delivery order was presented. The plaintiff may well say, "I abstained from active measures in consequence of your statement, and I am entitled to hold you precluded from denying that what you stated was true."

Mellor, J. I am entirely of the same opinion. Lord Ellenborough says in Stonard *v.* Dunkin, 2 Campb. 344, "Whatever the rule may be between buyer and seller, it is clear the defendants cannot say to the plaintiff, 'The malt is not yours,' after acknowledging to hold it to his account. By so doing, they attorned to him; and I should entirely overset the security of mercantile dealings were I now to suffer them to contest the title." I think the question is concluded by this and all the authorities, and the doctrine of estoppel, when generally applied to cases of this kind, is certainly very useful. The foundation of that doctrine is clearly stated in my brother Blackburn's book on Sale, p. 162, and I am not aware that any of the cases he cites and comments on in support of his reasoning have been ever overruled, qualified, or questioned. He says, "This is a rule, which, within the limits applied by law, is of great equity; for when parties have agreed to act upon an assumed state of facts, their rights between themselves are justly made to depend on the conventional state of facts, and not on the truth. The reason of the rule ceases at once when a stranger to the arrangement seeks to avail himself of the statements which were not made as a basis for him to act upon. They are for a stranger evidence against the party making the statement, but no more than evidence which may be rebutted; between the parties they form an estoppel in law."

Lush, J. I also think that the plaintiff is entitled to judgment on this short and intelligible ground, supported by sound reason and by all the authorities, that the defendant, by what he said to the station-master, assented to the transfer, and induced the plaintiff to believe that he would hold the barley to his order. By so doing he altered the position of the plaintiff towards Maris. The plaintiff might, on a refusal by the defendant to hold for him, have applied to Maris, and he was deprived of the information which would have caused him to have done so. The defendant is therefore precluded from denying what he said. There is no distinction whatever between this case and Woodley *v.* Coventry, 2 H. & C. 164; 32 L. J. (Ex.) 185, in principle. There the party actually paid the money, here the plaintiff had already paid the money first; but if his order had been rejected he might have required his money back.

Rule absolute to enter a verdict for the plaintiff.[1]

KIMBERLY ET AL. *v.* PATCHIN.

New York Court of Appeals, June Term, 1859.

[*Reported in* 19 *New York Reports*, 330.]

Appeal from the Supreme Court. Action to recover the value of 6,000 bushels of wheat, alleged to have been the property of the plaintiffs, and to have been converted by the defendant. Upon the trial before Mr. Justice Greene, at the Erie Circuit, it was proved that one Dickinson had in warehouse, at Littlefort, in Wisconsin, two piles of wheat, amounting to 6,249 bushels. John Shuttleworth proposed to purchase 6,000 bushels of wheat. Upon being shown the piles, he expressed a doubt whether they contained that quantity. Dickinson declared his opinion that they did, and agreed to make up the quantity if they fell short. A sale was then made at seventy cents per bushel, Dickinson signing and delivering to Shuttleworth a memorandum, as follows: —

Littlefort, February 17, 1848.

John Shuttleworth Bought of D. O. Dickinson

6,000 bushels of wheat, delivered on board, 70 cents		$4,200
Received his draft upon John Shuttleworth, of Buffalo, for	$2,100	
To remit me	1,600	
Five drafts of $100 each	500	
		4,200

D. O. Dickinson.

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[1] "At present I do not venture to differ from Knights *v.* Wiffen; I understand that the learned judges construed a certain statement as having not merely its ordinary meaning, but also a mercantile meaning, and they were of opinion that the mercantile meaning of the statement was that the defendant had sold the goods separated from other goods and held them for the benefit of the plaintiff. I confess it seems to me that in that case two well-known doctrines were mixed up, the doctrine of estoppel, and the doctrine of attornment by a warehouseman who has goods in his hands." *Per* Brett, L. J. in Simon *v.* Anglo-American Telegraph Co. 5 Q. B. D. 188, 212.

He also signed and delivered to Shuttleworth, this paper, viz.: —

LITTLEFORT, February 18, 1848.

6,000 bushels wheat.

Received in store 6,000 bushels of wheat, subject to the order of John Shuttleworth, free of all charges, on board. D. O. DICKINSON.

The wheat was left undisturbed in the warehouse. Shuttleworth sold the wheat to the defendant, assigning to him the bill of sale and warehouse receipt. Dickinson shortly afterwards sold the whole quantity of wheat in the two piles to a person under whom the plaintiffs derived title. The defendant having obtained the possession of the wheat, this action was brought. The judge, under exception by the defendant, directed a verdict for the plaintiffs, which was rendered, and the judgment thereon having been affirmed at General Term, in the eighth district, the defendant appealed to this court.

John H. Reynolds, for the appellant.

John L. Talcott, for the respondents.

COMSTOCK, J. Both parties trace their title to the wheat in controversy to D. O. Dickinson, who was the former owner, and held it in store at Littlefort, Wisconsin. The defendant claims through a sale, made by Dickinson to one Shuttleworth on the 18th of February, 1848. If that sale was effectual to pass the title, it is not now pretended that there is any ground on which the plaintiffs can recover in this suit. The sale to the person under whom they claim, was about two and a half months junior in point of time.

The sale to Shuttleworth was by a writing in the form of a present transfer of 6,000 bushels of wheat, at seventy cents per bushel. No manual delivery was then made, but instead thereof the vendor executed and delivered to the vendee another instrument, declaring that he had received in store the 6,000 bushels subject to the vendee's order; of the price $2,600 was paid down, and the residue $1,600 which was to be paid at a future day, the purchaser afterwards offered to pay, according to the agreement. So far the contract had all the requisites of a perfect sale. The sum to be paid by the purchaser was ascertained, because the number of bushels and the price per bushel were specified in the contract. Although the article was not delivered into the actual possession of the purchaser, yet the seller, by the plain terms of his agreement, constituted himself the bailee, and henceforth stood in that relation to the purchaser and to the property. That was equal in its results to the most formal delivery, and no argument is required to show that the title was completely divested, unless a difficulty exists yet to be considered.

The quantity of wheat in store to which the contract related was estimated by the parties at about 6,000 bushels. But subsequently, after Dickinson made another sale of the same wheat to the party under whom the plaintiffs claim, it appeared on measurement that the number of bushels was 6,249, being an excess of 249 bushels. When

Shuttleworth bought the 6,000 bushels, that quantity was mixed in the storehouse with the excess, and no measurement or separation was made. The sale was not in bulk, but precisely of the 6,000 bushels. On this ground it is claimed, on the part of the plaintiffs, that in legal effect the contract was executory, in other words a mere agreement to sell and deliver the specified quantity, so that no title passed by the transaction. It is not denied, however, nor does it admit of denial, that the parties intended a transfer of the title. The argument is, and it is the only one which is even plausible, that the law overrules that intention, although expressed in plain written language, entirely appropriate to the purpose.

It is a rule asserted in many legal authorities, but which may be quite as fitly called a rule of reason and logic as of law, that in order to an executed sale, so as to transfer a title from one party to another, the thing sold must be ascertained. This is a self-evident truth, when applied to those subjects of property which are distinguishable by their physical attributes from all other things, and therefore, are capable of exact identification. No person can be said to own a horse or a picture, unless he is able to identify the chattel or specify what horse or what picture it is that belongs to him. It is not only legally, but logically, impossible to hold property in such things, unless they are ascertained and distinguished from all other things; and this, I apprehend, is the foundation of the rule that, on a sale of chattels, in order to pass the title, the articles must, if not delivered, be designated, so that possession can be taken by the purchaser without any further act on the part of the seller.

But property can be acquired and held in many things which are incapable of such an identification. Articles of this nature are sold, not by a description which refers to and distinguishes the particular thing, but in quantities, which are ascertained by weight, measure, or count; the constituent parts which make up the mass being undistinguishable from each other by any physical difference in size, shape, texture, or quality. Of this nature are wine, oil, wheat, and the other cereal grains, and the flour manufactured from them. These can be identified only in masses or quantities, and in that mode, therefore, they are viewed in the contracts and dealings of men. In respect to such things, the rule above mentioned must be applied according to the nature of the subject. In an executed and perfect sale, the things sold, it is true, must be ascertained. But as it is not possible in reason and philosophy to identify each constituent particle composing a quantity, so the law does not require such an identification. Where the quantity and the general mass from which it is to be taken are specified, the subject of the contract is thus ascertained, and it becomes a possible result for the title to pass, if the sale is complete in all its other circumstances. An actual delivery indeed cannot be made unless the whole is transferred to the possession of the purchaser, or unless the particular quantity sold is separated from the residue. But actual delivery is not indispensable in any case in order to pass a title, if the thing to be delivered is ascertained, if the price is paid or a credit given, and if nothing further remains to be done in regard to it.

It appears to me that a very simple and elementary inquiry lies at the foundation of the present case. A quantity of wheat being in store, is it possible in reason and in law for one man to own a given portion of it and for another man to own the residue without a separation of the parts? To bring the inquiry to the facts of the case: in the storehouse of Dickinson there was a quantity not precisely known. In any conceivable circumstances could Shuttleworth become owner of 6,000 bushels, and Dickinson of the residue, which turned out to be 249 bushels, without the portion of either being divided from the other? The answer to this inquiry is plain. Suppose a third person, being the prior owner of the whole, had given to S. a bill of sale of 6,000 bushels, and then one to D. for the residue more or less, intending to pass to each the title, and expressing that intention in plain words, what would have been the result? The former owner most certainly would have parted with all his title. If, then, the two purchasers did not acquire it, no one could own the wheat and the title would be lost. This would be an absurdity. But if the parties thus purchasing could and would be the owners, how would they hold it? Plainly according to their contracts. One would be entitled to 6,000 bushels, and the other to what remained after that quantity was subtracted.

Again, suppose, Dickinson having in store and owning 249 bushels, Shuttleworth had deposited with him 6,000 bushels for storage merely, both parties agreeing that the quantities might be mixed. This would be a case of confusion of property where neither would lose his title. In the law of bailments it is entirely settled that S., being the bailor of the 6,000 bushels, would lose nothing by the mixture, and, it being done by consent, it is also clear that the bailee would lose nothing. Story on Bailments, § 40; 2 Bl. Com. 405.

These and other illustrations which might be suggested, demonstrate the possibility of a divided ownership in the 6,249 bushels of wheat. If, then, the law admits that the property, while in mass, could exist under that condition, it was plainly competent for the parties to the sale in question, so to deal with each other as to effectuate that result. One of them being the owner of the whole, he could stipulate and agree that the other should thenceforth own 6,000 bushels without a separation from the residue. And this I think is precisely what was done. The 6,000 bushels might have been measured and delivered to the purchaser, and then the same wheat might have been redelivered to the seller under a contract of bailment. In that case the seller would have given his storehouse receipt in the very terms of the one which he actually gave; and he might, moreover, have mixed the wheat thus redelivered with his own, thereby reducing the quantity sold and the quantity unsold again to one common mass. Now the contract of sale and of bailment, both made at the same time, produced this very result. The formalities of measurement and delivery pursuant to the sale, and of redelivery according to the bailment — resulting in the same mixture as before — most assuredly were not necessary in order to pass the title, because these formalities would leave the property in the very same condition under which it was in fact left; that is to say, in the actual custody of the vendor, and blended together in a common mass. Those formal and ceremonial acts were dispensed with by the contract of the parties. They went directly to the result without the performance of any useless ceremonies, and it would be strange, indeed, if the law denied their power to do so.

There are in the books a considerable number of cases having a real or some apparent bearing upon the question under consideration. Some of them very unequivocally support the defendant's title under the sale to Shuttleworth. A few only of these will be cited. In Whitehouse *v.* Frost, 12 East, 614, the vendors owned forty tons of oil secured in one cistern, and they sold ten tons out of the forty, but the quantity sold was not measured or delivered. The purchaser sold the same ten tons to another person, and gave a written order on the original vendors, which, on being presented, they accepted, by writing the word "accepted" on the face of the order, and signing their names. It was held by the English Common Pleas that the title passed; considerable stress being laid on the acceptance of the order, which, it was said, placed the vendors in the relation of bailees to the quantity sold. This was in 1810. In the following year the case of Jackson *v.* Anderson, 4 Taunt. 24, was decided in the King's Bench. That was an action of trover for 1,960 pieces of coin called Spanish dollars. Mr. Fielding, at Buenos Ayres, remitted to Laycock & Co., at London, $4,700, and advised the plaintiffs that 1,960 of the number were designed for them in payment for goods bought of them. Laycock & Co. received the 4,700 pieces, and pledged the whole of them to the defendant, who sold them to the Bank of England. It was held: 1. That the letter of advice was a sufficient appropriation of $1,960 to the plaintiffs. 2. That the plaintiffs and defendant did not become joint-tenants or tenants in common of the dollars. 3. That although no specific dollars were separated from the residue for the plaintiffs, yet as the defendant had converted the whole, trover would lie for the plaintiffs' share. Of course the action in its nature directly involved the plaintiffs' title, and it was held that the sale or appropriation of a part without any separation was a perfect sale. In Pleasants *v.* Pendleton, 6 Rand. 473, the sale (omitting immaterial circumstances) was of 119 out of 123 barrels of flour, situated in a warehouse, all of the same brand and quality. It was held by the Virginia Court of Appeals, upon very elaborate consideration, and after a review of all the cases, that the title was transferred by the sale. See also Damon *v.* Osborn, 1 Pick. 477; Crofoot *v.* Bennett, 2 Comst. 258. In the last mentioned, which was decided in this court, the sale was of 43,000 bricks in an unfinished kiln containing a larger quantity. A formal possession of the whole brick-yard was taken by the purchaser. It was held that he acquired title to the 43,000, although no separation was made. In the opinion of Judge Strong, the case was made to turn mainly on a supposed delivery of the whole quantity. But, with deference, that circumstance does not appear to me to have been the material one, inasmuch as all the bricks confessedly were not sold. The delivery therefore, did not make the sale, and if part could not be sold without being separated, I do not see how a formal delivery of the whole brick-yard could cure the difficulty. The learned judge speaks of the transaction as a delivery of the whole quantity "with the privilege of selection." But assuming, as he did, that the want of selection or separation was the precise difficulty to be overcome, it is not easy to see how a privilege to select could change the title before the selection was actually made. The case, therefore, it seems to me, can only stand on the ground that the sale was, in its nature, complete; the formal delivery of the whole being doubtless a circumstance entitled to weight in arriving at the intention of the parties. The case is, in short, a strong authority to prove that, in sales by weight, measure, or count, a separation of the part sold from the mass is not in all cases a fundamental requisite.

Referring now to cases where it has been held that sales of this general nature were incomplete, it will be found that they are not essentially and necessarily opposed to the conclusion that, in the instance before us, the title was changed. In White, assignee, &c., *v.* Wilks, 5 Taunt. 176, a merchant sold twenty tons of oil out of a stock consisting of different large quantities in different cisterns, and at various warehouses. The note of sale did not express the quality or kind of oil sold, or the cistern or warehouse from which it was to be taken, and the purchaser did not even know where the particular oil lay which was to satisfy the contract. Very clearly the title could not pass upon such a sale; and so it was held, although the seller was entitled by the contract to charge "1*s.* per ton per week rent," for keeping the oil. A very different question would have been presented if the cistern from which the twenty tons were to be taken had been specified. The mass and quality would then have been ascertained. As it was, the subject of the contract was not identified in any manner. The remarks of the judge, evidently not made with much deliberation, must be construed with reference to the particular facts of the case.

In Austen *v.* Craven, 4 Taunt. 644, there was a contract to sell 200 hogsheads of sugar, to be of four different kinds and qualities which were specified. It did not appear that the seller, at the time of the contract, had the sugar on hand, or any part of it, and the fact was assumed to be otherwise. The sale was, moreover, at so much per cwt., requiring that the sugar should be weighed in order to ascertain the price. In these circumstances the case was considered plainly distinguishable from Whitehouse *v.* Frost, *supra*, and it was held that the title did not pass. I do not see the slightest ground for questioning the decision, although perhaps one or two remarks of Chief Justice Mansfield are capable of a wider application than the facts of the case would justify.

The two cases last mentioned have been not unfrequently cited in various later English and American authorities, which need not be particularly referred to. Some of these authorities may suggest a doubt whether the title passes on a mere sale note by measure or weight out of a larger quantity of the same kind and quality, there being no separation and no other circumstances clearly evincing an intention to vest the title in the purchaser. It is unnecessary now to solve that doubt, because none of the decisions announce the extreme doctrine that where, in such cases, the parties expressly declare an intention to change the title, there is any legal impossibility in the way of that design. Upon a simple bill of sale of gallons of oil or bushels of wheat, mixed with an ascertained and defined larger quantity, it may or may not be considered that the parties intend that the portion sold shall be measured before the purchaser becomes invested with the title. That may be regarded as an act remaining to be done, in which both parties have a right to participate. But it is surely competent for the vendor to say in terms that he waives that right, and that the purchaser shall become at once the legal owner of the number of gallons or bushels embraced in the sale. If he cannot say this effectually, then the reason must be that two men cannot be owners of separate quantities or proportions of an undistinguishable mass. That conclusion would be a naked absurdity, and I have shown that such is not the law. In the case before us the vendor not only executed his bill of sale professing to transfer 6,000 bushels of wheat, but, waiving all further acts to be done, in order to complete the transaction, he acknowledged himself, by another instrument, to hold the same wheat in store as the bailee thereof for the purchaser. If his obligations from that time were not simply and precisely those of a bailee, it is because the law would not suffer him to stand in that relation to the property for the reason that it was mixed with his own. But no one will contend for such a doctrine.

I repeat it is unnecessary to refer to all the cases, or to determine between such as may appear to be in conflict with each other. None of them go to the extent of holding that a man cannot, if he wishes and intends so to do, make a perfect sale of part of a quantity without actual separation, where the mass is ascertained by the contract and all parts are of the same value and undistinguishable from each other.

One of the cases, however, not yet cited, deserves a brief consideration, because it was determined in this court, and has been much relied on by the plaintiffs' counsel. I refer to Gardiner *v.* Suydam, 3 Seld. 357. The owner of flour delivered it in various parcels to a warehouseman, and from time to time took receipts from him. One of these receipts was held by the defendants and others by the plaintiffs, both parties having accepted and paid drafts on the faith thereof. The defendants' receipt was the first in point of time, and was for 536 barrels, being given at a time when in fact there were but 201 barrels in the warehouse, so that it covered 335 more than were then on hand. But other quantities were subsequently delivered at the warehouse, all of the same kind and quality, and the defendants, in fact, received by shipment to them, 500 barrels. For the conversion of this quantity they were sued by the plaintiffs, who had failed to receive the flour which their receipts called for. It cannot fail to be seen from this statement that the defendants, having the first receipt and receiving no more flour than it specified, were entitled to judgment by reason of the priority of their title; and this ground of decision is very clearly stated in the opinion of the chief judge. He thought if the transfer of the receipts could pass the title to the flour, notwithstanding the mixture of all the quantities together, that the one held by the defendants entitled them not only to the 201 barrels in store when it was given, but also to so many barrels delivered in store afterwards as were necessary to make up their number. This view, which appears to me correct, was fatal to the plaintiffs' case. But in another aspect of the controversy, the learned chief judge was of opinion that the transfer to the plaintiffs of the receipts held by them passed no title, on the ground that the quantities which they respectively covered were all mixed together in the storehouse. Assuming the correctness of that view — which I am constrained to question — the case is still unlike the present one. The transfer of a warehouseman's receipt, given to the owner, was certainly no more than a simple sale note of the specified number of barrels; and where, in such cases, that is the whole transaction between vendor and vendee I have already admitted a doubt, suggested by conflicting cases, whether the title passes. If the owner of the flour had held it in his own warehouse, and had not only given a bill of sale of a portion of it, but had himself executed to the purchaser another instrument declaring that he held the quantity sold as bailee and subject to order, then the case would have resembled the one now to be determined.

We are of opinion, therefore, both upon authority and clearly upon the principle and reason of the thing, that the defendant, under the sale to Shuttleworth, acquired a perfect title to the 6000 bushels of wheat. Of that quantity he took possession at Buffalo, by a writ of replevin against the master of the vessel in which the whole had been transported to that place. For that taking the suit was brought, and it results that the plaintiff cannot recover. It is unnecessary to decide whether the parties to the original sale became tenants in common. If a tenancy in common arises in such cases, it must be with some peculiar incidents not usually belonging to that species of ownership. I think each party would have the right of severing the tenancy by his own act; that is, the right of taking the portion of the mass which belonged to him, being accountable only if he invaded the quantity which belonged to the other. But assuming that the case is one of strict tenancy in common, the defendant became the owner of 6,000 and the plaintiffs of 249 parts of the whole. As neither could maintain an action against the other for taking possession merely of the whole, more clearly he cannot if the other takes only the quantity which belongs to him.

The judgment must be reversed and a new trial granted.

GRAY and GROVER, JJ., dissented; STRONG, J., expressed himself as inclined to concur, if necessary to a decision, but it being unnecessary, he reserved his judgment.

Judgment reversed and new trial ordered.

FOOT *v.* MARSH.

NEW YORK COURT OF APPEALS, SEPTEMBER 18, 1872, JANUARY TERM, 1873.

[*Reported in* 51 *New York*, 288.]

APPEAL from order of the General Term of the Supreme Court in the fifth judicial district, reversing judgment in favor of plaintiff, entered upon a verdict, and granting a new trial.

This action was brought to recover damages for the alleged breach of a contract for the sale and delivery of a quantity of oil. On the trial it appeared that a party in Syracuse having about 150 barrels of oil consigned to him for sale. forty-six of which was known as Murray oil, forty-seven as Buffalo and Erie oil, thirty-six as Lemon oil. and twenty-one barrels of oil marked V. B. That the Murray oil had preference to the other oils on account of its reputation, and was worth two cents per gallon more than the Buffalo and Erie oil, or the oil in barrels marked V. B., and that the thirty-six barrels known as Lemon oil were inferior to either of the other descriptions, and that a portion of the entire quantity being then in the cellar of the warehouse of Thompson, Gage & Co., and the residue in the cellar of the warehouse of a Mr. Davis of that place, [the consignee] proposed to sell them to the defendants at sixteen cents per gallon. The defendants, not caring to purchase the whole, replied that if they could sell a portion, and retain a portion, they would buy. The consignee thereupon gave to one of the defendants a sample of oil, which, as the consignee at first testified, was a poor specimen of the most inferior oil, but upon cross-examination it appeared to have been taken from the Buffalo and Erie oil, with which the defendants went to the plaintiffs' place of business at Rome, Oneida County, and exhibited to them the sample; told them where the oil was, and proposed to sell to them a portion of the whole 150 barrels. An agreement was finally concluded for a sale to the plaintiffs of 100 barrels of oil, by the sample then exhibited, for which the plaintiffs were to give their note at three months; and as the barrels contained different quantities, in order to ascertain the amount for which the note should be given it was agreed that each barrel should contain an average of forty gallons, in all 4,000 gallons, and that they should be subject to twenty shillings storage per month until called for. There was upon the trial a conflict in the parol evidence as to whether it was not a part of the agreement for the purchase and sale of the oil that the defendants, and not the plaintiffs, should risk the leakage. There was also a conflict in the evidence as to whether it was not a part of the agreement that the defendants should set apart 100 barrels containing an average of forty gallons to the barrel, and as to whether they did not so set it apart in the place of its storage. It also appeared that after the parties had concluded all negotiations and come to an agreement for the sale and purchase of the oil, the plaintiffs executed and delivered to the defendants their note for the $870 (the amount agreed upon), and the defendants executed and delivered a bill of sale, as follows: —

N. B. Foot & Co. bought of Marsh, Delaye & Rogers, 100 barrels, at twelve shillings, $150; 4,000 gallons of oil at eighteen cents, $720=$870. Received payment by note at three months from June 7, 1862.

MARSH, DELAYE & ROGERS.

The above oil is to be delivered when called for, subject to twenty shillings per month storage, and the quality of the oil is to be like the sample delivered. Marsh, Delaye & Rogers.

Defendants thereupon accepted the offer previously made by the consignee for the sale of the whole 150 barrels. When the plaintiffs' note matured they paid it, and afterward, on the 11th of November following, called upon the defendants for a delivery of the oil, and were shown 100 barrels which contained in all but 1,821 gallons, worth from five to ten cents per gallon less than the sample by which they purchased. The evidence tended to show that the loss occurred by leakage from the barrels in which it was stored, and that the depreciation in quality was largely if not entirely attributable to the same cause. It also appeared that the remaining 2,179 gallons, if equal to the sample, would, at the time the plaintiffs called for a delivery of the oil, have been worth $1,198.45. The defendants' counsel objected to proving a deficiency, and, after the evidence closed, insisted that by the writing the contract for its sale was not executory, but an executed contract, and in substance, if any loss was thereafter occasioned by leakage, it was the plaintiffs', and not the defendants' loss, and hence, that there was no question for the jury. But the court ruled otherwise, and the defendants excepted.

The court charged the jury, that if from the evidence they should find that it was agreed between the parties that the defendants should set apart 100 barrels of oil, averaging forty gallons to the barrel, of a quality equal to the sample, and that they *did* set apart that number of barrels containing that average quantity, and of a quality equal to the sample furnished, that from thenceforth the oil was at the plaintiffs' risk, and they could not recover. But if, on the contrary, there was no such agreement made or authority given the defendants to set apart the oil, that then the contract became, from its terms, a contract to deliver 4,000 gallons of oil when called for, and that the defendants were bound to have it on hand when called for. To this part of the charge the defendants excepted. The court further charged, that if there was no authority given the defendants to set apart the oil, there was a deficiency for which the plaintiffs were entitled to recover $1,198.45 with $273.10 interest from the time of demand, making in all, $1,471.55. To so much of the charge as instructed the jury to allow interest, the defendants excepted. The jury rendered a verdict for $800, and thereupon the defendants upon the minutes moved for a new trial, which was denied, and judgment ordered and entered upon the verdict.

D. M. K. Johnson, for the appellants.

J. D. Kernan, for the respondents.

GRAY, C. The principal question presented for our consideration arises upon the defendants' exception to that portion of the charge given by the judge to the jury, in which he stated, in substance, that if no agreement was made or authority given to the defendants to set apart for the plaintiffs the oil described in the contract, that then the contract, from its terms, became a contract to deliver 4,000 gallons of oil when called for, and that the defendants, in order to comply with the call, were bound to have that quantity on hand whenever the call should be made. This case is by the defendants likened to the case of Kimberly and others *v.* Patchin, 19 N. Y. 330, and the ground upon which this portion of the charge is claimed to be erroneous is, that the contract, when read by the light of the circumstances surrounding it, is in principle, like the contract in that case, for the sale of 6,000 bushels of wheat, parcel of 6,249 bushels, at seventy cents per bushel, of which no separation or manual delivery was made, but as a substitute for a manual delivery, and to constitute the contract for its sale an executed, not an executory contract, the vendor gave to the purchaser his receipt for it, agreeing to deliver it to his order, free of all charges, whereupon the vendor was held to have constituted himself the bailee of the wheat, and to have thenceforth stood in that 1 relation to the purchaser and the property; to render the contract effectual as an executed contract from the time it was made, the purchaser must have been invested with the right, after demand, to take the property. This was a right the defendants at the time of making 2. the sale had no power to confer, they not being at the time the owners of any portion of it; nor did they, in the place of a manual delivery, give to the plaintiffs their receipt for it, and thus attempt to constitute themselves the bailees of the plaintiffs and of the oil, as did the vendor of the wheat in Kimberly *v.* Patchin. If the 150 barrels of oil, of which the 100 barrels and the 4,000 gallons were understood to be a part, were, like the wheat, all of the same quality, so that nothing but the quantity, without reference to quality, was to be taken from the larger amount, the extrinsic facts that the sale was at a profit of only two cents per gallon, and the risk of leakage during the summer months, so largely exceeded the profits of the sale, it might be urged, with more plausibility than it now can, that the agreement of the defendants to deliver the barrels and oil when called for was like the agreement contained in the receipt in Kimberly *v.* Patchin to deliver the wheat to the order of the purchaser, and that the defendants should, under the circumstances, as was the vendor in that case, be regarded as the bailees of the plaintiffs. But, in order to substitute an arrangement between the parties for a manual delivery of a parcel of property mixed with an ascertained and defined larger quantity, it must be so clearly defined that the purchaser can take it, or, as the assignee of the purchaser did in Kimberly *v.* Patchin, maintain replevin for it. In this case the larger quantity, parcel of which was understood to be contracted to the plaintiffs, consisted of 150 barrels containing three different qualities of oil, but sixty-eight of which (forty-seven of the Buffalo and Erie oil, and twenty-one barrels marked V. B.) corresponded with the sample by which the 100 barrels were sold. The residue, forty-six barrels of the Murray oil, was superior to the sample; and thirty-six, known as the Lemon oil, were inferior to the sample. The plaintiffs would not have the right to take the Murray or superior oil, and could not be compelled to take the Lemon or inferior oil. And if the sample was, as the witness at one time stated, a poor sample of the most inferior oil, then but thirty-six barrels of that description, containing less than 1,500 gallons, could have been selected from the whole quantity, and hence the plaintiffs were without adequate means of redress, unless by action, for failing to deliver the quantity of oil sold conforming to the sample. The fact that the oil, which was the subject of the sale, was understood by the plaintiffs to be a parcel of a larger quantity, and that the sale was made at a profit of only two cents per gallon, while the risk of loss by leakage and evaporation was very large, are circumstances that would go far to prove that the defendants did not understand the legal import of the writing drawn and subscribed by them, or that they were overreached by the plaintiffs, who suggested their terms after, as one of them had testified, they refused to purchase, unless the defendants would guarantee them against leakage, which the defendants refused to do. But as no question was raised by the pleadings, or elsewhere, as to a reformation of the contract, we must regard it as expressing the intentions of the parties and give it the interpretation which, under the circumstances, its language plainly imports. The charge was more favorable to the defendants than a fair construction of the written contract warranted. The conversations, out of which the defendants sought to establish an agreement between the parties that the defendants might set apart the 100 barrels of oil for the plaintiffs, as well as the conversations as to the guarantee against loss by leakage, were all prior to the reduction of their agreement to writing, and should have been excluded from the consideration of the jury, leaving the writing as the only evidence of the agreement to be interpreted by the aid of extrinsic facts. No error was committed in the instructions to allow interest. The verdict was more favorable to the defendants than the charge warranted; of that, however, they cannot, upon this appeal, complain.

The order appealed from should be reversed.

All concur.

Order reversed.

HARVEY SCUDDER *v.* JOHN WORSTER AND ANOTHER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, NOVEMBER TERM, 1853.

[*Reported in* 11 *Cushing*, 573.]

THIS was an action of replevin, for 150 barrels of pork, to which the defendants pleaded only the general issue. It was submitted to this court on an agreed statement of facts, which, so far as necessary to a proper understanding of the points involved, sufficiently appear in the opinion.

H. A. Scudder, for the plaintiff.

W. G. Russell, for the defendants.

DEWEY, J.[1] . . . It appears from the facts stated, that on February 10, 1850, a contract was made by the defendants with Secomb, Taylor, & Company, to sell them 250 barrels of pork branded "Worcester & Hart;" that a bill of sale of the pork was made and delivered to them, and they gave the defendants their negotiable promissory notes of hand therefor, payable in six months; that it was further agreed that the pork should remain in defendants' cellar on storage, at the risk and expense of the purchasers; that Secomb, Taylor, & Company, on the 13th of May, 1850, sold 100 barrels of the pork to one Lang, who received the same of the defendants upon the order of Secomb, Taylor, & Company; that on the 27th of May, 1850, Secomb, Taylor, & Company sold the plaintiff 150 barrels, with an order on the defendants therefor. The next day the plaintiff gave notice to the defendants of the purchase, and requested them to hold the same on storage for him, to which the defendants assented. On the 25th of June, Secomb, Taylor, & Company became insolvent, and on the same day the plaintiff called upon the defendants for the purpose of receiving the 150 barrels of pork, but the defendants refused to allow him to do so. On the next day a more formal demand, accompanied by an offer to pay storage, was made, which being refused by the defendants, an action of replevin was instituted, and 150 barrels of pork, the same now in controversy, were taken and removed from said cellar, and delivered to the plaintiff.

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[1] The part omitted does not affect the merits of the case.

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The further fact is stated in the case, and it is this which raises the question of property in the plaintiff, that the pork bargained and sold in the manner above stated was in the cellar of the defendants, and a parcel of a larger quality of the same brand, and also with some of a different brand, and so continued parcel of a larger quantity of similar brand, up to the time of the suing out of the plaintiff's writ of replevin: though this fact was not at the time of the sale stated to the purchasers, or to the plaintiff when he purchased of Secomb, Taylor, & Company. Had these 250 barrels of pork been a separate parcel, or had the parties designated them by any visible mark, distinguishing them from the residue of the vendors' stock of pork, the sale would clearly have been an absolute one, and the property would at once have passed to the purchaser. There was nothing required to have been done but this separation from the general mass of like kind, to have placed the sale beyond all question or doubt as to its validity.

The cases cited by the plaintiff's counsel fully establish the position, that what was done in this case would have transferred the property in the pork, if the sale had been of all the pork in the cellar, or of any entire parcel separated from the residue, or if the 250 barrels had some descriptive mark distinguishing them from the other barrels not sold. The difficulty in the case is, in maintaining that in the absence of each and all these circumstances, distinguishing the articles sold, the particular barrels of pork selected by the officer from the larger mass when he served this process, were the property of the plaintiff, or had ever passed to him. In addition, however, to the numerous cases cited to establish the general principles contended for on the part of the plaintiff, and which would have been decisive, if it had been a sale of all the pork in the cellar, or a particular parcel, or certain barrels having descriptive marks which would enable the vendee to separate his own from the residue, were cited several more immediately bearing upon the present case, and where property not separable has been held to pass to the vendee. The leading case relied upon is that of Pleasants v. Pendleton, 6 Rand. 473. This was an action by the vendor to recover the price of 119 barrels of flour sold to the defendant. No other objection existed to the validity of the sale, except that the 119 barrels were a parcel of 123 barrels, all of similar kind, in the same warehouse. There were certain brands or marks on the entire 123 barrels. The flour was destroyed by fire while on storage, and the vendee refused to pay for the 119, upon the ground that the sale was not perfected for want of separation from the 123 barrels. The court refused to sustain

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the defence, and gave judgment for the plaintiff. In reference to this case, Grimke, J., in Woods *v.* McGee, 7 Ohio, 127, says: "It is impossible to divest ourselves of the impression that the small difference between the aggregate mass and the quantity sold, the former being 123 barrels, and the latter 119, may have influenced the decision. It was a hard case, and hard cases make shipwreck of principles."

Jackson *v.* Anderson, 4 Taunt. 24, was an action of trover to recover for the conversion of 1,969 Spanish dollars. It appeared that the amount had been transmitted to a consignee for the use of the plaintiff, but they were in a parcel of $4,918, all of which came into the hands of the defendant. Among other points raised at the argument, was this, that there was nothing to distinguish the $1,969 from the entire mass; that there had been no separation, and of course the plaintiff had no property in any particular portion of the money. The point, it seems, was not made at the trial before the jury, but suggested by the court during the argument before the full court, and this is stated by the reporter; the court interrupted the counsel, and intimated a strong doubt, as there was nothing to distinguish the $1,969 from the remaining contents of the barrel, whether the action could lie. At a future day the court gave judgment for the plaintiff. The objection was overruled upon the ground that the defendant had disposed of all the dollars, consequently he had disposed of those belonging to the plaintiff.

The case of Gardner *v.* Dutch, 9 Mass. 427, is apparently the strongest case in favor of the plaintiff. The case was replevin against an officer who had attached goods as the property of Wellman & Ropes. The plaintiff had seventy-six bags of coffee, to which he became entitled as owner, upon an adjustment of accounts of a voyage he had performed for Wellman & Ropes, but the bags belonging to the plaintiff were in no way distinguished by marks, or separated from the other coffee of Wellman & Ropes. The plaintiff on his arrival at Salem, from his voyage, delivering the entire coffee to Wellman & Ropes, taking their receipt "for seventy-six bags of coffee, being his adventure on board schooner 'Liberty,' and which we hold subject to his order at any time he may please to call for the same." The point taken in the case was that the plaintiff had not the sole property, but only an undivided interest, and so could not maintain replevin. The court ruled that the plaintiff was not a tenant in common, but might have taken the number of bags to which he was entitled, at his own selection, and might maintain his action.

This case, on the face of it, seems to go far to recognize the right of one having a definite number of barrels of any given articles mingled in a common mass, to select and take, to the number he is entitled, although no previous separation had taken place. It is, however, to be borne in mind in reference to this case, that it did not arise between vendor and vendee. The interest in the seventy-six bags of coffee did not originate by purchase from Wellman & Ropes. They became the specific property of the plaintiff in that action on an adjustment of an adventure, the whole proceeds of which were in his hands; and separated with the possession, only when he took their accountable receipts for seventy-six bags, held by them on his account. It did not raise the question, here so fully discussed, as to what is necessary to constitute a delivery, and how far it was necessary to have a separation from a mass of articles, to constitute a transfer of title. Perhaps the circumstances may well have warranted that decision, but we are not satisfied that the doctrine of it can be properly applied to a case where the party asserts his title, claiming only as a purchaser of a specific number of barrels, there having been no possession on his part, and no separation of the same from a larger mass of articles similar in kind, and no descriptive marks to designate them.

On the other hand, in support of the position that this sale was never perfected for want of such separation of the particular barrels on account of the plaintiff, or some designation of them from others of like kind, there will be found a strong weight of authority; and to some of the most prominent cases I will briefly refer. Thus, in the case of Hutchinson *v.* Hunter, 7 Barr, 140, which was an action of *assumpsit* to recover payment for 100 barrels of molasses sold to the defendant, the same being parcel of 125 barrels, and the whole destroyed by fire while on storage, and before separation or designation of any particular barrels, it was held that the plaintiff could not recover, the sale never having been consummated. Rogers, J., says: "The fundamental rule which applies to this case is, that the parties must be agreed as to the specific goods on which the contract is to attach before there can be a bargain and sale. The goods must be ascertained, designated, and separated from the stock or quantity with which they are mixed, before the property can pass." He considers the case of Pleasants *v.* Pendleton, 6 Rand. 475, as decided on erroneous principles. The case of Hutchinson *v.* Hunter presented a case of a sub-contract or sale like the present, and it was urged that this differed the case from what it might otherwise have been, as respects the original vendor. But the court held that this did not vary the case in the matter of the necessity of a separation of the article sold from the greater mass. So in Golder *v.* Ogden, 15 Penn. St. (3 Harris), 528, where a contract was made for the sale of 2,000 pieces of wall paper, the purchaser giving his notes therefor to the vendor, and taking away with him 1,000 pieces, and it was agreed that the other 1,000 pieces should remain until called for by the purchaser, upon a question of property in the remaining 1,000 pieces between the assignees of the vendor and the purchaser, it was held that these 1,000 pieces not having been selected by the buyer, or separated, or set apart for him, but remaining mingled with other paper of same description, did not become the property of the alleged buyer, as against an assignment for the benefit of the creditors of the vendor. The principle advanced in that case seems to be the sound one: "That the property cannot pass until there be a specific identification in some way of the particular goods which the party bargains for. The law knows no such thing as a floating right of property, which may attach itself either to one parcel or the other, as may be found convenient afterwards." The case of Waldo *v.* Belcher, 11 Iredell, 609, was the case of a sale of corn by a vendor, having in his store 3,100 bushels of corn, and selling 2,800 bushels of the same, but the 2,800 bushels were never separated from the 3,100, and the whole was, after the sale, destroyed by fire; and it was held that the property in the 2,800 bushels did not pass to the vendee, though it would have been otherwise had it been a sale of all the corn in the crib. The ground of the decision was, that there had been no separation, that it could not be ascertained which corn was the property of the vendee until it was separated. The purchaser could not bring detinue, because he could not describe the particular thing. This would be equally so as to replevin. The case of Merrill *v.* Hunnewell, 13 Pick. 213, bears strongly upon the question before us. It was a sale of nine arches of bricks in a kiln containing a larger number, but not separated from the residue, or specifically designated. After the vendor had, by other sales, reduced the quantity on hand to less than nine arches, upon a question of property between the vendee and an attaching creditor of the vendor, it was held the purchaser took no property in the bricks, the sale being a part of a large mass, not delivered nor specifically designated.

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Blackburn, in his Treatise on Sales, p. 122, presents the law on this subject thus: "Until the parties are agreed as to the specific identical goods, the contract can be no more than a contract to supply goods answering a particular description, and since the vendor would fulfil his part of the contract by furnishing any parcel of goods answering that description, it is clear there can be no intention to transfer the property in any particular lot of goods more than another, until it is ascertained which are the very goods sold."

Examining the facts in the case before us, and applying the principles of the cases last cited, and the approved elementary doctrine as to what is necessary to constitute a sale of property not separated from the mass of like kind, or designated by any descriptive marks, the court are clearly of opinion that the property in the specified 150 barrels of pork taken by the plaintiff, under his writ of replevin, had never passed from the vendors, and therefore this action cannot be maintained.

In the argument of this case on the part of the plaintiff, the case was put as a case of intermixture of goods, and it was argued that such intermixture having taken place, the plaintiff might, for that cause, hold the property as his. But, in fact, there was no such case of intermixture. The entire property was always in the defendants.

It was also urged that the defendants were estopped to deny that the 150 barrels of pork were the property of the plaintiff, having given a bill of sale of the same, and under the circumstances stated in the statement of facts. Had this been an action to recover damages for the value of 150 barrels of pork, this position might be tenable, and the defendants estopped to deny the property of the plaintiff in such 150 barrels. This would be so if an action had been brought against the defendants as bailees of 150 barrels of pork, and for not delivering the same.

But the distinction between the case of an action for damages for not delivering 150 barrels, and that of replevin, commanding the officer to take from the possession of the defendants 150 barrels, and deliver the same to plaintiff as his property, is an obvious one. To sustain the former, it is only necessary to show a right to 150 barrels generally, and not any specific 150 barrels; but to maintain replevin, the plaintiff must be the owner of some specific 150 barrels. If bought, they must be specifically set apart, or designated in some way as his, and not intermingled with a larger mass of like kind owned by the vendor. *Judgment for the defendants.*

CORNELIUS S. KEELER *v.* HERSEY B. GOODWIN.

Supreme Judicial Court of Massachusetts, March, 1873.

[*Reported in* 111 *Massachusetts*, 490.]

Tort against Hersey B. Goodwin and Joseph H. Locke, for conversion of 1,000 bushels of corn. Writ dated November 7, 1870. At the trial in the Superior Court, before Lord, J., the following facts appeared: —

On September 29, 1870, Wesley P. Balch bought 1,000 bushels of corn from the defendants, to be paid for in cash in ten days, and the defendants gave him an order on the warehouse where the corn was stored, being then parcel of a larger quantity lying in bulk. On October 1, Balch indorsed and delivered the order to the plaintiff as security for a lien. The plaintiff did not then know that the corn had not been paid for, but Balch never paid for the corn, and, within ten days from September 29, became insolvent. About fifteen days after receipt of the order the plaintiff presented it to the warehouseman and demanded the corn. Delivery was refused for the reason that the order had been countermanded by the defendants; and before this suit was brought the defendants took the corn away. The order was never presented to the warehouseman, except as above stated.

The plaintiff offered evidence tending to prove a usage in the grain trade to treat an order on a warehouse as a delivery.

The judge ruled that the action could not be supported, and directed a verdict for the defendants, which was returned. The judge reported the case for the determination of this court; if the ruling was correct, judgment to be entered for the defendants, unless the plaintiff could maintain his action by an amendment; if the ruling was erroneous, the verdict to be set aside and a new trial ordered.

S. J. Thomas, for the plaintiff.

A. Churchill & J. E. Hudson, for the defendants.

Wells, J. There are two fatal difficulties in the way of recovery by the plaintiff.

1. To maintain an action of trover, in favor of one who has never had possession, there must be proof both of title and right of present possession. Fairbank *v.* Phelps, 22 Pick. 535; Winship *v.* Neale, 10 Gray, 382; Landon *v.* Emmons, 97 Mass. 37.

Here was a contract of sale of 1,000 bushels of corn, "parcel of a larger quantity lying in bulk." Until separation in some form, no title could pass. Young *v.* Austin, 6 Pick. 280; Merrill *v.* Hunnewell, 13 Pick. 213; Scudder *v.* Worster, 11 Cush. 573; Weld *v.* Cutler, 2 Gray, 195; Ropes *v.* Lane, 9 Allen, 502, 510; s. c. 11 Allen, 591. That it was on storage with a third party, as warehouseman, would make no difference in this respect.

Delivery of the order upon the warehouseman authorized him to make the separation or appropriation necessary to complete the sale by giving to the contract its intended effect upon the specific property covered by it. If that had been accomplished, either by actual separation, or by appropriation to the use or credit of the purchaser, in the usual mode of transacting the business of the warehouse, he would have acquired title, right of possession, and constructive possession of the grain so purchased. Cushing *v.* Breed, 14 Allen, 376.

But until some act takes place by which the relations of the warehouseman, in respect to the property in his custody, are modified in accordance with the contract of sale, so that he may be considered as bailee for the seller and purchaser respectively, according to their several interests, and thus released, *pro tanto*, from his original liability to the seller alone, there is no such appropriation of the grain sold as will ripen the interest of the purchaser into title and right to the possession of any specific portion of the bulk. Whether the assent of the warehouseman is necessary to the imposition of this twofold relation upon him, or whether presentation of the order alone, or notice of the sale would be sufficient, we need not now determine, because there was neither in this case, until after the authority of the warehouseman to make the appropriation had been revoked. The purchaser, therefore, never acquired any title or right of possession, and could transfer none, and consequently no right of action, to the plaintiff.

2. But regarding the sale and order for delivery as sufficient to make it effectual to pass the title as between the parties, still until actual and full delivery the seller is not deprived of his right to insist upon his lien for the price. Delivery to a carrier for transportation to the purchaser is sufficient to pass the title, and authorize the carrier to complete the delivery and make it absolute. But until so made absolute, the seller may revoke his authority, and thus intercept the transmission, restore himself to possession, and retain his lien.

The same principle applies in all cases of inchoate delivery, by whatever mode of transmission of possession. Until the delivery is actual and absolute, the seller may suspend it, and revoke the authority of any intermediary to perfect it. M'Ewan *v.* Smith, 2 H. L. Cas. 309; Griffiths *v.* Perry, 1 E. & E. 680; Rowley *v.* Bigelow, 12 Pick. 307, 312; Mohr *v.* Boston & Albany Railroad Co., 106 Mass. 67. The insolvency of Balch, the purchaser, was a sufficient justification for so doing, even if the sale was an unconditional one upon a credit of ten days. Arnold *v.* Delano, 4 Cush. 33; Stubbs *v.* Lund, 7 Mass. 453; Naylor *v.* Dennie, 8 Pick. 198. *Judgment for the defendants.*[1]

Vendee [illegible] [illegible] ties, [illegible] paid for the

EZEKIEL MORRISON *v.* GEORGE WOODLEY.

and that

SUPREME COURT OF ILLINOIS, SEPTEMBER TERM, 1876.

[*Reported in* 84 *Illinois*, 192.]

MR. JUSTICE DICKEY delivered the opinion of the court.

Appellant and appellee were both residents of Chicago, and each had his place of business there. On the 24th of February, 1870, appellant sold to appellee 3,000 railroad hemlock ties, at twenty cents each, and gave him a bill and receipt, in the words following: —

> Mr. George Woodley bought of E. Morrison 3,000 hemlock railroad ties, lying on Foss' dock, Muskegon, free of dockage, and subject to Chicago inspection, — ties to be taken off dock at the first of navigation.
>
> To 3,000 hemlock ties, @ 20 cents $600.00
>
> Received payment,
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> CHICAGO, Feb. 24, 1870. E. MORRISON.

Appellant, at that time, had lying on that dock in Wisconsin some 7,000 to 8,000 of that kind of ties, these remaining there under the care of Mr. Fleming, who had bought the ties for appellant (but who had, as appellant testifies, no authority to sell or dispose of the same), until May. The appellee wrote to Fleming from Chicago, on the 7th of May, 1870, as follows: —

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[1] By chapter 93 of Massachusetts Acts of 1878, now enacted in Pub. Stat. c. 72, § 7, it is provided that where grain or other property is stored in a public warehouse in such a manner that different lots are mixed so that the identity cannot be accurately preserved, the warehouseman's receipt for any portion shall be deemed a valid title to the portion designated, without regard to any separation or identification. Similar statutes exist in Maine and Minnesota, and perhaps other States. Doubtless the object aimed at by such statutes would be attained without legislative enactment by the courts of most western States, holding as they do that the depositor of grain in a warehouse to be mixed with other grain retains title to a portion of the mass. National Bank of Pontiac *v.* Langan, 28 Ill. App. 401; Woodward *v.* Semans, 125 Ind. 330; Arthur *v.* Chicago, Rock Island, & Pac. Ry., 61 Ia. 648; Ledyard *v.* Hibbard, 48 Mich. 421; Hall *v.* Pillsbury, 43 Minn. 33; James *v.* Plank, 48 Ohio St. 255; Young *v.* Miles, 20 Wis. 615, 23 Wis. 643; Rahilly *v.* Wilson, 3 Dill. 426. See also Bretz *v.* Diehl, 117 Pa. 603. Cf. South Australian Ins. Co. *v.* Randell, L. R. 3 P. C. 101.

A. M. Fleming, Esq. — Dear Sir: Your telegram is rec'd, have answered; don't ship. There is no market for them now, and every dock is full here; has been three large cargoes docked to-day, and there is no place to put them, here. I expect a place every day, and will send for them at earliest moment. Please see the owners of the dock, and write me what they will charge to let them lay longer; do the best you can for me, as the prospect is that I shall lose money on them under the circumstances. You said only a few of them were in the way. Can't those be hauled and piled on the bank? Please figure as you would were they your own, and write me by return mail. If necessary, I will come over or send a man to move them, and if no other way presents, will send a schooner over after them. Please do all you can for me, and the favor will be duly appreciated. Yours truly,

Geo. Woodley,
Chicago, May 7, 1870. 256 S. Water St., Chicago.

Subsequently, appellee made some arrangement with the owner of the dock, to avoid the necessity of immediate removal of the ties, and paid $20, either for dockage or to provide for the expense of removing part of the ties, if the dock should be needed for other purposes.

The 3,000 ties sold to appellee were never selected or set apart for appellee, or separated from the other ties belonging to appellant, and not embraced in this sale. Sometime in September, 1870, the whole of these ties (embracing those sold by appellant to appellee) were taken from this dock and used in the construction of the Grand Rapids and Lake Shore Railroad, without the knowledge or consent of either appellant or appellee.

Appellant insists, the proof shows it was the intention of the parties that the property in the ties should vest at once in appellee, and that, at least ever after they were put by appellee (as appellant insists) in the care of Fleming, appellant had nothing more to do about these ties, and did nothing more about them, and hence was in no way liable to appellee either for the loss of the ties or for the money he received from appellee. To some members of this court this would seem to be the fair conclusion from the weight of the evidence. To others it seems that the Circuit Court was right in coming to a different conclusion, from a fair consideration of all the proofs.

It is plain that there is evidence tending to prove, that after all that is relied upon by appellant as vesting the title in appellee, there was a new arrangement made between the parties, by which it was agreed that appellant take back the ties on the dock, and in lieu thereof agreed to let appellee have a like amount of like ties from a quantity of ties belonging to appellant, at another place, a few miles north of the dock at Muskegon, and also tending to show, that instead of letting appellee have his 3,000 ties from the latter place, appellant sold and shipped to other parties all the ties he had at that place.

The evidence is contradictory on this branch of the case, and in many other respects, and after a careful examination of all the evidence, we find no sufficient ground for disturbing the judgment.

Judgment affirmed.[1]

SECTION V.

Specification of the Goods by Subsequent Appropriation.

ANONYMOUS.

In the Common Pleas, Easter Term, 1477.

[*Reported in Year Book*, 17 *Edward IV.*, 1, 2.]

In trespass for a close broken, and corn, barley, and grass taken away.

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Catesby. Actio non, for long before the supposed trespass, the plaintiff and defendant bargained in such a ward in London that the defendant should go to the place where, &c., and there see the said corn, barley, and things aforesaid, and if they pleased him when he saw them, that he should then take the said corn, barley, and grass, paying to the plaintiff 3*s.* 4*d.* for each acre, one with the other. And we say that we went there, and that we saw them as aforesaid, and we were well content with the bargain, wherefore we took them, which is the same trespass. Judgment, &c. . . .

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Brian. . . . It seems to me for any words which have been pleaded in this bargain, that it was not lawful for him to take the corn, for it cannot be intended that he meant the defendant should have the corn

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[1] "The weight of American authority supports the proposition that when property is sold to be taken out of a specific mass of uniform quality, title will pass at once upon the making of the contract, if such appears to be the intent. Oil in a tank and grain in an elevator may serve as illustrations of this rule. Where, however, the property is sold as part of a mass made up of units of unequal quality or value, such as cattle in a herd, selection is essential to the execution of the contract, and of course the rule cannot apply. Benj. on Sales, 477–531, and cases there cited. The storage of oil in tanks and of grain in elevators, although not universal, is the usual and ordinary means employed by large dealers in those commodities, and whilst no custom of that kind, technically speaking, could be established, the usage of the trade and general course of business in this country is well known. In view of the necessities which grow out of such usage, the American courts have departed from the rule adhered to in England, and have recognized a rule for the delivery of this class of property more in conformity with the commercial usages of the country. A distinction is made between those cases where the act of separation is burdensome and expensive or involves selection, and those where the article is uniform in bulk and the act of separation throws no additional burden on the buyer. In the latter class of cases a tender of too much, from which the buyer is to take the proper quantity, is a good delivery. Benj. on Sales, 1030, note. See also Kimberly *v.* Patchin, 19 N. Y. 130; Hutchison *v.* Commonwealth, 82 Pa. 472; Wilkinson *v.* Stewart, 85 Pa. 255; Bretz *v.* Diehl, 117 Pa. 589." Brownfield *v.* Johnson, 128 Pa. 254, 267.

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without paying the money. But if he had said to him, "Take, and pay when you will," or if he had given him a day for payment, then I conceive well that he could take them, and that would be a good bar if it was pleaded to so much. And further, I say that the property is in the defendant by the bargain in the case at bar, and in your cases of the horse and the cloth; nevertheless, he may not take them without the leave of the other. And he shall have a writ of detinue, but the defendant shall be excused by saying he was ready to give it up if the other had paid; and if he bring an action of debt he shall have the same plea. The case is much as where the property remains all the time in me, and nevertheless during a certain time I cannot take it; as where I deliver certain sheep to a man to soil his fields for a certain time; there the property is in me, and still during the time I cannot take them back. For the other point, it seems to me that the plea is not good without showing that he had certified the other of his pleasure; for it is trite learning that the thought of man is not triable, for the devil himself knows not the thought of man; but if you had agreed that if the bargain pleased you, then you should show it to such a one, then I grant you need not have done more for it is a matter of fact.

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t. Seller could sell a field of goods; & title could pass: but buyer cannot
the goods until ⓐ price paid, or ⓑ time is given.

MUCKLOW AND OTHERS, ASSIGNEES OF ROYLAND, v. MANGLES.

IN THE COMMON PLEAS, JUNE 18, 1808.

[*Reported in* 1 *Taunton*, 318.]

TROVER by the assignees of a bankrupt for a barge and other effects. Upon the trial before Mansfield, C. J., at Westminster, at the sittings in this term, it was proved that Royland, who was a barge-builder, had undertaken to build the barge in question for Pocock. Before the work was begun, Pocock advanced to Royland some money on account, and as it proceeded, he paid him more, to the amount of £190 in all, being the whole value of the barge. When it was nearly finished, Pocock's name was painted on the stern. Two days after the completion of the work, and before a commission of bankrupt had issued, the defendant, who was an officer of the sheriff of Middlesex, under an execution against Royland, took this barge, which had not then been delivered to Pocock, but gave it up to him under an indemnity. The jury found a verdict for the plaintiffs.[1]

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MANSFIELD, C. J. The only effect of the payment is, that the bankrupt was under a contract to finish the barge; that is quite a different thing from a contract of sale, and until the barge was finished we cannot say that it was so far Pocock's property that he could have taken it away. It was not finished at the time when Royland committed the act of bankruptcy; it was finished only two days before the execution. In the case cited it was necessarily held that the tar was not in the possession of the bankrupt; otherwise, in every case of tenancy in common with a bankrupt, the act of bankruptcy would vest the entire property of the chattel in his assignees.

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[1] *Best*, Serjt., now moved that the sum of £190, the value of the barge, might be deducted from the amount of the verdict, inasmuch as the property had absolutely vested in Pocock.

Heath, J. This is the species of contract which in the civil law is described by the term *Do ut facias.* It comes within the cases which have been held to be executory contracts, and as such not within the Statute of Frauds, as contracts for the sale of goods. A tradesman often finishes goods, which he is making in pursuance of an order given by one person, and sells them to another. If the first customer has other goods made for him within the stipulated time, he has no right to complain; he could not bring trover against the purchaser for the goods so sold. The painting of the name on the stern in this case makes no difference. If the thing be in existence at the time of the order, the property of it passes by the contract, but not so where the subject is to be made.

Lawrence, J. I am of the same opinion. No property vests till the thing is finished and delivered. *The court refused the rule.*

WOODS and Another, Assignees of Alexander Paton, a Bankrupt, *v.* RUSSELL.

In the King's Bench, June 26, 1822.

[*Reported in* 5 *Barnewall & Alderson*, 942.]

Abbott, C. J., now delivered the judgment of the court.

This was an action of trover for a ship, rudder, and cordage, by the assignees of Alexander Paton, a bankrupt, and the facts were shortly as follows: Paton was a ship-builder, and in October, 1818, he entered into a written contract with the defendant to build and complete a ship for the defendant, and finish and launch her in April, 1819; and the defendant was to pay for the ship by four instalments of £750 each: the first when the keel was laid; the second when they were at the light plank; and the third and fourth when the ship was launched. The payments were to be made by bills at two, four, six, and eight months. The first and second instalments were duly paid in March, 1819; the defendant appointed a master, who, from that time, superintended the building. In May, 1819, the defendant advertised the ship for charter, and on the 16th of June chartered her, with Paton's privity, for a voyage from Newcastle to Newfoundland. Before the 26th of June the ship was measured and surveyed, with Paton's privity, with the intent that the defendant might get her registered in his name. On the 19th June the master entered into the usual bond for delivering up the register; on the 25th Paton signed the usual certificate of her build, &c., and on the 26th the ship was registered in the defendant's name. On that day the defendant paid Paton the third instalment. Paton's certificate described the ship as launched, but that was not the case, and Paton's people continued working upon her, and using his timber and materials till the 3d of July. One of the master's apprentices was employed on board by his directions from the early part of June, and on the 30th the master ordered him to sleep on board; but on that same day Paton committed an act of bankruptcy, upon which a commission afterwards issued. On the 2d of July the defendant and a crew he had hired took possession of the ship; and his servants, by his direction, took from Paton's yard and warehouse a rudder and cordage, which Paton had bought for the ship. On the 4th of July the ship was launched. The fourth instalment was never paid. The ship was incomplete when the act of bankruptcy was committed, and the expense of launching her was borne by the defendant. Upon these facts, the questions proposed to the consideration of the court were, whether the plaintiffs were entitled to recover the value of the ship, in which case the value, subject to a deduction, was to be taken at £3,000; or, if not, whether they were entitled to recover the value of the rudder and cordage; and, should the court be of opinion that they were entitled to neither, a nonsuit was to be entered; and upon these points alone the case was argued before the court. It has occurred, however, to the court, that a third question arises upon the facts, which neither party could have intended to exclude, which is this: whether, if the plaintiffs are not entitled to recover the whole value of the ship, they may not be entitled to recover to the extent of so much of the fourth instalment as, if the defendant has the ship, he ought to pay. And, upon the first and second questions, our opinion is in favor of the defendant; upon the last against him. This ship is built upon a special contract, and it is part of the terms of the contract, that given portions of the price shall be paid according to the progress of the work; part when the keel is laid, part when they are at the light plank. Held. The payment of these instalments appears to us to appropriate specifically to the defendant the very ship so in progress, and to vest in the defendant a property in that ship,[1] and that, as between him and the builder, he is entitled to insist upon the completion of that very ship, and that the builder is not entitled to require him to accept any other. But this case does not depend merely upon the payment of the instalments; so that we are not called upon to decide how far that payment vests the property in the defendant, because here Paton signed the certificate to enable the defendant to have the ship registered in his (the defendant's) name, and by that act consented, as it seems to us, that the general property in the ship should be considered from that time as being in the defendant. The defendant had, at that time, paid half what the ship, when complete, would be worth. Paton could not be injured by having the general property in the ship considered as vested in the defendant, because he would still have a lien upon the possession for the residue of the price; and we think the legal effect of signing the certificate, for the purpose of having the ship registered was, from the time the registry was complete, to vest the general property in the defendant. In order to register the ship in the defendant's name, an oath would be requisite that the defendant was the owner; and when Paton concurred in what he knew was to lead to that oath, must he not be taken to have consented that the ownership should really be as that oath described it to be? The case of Mucklow *v.* Mangles, 1 Taunt. 318, seems to us to be clearly distinguishable from the present, because ① the bargain there for building the barge does not appear to have stipulated for the advances which were made; and those advances do not appear to have been regulated by the progress of the work. Mr. Justice Heath's opinion appears to have been founded on the notion that the ② builder was not tied down to deliver that specific barge, but would have been at full liberty to have substituted any other he was building, and the builder had done no act expressing an unequivocal consent that the general property should be considered vested in the purchaser. The painting of the name upon the stern, the only act there, pledged the builder to nothing; it expressed an intention that the barge should be Pocock's, but it did no more. He might change that intention and obliterate the name. But the signing of the certificate here, to the intent that the defendant might obtain a registry in his own name, was a consent that what was necessary to enable the defendant to obtain such registry, should, as between them, be considered as complete; and that, as the defendant would have to swear that he was sole owner of the ship, the ③ ownership should be considered his. We are, therefore, of opinion, that the assignees, who claim under Paton, are bound equally with him; and as this is not a case within the statute of James, the plaintiffs are not entitled to recover the general value of the ship. And as to the rudder and cordage, as they were bought by Paton specifically for this ship, though they were not actually attached to it at the time his act of bankruptcy was committed, they seem to us to stand upon the same ④ footing with the ship, and that, if the defendant was entitled to take the ship, he was also entitled to take the rudder and cordage as parts thereof. Upon the last question, however, we are of opinion against the defendant. Though the general ownership was vested in the defendant, the possession remained with Paton; and as the bills for the third and fourth instalments were to be given at the launching of the ship (when launched), Paton, had he completed the ship, would have had a lien upon it till those bills were given; and as the defendant thought fit to take the ship before it was complete, after having given bills for the first three instalments only, we think he ought to have given a bill for so much of the fourth instalment as, according to the value of

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[1] Clarke *v.* Spence, 4 A. & E. 448; Sandford *v.* Wiggins Ferry, 27 Ind. 522, *acc.* See also Wood *v.* Bell, 5 E. & B. 772; Seath *v.* Moore, 11 A. C. 350; Reid *v.* Macbeth, [1904] A. C. 223.

Clarkson *v.* Stevens, 106 U. S. 505; Green *v.* Hall, 1 Houst. 506; Williams *v.* Jackman, 16 Gray, 514; Briggs *v.* A Life Boat, 7 Allen, 287; Wright *v.* Tetlow, 99 Mass. 397; Elliott *v.* Edwards, 35 N. J. L. 265; Edwards *v.* Elliott, 36 N. J. L. 449; Stevens *v.* Shippen, 29 N. J. Eq. 602; Andrews *v.* Durant, 11 N. Y. 35; Derbyshire's Est., 81 Pa. 18, *contra.*

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what remained to be done, Paton was entitled to receive; and that, unless what remained to be done would be equal to the whole of the fourth instalment, his taking the ship, without giving or tendering such a bill was a wrongful taking. We are, therefore, of opinion that, according to the provision made in that respect in the case, it ought to be referred to Mr. Bainbridge and Mr. Clayton, and such third person as they shall appoint, to take an account of the want of materials stipulated to be provided by Paton not on board, and the fair expense of launching, and to enter the verdict accordingly. If the want of materials, and the expense of launching, shall amount to £750, the verdict to be entered for the defendant; if it shall amount to less than £750, a verdict for the difference to be entered for the plaintiff. *Judgment accordingly.*

p 1079, 1082

FRAGANO *v.* LONG.

Sons - seller.
buyer, on terms.

In the King's Bench, Easter Term, 1825.

[*Reported in 4 Barnewall & Cresswell,* 219.]

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Assumpsit against defendant as owner of the brig or vessel James and Theresa, for negligence in shipping a cask of hardware. At the trial before Hullock, B., at the Lancaster summer assizes, 1824, the following facts appeared in evidence. Mason & Sons, hardwaremen at Birmingham, in April, 1822, received an order from the plaintiff residing at Naples, of which the following is a translation: —

> Naples, March 28, 1822.
>
> Order transmitted by G. Fragano, of this city, to Mason & Sons of Birmingham, through Mr. F. L. for the following merchandise, to be despatched on insurance being effected. Terms to be three months' credit from the time of arrival.

as agent
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ivo.

The order then specified the goods. In pursuance of this order, the cask of hardware in question marked with the plaintiff's initials was sent by the canal from Birmingham, by Mason & Sons, to Messrs. Stokes, their shipping agents at Liverpool, with directions to forward the same to Naples. An insurance was effected, and the interest declared to be in Fragano. On the 3d of July, Messrs. Stokes received a notice of the arrival of the goods from the canal carrier, and sent their porter, who received the goods from the carrier, and took them in a cart to the quay where the James and Theresa was lying, and delivered them on the quay to the mate of that vessel, who gave the following receipt:

> Received in good order and condition on board the James and Theresa, for Naples, one cask of hardware.
>
> G. F. Samuel Smith, *Mate.*
>
> From W. & J. Stokes.

The goods were left in the custody of the mate, and before they were actually put on board, by some accident the cask fell into the water, by which the injury complained of was sustained. Upon this evidence the jury, under the direction of the learned judge, found a verdict for the plaintiff. In Michaelmas Term, a rule *nisi* for a new trial was obtained, on the ground, first, that no bill of lading having been made out, the property in the goods was never vested in the plaintiff; secondly, that by the terms of the order, the goods were not to be at the plaintiff's risk until after their arrival at Naples.

F. Pollock was now called upon to support the rule.

Crompton, contra.

BAYLEY, J. Considering this case apart from the order given by the plaintiff, it is quite free from doubt either in law or justice. It appears, however, that the plaintiff sent an order to Mason & Sons at Birmingham, for the goods in question "to be despatched on insurance being effected. Terms to be three months' credit from the time of arrival." But for that order the goods never would have left Mason's warehouse, and when sent, they were marked with the plaintiff's initials. If the goods had been destroyed by lightning on the road to Liverpool, Fragano must have borne the loss. At Liverpool, Stokes & Co., Mason's shipping agents, shipped the goods and took a receipt. It is argued that the agent was thereby enabled to maintain an action for the goods, but that Fragano as his principal could not. I think that position is not correct, although there might have been some difficulty had Stokes & Co. set up an adverse interest. It therefore seems to me, that as the goods left Mason's warehouse by the order of the plaintiff, they were at his risk, and that he can maintain an action for them, unless the form of the order which he gave for them deprives him of that right. It has been urged that the form of the order throws the risk upon the vendor until the arrival of the goods, for they were not to be paid for until three months from that period, and consequently that the arrival was a condition precedent to Mason's right to sue for the price. If, however, the goods were not to be paid for unless they arrived, why should the plaintiff insure them? That shows that the arrival was not considered as a condition precedent to the payment. If the goods arrived, three months from the arrival was to be the period of credit; if they did not arrive, still the plaintiff would be bound to pay in a reasonable time after the arrival became impossible. If this were not so, the insurance would be altogether nugatory, for Fragano could not sue upon it, neither could Mason, the interest being declared to be in Fragano. For these reasons, I am of opinion that the form of the order for the goods does not vary the case, and that the verdict was properly found for the plaintiff.

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HOLROYD, J. I also think that the verdict found for the plaintiff was right. It has been argued that neither the mate nor the owner of the vessel was liable to any one but Stokes & Co., from whom the goods were received. But it is a principle of law, that the real owner of the goods, for whom Stokes & Co. were agents, may sue for the loss, although the defendant was not informed of his existence. Then it has been urged that Fragano had no interest in the goods, and the terms of the order have been adverted to in support of that argument; but I think that the goods became his F property as soon as they were sent off by Mason & Co. When goods are to be delivered at a distance from the vendor, and no charge is made by him for the carriage, they become the property of the buyer as soon as they are sent off. It was next contended that Fragano was not liable to the vendor unless the goods arrived; but the order for insurance is decisive as to that. The policy was to protect Fragano, and shows that he considered he should be the sufferer if the goods were lost on the voyage, which he could not have been, had the arrival of the goods been a condition precedent to his liability to the vendors. The expiration of three months was to be the time of payment if the goods arrived; if they did not arrive, the law would imply a promise to pay in a reasonable time.

LITTLEDALE, J., concurred. *Rule discharged.*

no like this case. Held no ~~sale,~~ because buyer never
ted. Rl: ∴ tho goods may be specific, no title passes until
d that it should pass.

ATKINSON AND OTHERS, ASSIGNEES OF SLEDDON, v. BELL AND OTHERS.

, buyer of machines from
ldon, which had been ordered
Bell upon the request
inventor, Kay.

IN THE KING'S BENCH, EASTER TERM, 1828.

[*Reported in 8 Barnewall & Cresswell*, 277.]

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ASSUMPSIT for goods sold and delivered, goods bargained and sold, work and labor, and materials found and provided. At the trial before Hullock, B., at the summer assizes for Lancaster, 1827, it appeared that the defendants were linen and thread manufacturers at Whitehaven, in Cumberland. The bankrupt, Sleddon, before his bankruptcy was a machine-maker, residing at Preston, in Lancashire. One Kay, of Preston, obtained a patent for a new mode of spinning flax, and the defendants, being desirous of trying the effect of it, on the 12th November, 1825, by letter ordered him to procure to be made for them as soon as possible a preparing-frame and two spinning-frames, in the manner he most approved of. In January, 1826, Kay ordered two spinning-frames and a roving-frame to be made by Sleddon for the defendants, and informed them that he had so done. These machines were formed on Kay's first plan, and completed at the end of March; and after they had been so completed they lay in Sleddon's premises a month, while two other machines of these defendants, intended to be used in the same mills, were altered by Sleddon, under Kay's superintendence; and when those had been completed to his mind, he ordered the machines in question to be altered in the same manner. They were altered accordingly, packed in boxes by Kay's directions, and remained on Sleddon's premises. On the 23d of June, 1826, Sleddon wrote to the defendants, and informed them that the two frames had been ready for the last three weeks, and begged to know by what conveyance they were to be sent. On the 8th of August a commission of bankrupt issued against Sleddon, under which he was duly declared a bankrupt. The assignees afterwards required the defendants to take the frames, but they refused to do so. It was objected on the part of the defendants, that the action was not maintainable for goods bargained and sold, because the property in the frames had never vested in the defendants. The learned judge was of opinion that the action was not maintainable, and he directed a nonsuit to be entered, with liberty to the plaintiffs to move to enter a verdict for the price of the machines. A rule *nisi* having been obtained for that purpose,

Brougham and *Parke* now showed cause.

Cross, Serjt., and *Tomlinson*, contra.

BAYLEY, J. I think the rule for entering a verdict for the plaintiff ought to be discharged. If the declaration had contained a count for not accepting the machines, the plaintiffs might have been entitled to recover; and I think now that, upon payment of costs, they should be allowed to set aside the nonsuit, and add other counts to the declaration, and have a new trial. But I cannot say that the property passed to the defendants, so as to enable the plaintiffs to recover on the counts for goods bargained and sold, or for work and labor. It is said, that there was an appropriation of these specific machines by the maker, and that the property thereby vested in the defendants. I think it did not pass. Where goods are ordered to be made, while they are in progress, the materials belong to the maker. The property does not vest in the party who gives the order until the thing ordered is completed. And although while the goods are in progress the maker may intend them for the person ordering, still he may afterwards deliver them to another, and thereby vest the property in that other. Although the maker may thereby render himself liable to an action for so doing, still a good title is given to the party to whom they are delivered. It is true that Kay saw these things while they were in progress, and knew that the bankrupt intended them for the defendants; yet they might afterwards have been delivered to a third person. This case is not affected by the argument that these are patent articles, because they might have been delivered to a third person with Kay's assent. The case of Woods *v.* Russell, 5 B. & A. 942, is distinguishable. The foundation of that decision was, that as by the contract given portions of the price were to be paid according to the progress of the work, by the payment of those portions of the price the ship was irrevocably appropriated to the person paying the money. That was a purchase of the specific articles of which the ship was made. Besides, there the shipbuilder had signed the certificate to enable the purchaser to have the ship registered in his name; the legal effect of which was held to be to vest the general property in the purchaser. If in this case an execution had issued against Sleddon, the sheriff might have seized the machines.

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They were Sleddon's goods, although they were intended for the defendants, and he had written to tell them so. If they had expressed their assent, then this case would have been within Rohde *v.* Thwaites, 6 B. & C. 388, and there would have been a complete appropriation vesting the property in the defendants. But there was not any such assent to the appropriation made by the bankrupt, and therefore no action for goods bargained and sold was maintainable. Then as to the counts for work and labor, if you employ a man to build a house on your land, or to make a chattel with your materials, the party who does the work has no power to appropriate the produce of his labor and your materials to any other person. Having bestowed his labor at your request on your materials, he may maintain an action against you for work and labor. But if you employ another to work up his own materials in making a chattel, then he may appropriate the produce of that labor and materials to any other person. No right to maintain any action vests in him during the progress of the work; but when the chattel has assumed the character bargained for, and the employer accepted it, the party employed may maintain an action for goods sold and delivered, or, if the employer refuses to accept, a special action on the case for such refusal. But he cannot maintain an action for work and labor, because his labor was bestowed on his own materials, and for himself, and not for the person who employed him. I think that in this case the plaintiff cannot recover on the count for work and labor.

Holroyd, J. I think that on the facts given in evidence a verdict might have been sustained on a count for not accepting the machines. I have entertained great doubt during the argument, whether a verdict might not be sustained on the count for work and labor and materials found. I think it will not lie for goods bargained and sold, because there was no specific appropriation of the machines assented to by the purchaser, and the property in the goods, therefore, remained in the maker. Then as to work and labor, the work was done, and the labor bestowed on the materials of the maker in manufacturing an article which never became the property of the defendants. I am of opinion, therefore, that the work was done for the bankrupt, and not for the defendant.

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Littledale, J. I am of the same opinion. Goods bargained and sold will not lie unless there be a sale. There could not be any sale in this case, unless there was an assent by the defendants to take the articles. Here there was no assent. The property must be changed, to make the action maintainable. If the property had been changed, the maker could not have delivered these machines to any one but the defendants. I think, however, he might have delivered them to another, notwithstanding anything that passed, and that the defendants could not have maintained trover against the party to whom they were delivered. In the case of an execution or a bankruptcy, these machines must have been treated as the goods of the maker. As to the count for work and labor and materials, the labor was bestowed, and the materials were found, for the purpose of ultimately effecting a sale, and if that purpose was never completed, the contract was not executed, and then work and labor will not lie. The work and labor and the materials were for the benefit of the machine-maker, and not for the defendants. *Rule absolute, on payment of costs.*

ALEXANDER AND ANOTHER *v.* GARDNER AND ANOTHER.

IN THE COMMON PLEAS, MAY 6, 1835.

[*Reported in* 1 *Bingham's New Cases*, 671.]

ASSUMPSIT for goods bargained and sold under the following circumstances: —

The plaintiffs, merchants in London, and agents for Irish houses in the sale of butter, being in expectation of a cargo from Murphy, of Sligo, entered, by means of their broker, into the following contract with the defendants: —

LONDON, October 11, 1833.

Sold to Messrs. William Gardner & Son, for account of Messrs. Alexander & Co., 200 firkins Murphy & Co.'s Sligo butter, at 71*s.* 6*d.* per cwt. free on board for first quality; 4*s.* and 6*s.* difference for inferiors. Payment, bill at two months from the date of landing. To be shipped this month. An average for weights and tares within six days of landing, if required.

On the 11th of November, the plaintiffs received from Murphy the invoice and bill of lading of these butters; and also the intelligence that, owing to there having been no ship in the port of Sligo bound for London, the butter had not been shipped till the 6th of November.

This circumstance was immediately communicated to the defendants, who at first refused to abide by the contract, on the ground that the butters were to have been shipped in October. In a little time, however, they abandoned their objection, and consented to retain the invoice and bill of lading which had been delivered to them on the 12th of November.

The invoice which described the butters in detail as to weight, number of casks, &c., was addressed to the plaintiffs, but upon handing it over, their name had been struck out, and the name of the defendants substituted, as is usual in the trade.

The bill of lading described the casks by their marks and several quantities, and directed them to be delivered to the plaintiffs.

In December, 1833, the greatest part of the butters was lost by shipwreck on the coast of Galway, and a small part of them arrived in a damaged state; whereupon the defendants, not having effected any insurance, refused to pay.

At the trial before Tindal, C. J., it was contended on their part that, under the circumstances above stated, the action for goods bargained and sold did not lie; and that the plaintiffs, in order to recover, should have declared specially on the contract of the 11th of October, alleging and proving that the goods had been shipped in October, and duly landed; since, according to the contract, payment was not to be made till two months after landing.

The jury found that the condition for shipping in October had been waived by the defendants, and returned a verdict for £414, the contract price of the butters.

Talfourd, Serjt., pursuant to leave reserved at the trial, obtained a rule *nisi* for setting aside this verdict, and entering a nonsuit on the ground above stated. He relied mainly on Simmons *v.* Swift, 5 B. & C. 857, where the owner of a stack of bark entered into a contract to sell it at a certain price per ton, and the purchaser agreed to take and pay for it on a day specified, and a part was afterwards weighed and delivered to him; it was held, that the property in the residue did not vest in the purchaser until it had been weighed, that being necessary in order to ascertain the amount to be paid; and that, even if it had vested, the seller could not, before that act had been done, maintain an action for goods sold and delivered. From that case it followed that an action for goods bargained and sold will not lie, unless the property in the goods passes to the purchaser at the time of the bargain. But so far was the property here from passing to the defendants at the time of the bargain, that at that time the goods were not in the plaintiffs' hands, or, for aught that appeared, in existence. And the principle established by Goss *v.* Lord Nugent, 5 B. & Adol. 58, that when the time for delivery is fixed by a written contract, it cannot be extended by oral agreement, afforded a strong argument to show that the plaintiffs should have set out in their declaration the special circumstances of their demand.

Bompas, Serjt., and *Martin* showed cause.

Talfourd and *Kelly* in support of the rule.

TINDAL, C. J. The question in this cause is, whether an action for goods bargained and sold is maintainable against the defendants. They contend that such an action does not lie against them, but that under the circumstances of the case, the plaintiffs should have declared specially.

The original contract was made on the 11th of October, 1833, in which contract it is stated that the plaintiffs sold to the defendants 200 firkins of Sligo butter, free on board, at 71*s.* 6*d.* per cwt.; that the goods were to be shipped in the course of that month, and that payment was to be by a bill of exchange, payable two months after the landing of the goods.

Upon this contract three objections have been raised to the action for goods bargained and sold.

First, that the butters were not in the possession of the plaintiffs at the time of the contract.

Secondly, that they were not shipped in October as the contract required; and,

Thirdly, that as the payment was to be at two months after the landing of the goods, and as the goods were never landed, such payment could not be required.

Notwithstanding these objections, I think the contract was to pay for goods bargained and sold, and that the declaration to that effect is in the proper form. And I agree that the plaintiffs must show that the property in the goods passed to the defendants by the contract; for, unless it did, the goods were not bargained and sold to them.

But as to the first objection, if the goods were ascertained and accepted, before the action was brought, it is no objection that they were not in the possession of the plaintiffs at the time of the contract. In Rohde *v.* Thwaites, 6 B. & C. 388, the vendor, having in his warehouse a quantity of sugar in bulk, agreed to sell twenty hogsheads: four hogsheads were delivered; the vendor filled up and appropriated to the vendee sixteen other hogsheads; informed him that they were ready, and desired him to take them away; the vendee said he would take them as soon as he could; and it was held that the appropriation having been made by the vendor and assented to by the vendee, the sixteen hogsheads thereby passed to the latter; and that their value might be recovered by the vendor under a count for goods bargained and sold.

Here it is impossible to say that the goods were not ascertained and accepted before the action was brought; for the quantity, quality, and price were all specified in the invoice; and the bill of lading was regularly indorsed to and accepted by the defendants.

But then it is said that the shipping of the goods in October was a condition precedent to any claim on the defendants. If the defendants had in the first instance repudiated the bargain on that ground, it is true no action would have lain against them. But it is found by the jury that they waived the objection; and this being only a parol contract, if the party waives the condition he is in the same situation as if it had never existed.

The third objection to the plaintiffs' recovery is, that the butters were to be paid for by a bill at two months after landing. But the object of that stipulation was merely to fix the time of payment, and not to make the landing a condition precedent. For that point it is enough to refer to the decision in Fragano *v.* Long.

The present case, therefore, is brought within the result of all the decisions, as stated by Serjeant Williams, in the note 2 Wms. Saund. 269 *b*.

Here the action was not brought till long after the two months which would have succeeded the landing of the goods, if they had arrived in the ordinary course. The plaintiffs, therefore, being in the situation of one who has parted with his goods, and the defendants of one who has received them upon an engagement to pay, the action will lie, and this rule must be discharged.

PARK, J. I entirely concur. The condition for shipping the goods in October having been waived, the question is, whether an action lies for goods bargained and sold; and that turns on the question whether or not there has been an acceptance of the goods by the defendants. I think there has, and that an action might have been maintained even for goods sold and delivered; but it is sufficient to say that the right to sue for goods bargained and sold is complete. The defendants' argument turns on the principle, that goods sold remain at the risk of the vendor, till everything is done to complete the contract: Hinde *v.* Whitehouse, 7 East, 558; or till a specific appropriation has taken place. But that having been effected here by the transfer of the bill of lading, the case falls within the principle of Rohde *v.* Thwaites and Fragano *v.* Long. We have been pressed with the authority of Simmons *v.* Swift. There the owner of a stack of bark entered into a contract to sell it at a certain price per ton, and the purchaser agreed to take and pay for it on a day specified; and a part was afterwards weighed and delivered to him: it was held that the residue did not vest in the purchaser until it had been weighed, that being necessary in order to ascertain the amount to be paid; and that, even if it had been vested, the seller could not, before that act had been done, maintain an action for goods sold and delivered. In that I entirely concur. But see what the case was in Rohde *v.* Thwaites. There the vendor, having in his warehouse a quantity of sugar in bulk, agreed to sell twenty hogsheads: four hogsheads were delivered to the vendee; the vendor filled up and appropriated to the vendee sixteen other hogsheads, informed him that they were ready, and desired him to take them away. The vendee said he would take them as soon as he could. It was held, that the appropriation having been made and assented to, the property in the sixteen hogsheads passed to the vendee, and that their value might be recovered by the vendor under a count for goods bargained and sold. And the argument that the arrival and landing of the goods was to be a condition precedent to payment, is answered by Fragano *v.* Long. There the vendee, resident at Naples, sent an order to the vendors, hardwaremen at Birmingham, "to despatch to him certain goods, on insurance being effected; terms, three months' credit from the time of arrival." The vendors despatched the goods by the canal to Liverpool, and effected an insurance, declaring the interest to be in the vendee: at Liverpool the goods were delivered by the agent of the vendors to the owner of a vessel bound to Naples, through whose negligence they were much damaged: it was held, that the property in the goods vested in the vendee as soon as they were despatched from Birmingham; that the terms of the order did not make the arrival of the goods at Naples a condition precedent to a liability to pay for them; and that the vendee might therefore maintain an action for the injury done to the goods through the negligence of the ship-owner.

That case, therefore, and the case of Rohde *v.* Thwaites, entirely warrant our present decision.

GASELEE, J. The chief justice and my brother Park having gone so fully into the case, I shall only observe that here the invoice specifies the weight and price of all the goods.

BOSANQUET, J. I think that this was a contract executed, and that therefore the plaintiff has properly declared for goods bargained and sold. It is not necessary for the support of such an action that the goods should be actually in the possession of the vendor. Here he was entitled to the possession, and has done all that was required on his part to render the transfer effectual. It is said he should have declared specially, showing the performance of the condition precedent as to the time of shipping, or a waiver of it in writing. If the contract containing the condition had been by deed, that doctrine might have applied, but this was a parol contract, and the condition might be waived without a writing. A contract must be declared on according to its legal effect; and the effect of all the circumstances here is, to render it a contract without a condition. The objection that the arrival of the goods was a condition precedent to payment, is answered by the case of Fragano *v.* Long, where it was decided that the property in the goods vested in the vendee as soon as they were despatched from Birmingham; that the terms of the order did not make the arrival of the goods at Naples a condition precedent to the vendee's liability to pay for them; and that he might therefore maintain an action for the injury done to the goods through the negligence of the ship-owner. Here, the time for arrival of the goods having long since elapsed, the time for payment must also be arrived if there was to be any payment at all, and that there was to be a payment is decided by Fragano *v.* Long.

Rule discharged.

TRIPP AND OTHERS, ASSIGNEES OF BENNETT, A BANKRUPT *v.* ARMITAGE AND OTHERS.

IN THE EXCHEQUER, HILARY TERM, 1839.

[*Reported in* 4 *Meeson & Welsby*, 687.]

TROVER for deal sashes, linings, shutters, boards, and other building materials. Pleas, first, except as to certain doors, linings, boards, &c., specified in the plea, not guilty; secondly, as to the causes of action to which the first plea was pleaded, that the plaintiffs were not possessed of their own property as assignees of the goods and chattels to which the first plea was pleaded, or any part thereof, in manner and form, &c.; thirdly, as to the causes of action relating to the conversion of the goods and chattels particularly mentioned in and excepted by the first plea, payment into court of £129, which the plaintiffs took out of court in discharge of those causes of action. At the trial before Lord Abinger, C. B., at the last Gloucestershire Assizes, the following appeared to be the facts of the case: —

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& not attached, could be taken by Δ, tho accepted by Δ.
Rg: a contract for a completed bld. & not for specific chattels.

In the year 1837, a company was formed for the erection of a new hotel in Cheltenham, and a deed was executed for regulating the affairs of the company, by which the defendants were appointed trustees. Advertisements having been issued for tenders for building the hotel, the bankrupt, Bennett, who then carried on business as a builder and timber-merchant in Cheltenham, sent in a tender, and entered into a written contract with the defendants, therein described as trustees of the Cheltenham Hotel Company, dated 3d March, 1837; by which, after reciting that Messrs. Churchill & Mallory had agreed to do the smith's and ironmongery work, and Mark Barrett the painting, plumbing, and glazing, by agreements of even date therewith, and that Bennett had agreed to do all the work, save as aforesaid, at the price of £15,381 8*s.* 4*d.*; it was witnessed that Bennett thereby covenanted for himself, his heirs, executors and administrators, with the defendants, that he would build the hotel (except as aforesaid), and render the same fit for habitation, to the satisfaction of R. W. Jearrad (the architect employed by the defendants), by the times therein mentioned (enumerating various times by which specified portions of the work were to be completed); that, should Bennett neglect to complete any one portion of the work by the time therein appointed, or several portions of the works by the times therein respectively appointed, he should forfeit and pay the sum of £250 as liquidated damages, and the defendants should be entitled to set it off, &c. The agreement then contained the following clause: "And further, that, should the said T. H. Bennett, his executors or administrators, at any time or times, omit to go on with, or neglect to do the said works, matters, and things hereby agreed to be done by him, so expeditiously as he might do in the judgment of the said R. W. Jearrad, or the said architect of the said company for the time being, or in case the said T. H. Bennett should become bankrupt, or insolvent, or being arrested should go to gaol, before the said work should be completed and finished, then and in any or either of such cases, it should and might be lawful to and for the said trustees, their heirs or assigns, to take possession of the work then already done by the said T. H. Bennett, and to avoid and put an end to that agreement; and thereupon the several clauses and agreements therein contained on the part of the said trustees should be absolutely null and void, to all intents and purposes whatsoever; and further, that the said trustees should pay to the said T. H. Bennett, his executors or administrators, or his or their assignee or assignees, as the case might be, so much money, and only so much money, as the said R. W. Jearrad, or other, the architect for the time being of the said company, should adjudge to be the fair worth of the work actually done and fixed by the said T. H. Bennett, his executors or administrators, to the hotel, as compared with the whole work to be done for the said price of £15,381 8*s.* 4*d.*" Proviso, that should the trustees require any additions to or alterations in the buildings, or the mode of doing the same, and should by writing under the hand of one of them, countersigned by Jearrad, direct the same to be done, then such additions or variations should be made, but should not in any respect vacate, alter, annul, or make void the agreement, but the difference caused by such additions or variations should be valued by Jearrad, and should be paid to or allowed by Bennett, as the case might be. The trustees then covenanted to pay the money by instalments, at certain dates corresponding with the times at which the specified works were to be performed. There was also a proviso, making the doing of the works conditions precedent to payment, and the architect's certificate indispensable. Certain additional works were contemplated as the building proceeded, which Bennett also undertook at stipulated prices. Previously to the month of September, 1837, Bennett received the five first instalments as they became due, upon a certificate of Jearrad, the architect, that the work had been done. In that month, Bennett, being pressed for money, applied to Jearrad for advances, in anticipation of the instalments not then due; and being required to give in a statement of the works done in part of the contract, he furnished an account, containing, among other items, the following: "Bricks on the ground (*i. e.* on the hotel premises), £140; joiner's work prepared, £1,000." The trustees thereupon agreed that certain advances should be made to Bennett, on the security of all the materials which were or should be brought by him upon the premises during the works, and he consequently obtained certificates from time to time from Jearrad, under which he received several sums of money for work not actually done. During the progress of the building, one Turnbull was the clerk of the works, and the course of business was for him to inspect every article that came in under any of the contracts, and none were received except on his approval. Some sash-frames for the windows had been sent in by Bennett, and approved of by Turnbull, and, before the bankruptcy, had been again taken from the premises to a workshop of Bennett's, for the purpose of having affixed to them some iron pulleys, which had been supplied to the defendants by Churchman & Mallory, under their contract. At the time of the bankruptcy, these sash-frames, with the pulleys affixed to them, were at Bennett's workshop.

On the 22d of November, Bennett committed an act of bankruptcy, on which a fiat subsequently issued, and the plaintiffs were appointed his assignees. Between the 22d and the 25th of November, the sash-frames, to which the pulleys had been so attached, and also the various articles excepted out of the first plea, were delivered upon the premises of the company. There were also on the hotel premises, at the time of the bankruptcy, a large quantity of other materials which had been sent in from time to time by Bennett, and which had been approved of by Turnbull, and were in a prepared state, but not yet fixed. On taking an account between the value of the work actually done and fixed at the time of the bankruptcy, and the money received by Bennett up to that time, it appeared that he had been paid in advance about £800 beyond the value of such work. The present action was brought by the assignees to recover the value of the materials which were upon the

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premises, unfixed, at the time of the bankruptcy, of the sash-frames, and of the other materials delivered on the premises after the bankruptcy. These last, however, were satisfied by the £129 paid into court and taken out by the plaintiffs. On the materials delivered before the bankruptcy the defendants claimed a lien, as being the security on the faith of which the advances had been made by Jearrad to the bankrupt; and they also claimed the property in the sash-frames, as being specific articles which had been appropriated by them, and approved on their part by Turnbull, and to which their pulleys had been attached. The only evidence of a conversion of the sash-frames was a demand and refusal, the demand not being limited in terms to the wood-work of the frames. The value of the frames with the pulleys was £9 5*s.*; of the pulleys, £1 9*s.* The learned judge directed the jury, that if the advances were made to Bennett on the understanding and agreement that the materials brought upon the premises should be considered as a pledge for those advances, they should find a verdict for the defendants; and he intimated an opinion that the sash-frames had been so far specifically appropriated to the defendants as to prevent the plaintiffs from recovering in respect of them. The jury found a verdict for the defendants, and the learned judge gave the plaintiffs leave to move to enter a verdict for £9 5*s.*, the value of the sash-frames.

Maule and *Greaves* showed cause.

R. V. Richards (with whom were *Talfourd*, Serjt., and *W. J. Alexander*), in support of the rule.

LORD ABINGER, C. B. I have been much disposed, I confess, to endeavor to find some possible ground for sustaining the verdict, because I consider this to be one of the hardest cases that ever occurred. The defendants undoubtedly intended to pay money into court to cover all matters on which there was any doubt, and to rest only upon a defence which was perfectly clear; and on a great part of their case, amounting to several hundred pounds, they did make out a clear defence; but there unfortunately occurred this little omission with respect to these sashes, which has given rise to the whole question now in dispute. The case has been very ably and ingeniously argued by Mr. Maule, but I cannot at all adopt the first ground he has taken, namely, that by reason of the approbation of Turnbull, the clerk of the works, and the application of the pulleys sent by the defendants to be fixed to the sashes, the property was appropriated to the defendants. My reason for not acceding to that argument is shortly this: that this is not a contract for the sale and purchase of goods as movable chattels; it is a contract to make up materials, and to fix them; and until they are fixed, by the nature of the contract the property will not pass. It is said that although the contract be general in the first instance, yet it may become, by circumstances, specific; that although a man may agree to buy goods generally, and on the part of the vendor the contract may be complied with by supplying any goods he chooses of the description named, yet, if particular goods be afterwards pointed out and designated between the parties, the contract is thereby modified, and becomes then an undertaking to supply the specific goods, the property in which thereby passes to the vendee. But this is not a contract to purchase goods at all, — it is a contract for several works to be done. Wherever the property of the goods passes by the contract, and has become vested in the purchaser, if they are destroyed by any accident, the purchaser would be responsible. But I think we cannot say, that, if these sashes had been destroyed, the purchasers, that is, the defendants, would have borne the loss; they are not bound by the contract to pay for anything till it is put up and fixed; and if destroyed by fire, or in any way abstracted from the premises, without the fault of the builder, he would surely have a right to recover the value of such goods from the defendants. I think, therefore, that from the nature of this contract, the property remained in the bankrupt, although the goods had been approved of by the defendants. That approval does not mean the assent of the parties to take the article and pay for it at once, but merely the approval of it as a proper thing to be put up. . . .

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PARKE, B. I entirely concur. With respect to the first point, which has been insisted upon at so much length and with so much ingenuity and ability by Mr. Maule, I think the answer is a very short one. I admit that the cases which have been cited and commented upon by him are perfectly good law: but there is one most material distinction between them and the present, viz., that in all those cases there was a contract with respect to a particular chattel, which by the contract was to become the property of the person taking it, under certain circumstances; but in this case there is no contract at all with respect to these particular chattels, it is merely parcel of a larger contract. The contract is, that the bankrupt shall build a house; that he shall make, amongst other things, window-frames for the house, and fix them in the house, subject to the approbation of a surveyor; and it was never intended by this contract, that the articles so to be fixed should become the property of the defendants, until they were fixed to the freehold. It is said that the approbation of the surveyor is sufficient to constitute an acceptance by the defendants; but that approbation is not given *eo animo* at all; it is only to ascertain that they are such materials as are suitable for the purpose; and notwithstanding that approval, it is only when they have been put up, and fixed to the house, in performance of the larger contract, that they are to be paid for. That appears to me to be a sufficient answer to the first and principal point which has been argued by Mr. Maule against the rule. . . .

GURNEY, B. I am of the same opinion. It is clear, upon this contract, that the property in the frames had not passed out of the bankrupt to the defendants. They had therefore no right to take possession of these frames; they had only a right to sever the pulleys from the frames, which they have not done, but have possessed themselves of both; and they make their own default in not severing the one from the other, the ground of their refusal to deliver up that which the assignees were entitled to.

Rule absolute to enter a verdict on so much of the declaration as applied to the sash-frames; damages, £7 16*s*.

WILKINS *v.* BROMHEAD AND HUTTON.

IN THE COMMON PLEAS, JANUARY 23, 1844.

[*Reported in* 6 *Manning & Granger*, 963.]

TROVER against the defendants, who were assignees of Smith & Bryant, bankrupts, for a greenhouse and materials. Pleas, not guilty, and not possessed; on both of which pleas issue was joined.

At the trial of the cause, before Coleridge, J., at the last Bristol summer assizes, it appeared that the plaintiff, a gentleman residing near Cardiff, in Glamorganshire, in October, 1841, employed the bankrupts Smith & Bryant, who were carpenters at Bristol, to make him a greenhouse for the price of £50: it was also agreed that Smith & Bryant should put up the greenhouse on the plaintiff's premises at Cardiff, for the further sum of £14 14*s*. Smith & Bryant, having finished the wood-work, sent the sashes to a glazier of the name of Wait, to be glazed. The whole work being completed, but not permanently fixed together, Smith & Bryant, in June, 1842, informed the plaintiff, by letter, that the greenhouse was ready for delivery, and requested him to remit the £50 "for the greenhouse" through Stuckey's Banking Company. The plaintiff remitted the £50, and wrote to request Smith & Bryant "to keep the greenhouse, and take care of it, till he sent for it." In February, 1843, pending an action against Bryant, the whole was sent by him to Wait without the knowledge of the plaintiff, to secure it from an execution against Bryant. Bryant asked Wait to place the greenhouse in his warehouse, alleging that Smith & Bryant had not room for it on their premises, telling him also that it was the plaintiff's property, and requesting Wait to keep it till he sent for it, which Wait agreed to do. On the 14th of March a fiat in bankruptcy issued against Smith & Bryant, under which the defendants were appointed assignees. On the 22d of April the greenhouse was removed by Wait to the premises of the bankrupts, and was taken possession of by the messenger under the fiat.

On the 9th of May, 1843, an agent of the plaintiff made a demand of the greenhouse upon the solicitor of the fiat, at the same time leaving with him a written demand, addressed to the defendants. The solicitor, on the 12th, informed the plaintiff's agent that the opinion of counsel had been taken, and that the assignees were advised not to give up the greenhouse; and he accepted a notice, and indorsed a refusal, dating it on the 9th.

On the part of the defendants it was contended that there was no evidence for the jury of the plaintiff's property in the greenhouse; and Atkinson *v.* Bell, 8 B. & C. 277, 2 Mann. & Ryl. 292, was cited; and that even assuming that there was some evidence of property in the plaintiff, the greenhouse, at the time of the fiat, was in the possession, order, and disposition of the bankrupts, with the consent of the owner, within the 6 G. 4, c. 16, § 72. A further point was taken, that there was no evidence of a conversion by the defendants; but it was abandoned on the argument.

The learned judge having refused to nonsuit the plaintiff, the defendants' counsel declined to address the jury, who were directed to find for the plaintiff, on both issues. A verdict was returned accordingly, damages £50; leave being reserved to move to enter a nonsuit, if the court should think either objection well founded.

Channell, Serjt. (with whom was *Butt*), showed cause.

Sir *T. Wilde* and *Bumpas*, Serjts., in support of the rule.

Tindal, C. J. The motion before the court proceeds upon two distinct grounds: the first ground is, that, under the contract, no property in the greenhouse in question passed to the plaintiff; the second, admitting that the property did pass by the contract, as the greenhouse remained in the possession of the bankrupts, or of Wait, down to the time of the bankruptcy, it must be taken to be property in their order and disposition, as reputed owners, with the consent and permission of the true owner, and, consequently, that it vested in their assignees. As to the first point, there can be no doubt but that a contract for the making of a chattel does not of itself vest the property in the chattel, when completed, in the person giving the order. But here the question turns, not upon the original contract between the plaintiff and Smith & Bryant, but upon the circumstances which afterwards took place, viz., the payment by the plaintiff, after the greenhouse had been completed, of the stipulated price, the appropriation and setting apart by the bankrupts of the greenhouse for the plaintiff, and his assent to such appropriation. There was an appropriation on the one side, and an assent to such appropriation on the other; which, I think, was quite sufficient to pass the property to the plaintiff. It may be that the original contract did not pass the property; but the parties may be said to have entered into a new contract. I cannot conceive why, under the circumstances of this case, the property in an article made to order should not pass upon its completion, as it would have done if it had been in existence at the time of the original contract. The objections raised upon this point were mainly founded upon Atkinson *v.* Bell, 8 B. & C. 277, 2 Mann. & Ryl. 292. But, if that case be examined, it will be found not to apply. The decision there turned entirely on the absence of assent on the part of the purchasers to the appropriation of the machines by the vendor. It is said, by Bayley, J., "These were Sleddon's goods, although they were intended for the defendants, and he had written to tell them so. If they had expressed their assent, then this case would have been within Rohde *v.* Thwaites, 6 B. & C. 388, 9 Dowl. & Ryl. 293, and there would have been a complete appropriation, vesting the property in the defendants. But there was not any such assent to the appropriation made by the bankrupt; and, therefore, no action for goods bargained and sold was maintainable." Holroyd, J., observes, "I think the action will not lie for goods bargained and sold, because there was no specific appropriation of the machines assented to by the purchasers, and the property in the goods therefore remained in the maker." And Littledale J., adds, "There could not be any sale in this case, unless there was an assent, by the defendants, to take the articles." Looking at the facts of this case, it seems to me that there is complete evidence of assent, on the part of the plaintiff, to the appropriation made by the vendors. The plaintiff was informed by letter that the greenhouse was finished, and was requested to remit the price. He did so, at the same time requesting the vendors to keep the greenhouse for him until he sent for it. It has been argued, that the letter of the plaintiff, desiring Smith & Bryant to keep the greenhouse for him, was written before the article was seen, and that it would be hard if it were held to be such an acceptance as would preclude him from rejecting the article if it afterwards turned out defective in its construction. If a purchaser's assent to the appropriation was shown to have been obtained by misrepresentation, it seems to me it would probably be held to be no assent at all. But that is not the case here; and although the plaintiff thought proper to assent to the appropriation without seeing the greenhouse, the assent was not the less complete. Upon this point, therefore, I think that the property vested in the plaintiff, so as to enable him to maintain this action. . . . *Rule discharged.*[1]

JAMES WILSHER ALDRIDGE *v.* PATRICK JOHNSON.

IN THE QUEEN'S BENCH, JUNE 5, 1857.

[*Reported in 7 Ellis & Blackburn*, 885.]

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THIS was an action brought by the plaintiff to recover certain goods alleged to be his property, and to have been detained by the defendant; or the value of such goods, and damages for their detention; and also to recover damages for the wrongful conversion of the same goods by the defendant.

The defendant pleaded to the whole declaration: first, not guilty; and, secondly, that the goods were not the plaintiff's property.

On the trial before Erle, J., at the sittings in London in last Hilary term, a verdict was found for the plaintiff, by consent, for the whole amount of his claim, and costs 40*s.*, subject to the opinion of the court upon the following case: —

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[1] ERSKINE, MAULE, and CRESSWELL, JJ., delivered concurring opinions

for ∇ for 155 sacks; for Δ for all not sacked.
is not sale of a particular chattel, but of a portion of a mass,

The plaintiff is a corn-merchant at Witham, in Essex; and the defendant is the official assignee of the estate and effects of one James Watling Knights, a bankrupt, who, up to the time of his bankruptcy, as hereinafter mentioned, carried on business at Ipswich in Suffolk as an auctioneer and seed-merchant.

On 12th September, 1856, the plaintiff took thirty-four bullocks to Ipswich for the purpose of having them sold by auction by the said J. W. Knights, and instructed Knights to sell them if they should fetch a certain price. They did not, however, fetch that price, and consequently were bought in by the plaintiff. Knights then informed the plaintiff that he had a quantity of barley in his granary, and proposed to exchange a portion of it for the plaintiff's bullocks. The plaintiff went and looked at the barley, which consisted at that time of one large heap containing between 200 and 300 quarters. He weighed a bushel of it for the purpose of ascertaining its quality, and took a sample away with him; but no bargain was made on that day; and the bullocks were sent to Colchester the same evening. On the following day (13th September), the plaintiff and Knights were at Colchester market; and the plaintiff sold two of his bullocks there; after which a conversation took place between the plaintiff and Knights, upon the subject of the exchange proposed on the previous day, which resulted in the following arrangement between them: —

It was agreed that Knights should have the remaining thirty-two bullocks at the price of £6 apiece, and that the plaintiff should take in exchange 100 quarters of the barley which he had seen at Ipswich the day before, at the price of £2 3*s.* a quarter. The difference between the value of the barley and of the bullocks, *viz.*, £23, was to be paid in cash by the plaintiff to Knights. It was further agreed that the plaintiff should send his own sacks to Ipswich on the following Monday (15th), and that Knights should fill the sacks with the barley, take them to the railway, and place them upon trucks, free of charge, to be conveyed to the plaintiff at Witham. Something was also said about a sum of £20 7*s.*, which the plaintiff owed Knights for some goods which he had previously purchased; but it was agreed that this transaction should not interfere with the arrangement which was then being made.

As soon as this arrangement was effected, the plaintiff made a note of it in his pocket-book, and the thirty-two bullocks were then and there delivered by the plaintiff to Knights.

On the following Monday, pursuant to the above arrangement, the plaintiff sent to Ipswich 200 sacks (being a sufficient number to contain the whole 100 quarters of barley). Some of these sacks were marked in the plaintiff's name; and they were all duly received by Knights: but the barley was not delivered or forwarded to the plaintiff. On 16th September the plaintiff wrote to Knights for a sample of the barley, which was accordingly sent. On 17th September, Knights sent one of his men named Abel Smith, to fill 155 out of the 200 sacks with barley

Comment: Can only be distinguished from Atkinson v Bell supra p130, on ground that here buyer assented, & then from the above-mentioned heap; and accordingly Smith proceeded to the granary, and, with the assistance of other persons, filled 155 of the sacks with barley from the heap (each sack containing one coomb, or half a quarter). After the sacks had been filled, there was left in the heap some seventy or eighty quarters; so that the quantity put into the sacks was only about half the bulk. By the further direction of Knights, Smith applied, the same day, at the railway station at Ipswich, for some trucks, to convey the 155 sacks to the plaintiff at Witham, but was not able to obtain any. On the following Saturday (20th), the plaintiff again saw Knights at Colchester market, and complained to him of the non-delivery of the barley. He said he was sorry that he had not sent it; but that he had been very busy and unable to get trucks, and that it should be sent on the Monday following without fail. On the following Monday morning (22d), Knights gave directions to a clerk in his employ, named Mulley, to get some trucks, and have the 155 full sacks, which were then standing in the granary, put upon them to be sent to the plaintiff. Mulley accordingly applied for the trucks, but without success. After giving these directions, Knights himself went up to London, saw the plaintiff in Mark Lane, and told him that the barley would be put upon the rail that day.

In the course of the same morning, the plaintiff had sent to Ipswich a person in his employ named Church, to demand of Knights the 100 quarters of barley. Accordingly, Church called at Knights' about noon, and found that he was away from home, but saw Mulley, and demanded the barley of him. Mulley said that he could get no trucks to put it upon, and that Church had better try himself to get some: that, if he could procure any, the barley should be put upon the rail that afternoon; but that, at any rate, it should be forwarded the first thing the next morning. After this Church returned to Witham.

While the above communication was passing between Mulley and Church, the former received from Knights a telegraphic despatch in the following terms: —

"If you have not put oats on rail, do not, nor allow more barley to go if applied for. Private."

The barley mentioned in the said despatch was the same barley in respect to which Knights had given Mulley directions in the morning; but Mulley did not mention to Church the contents of the despatch, nor the fact that he had received any communication from Knights.

The barley was not forwarded to the plaintiff the next day, but remained in the sacks till the following Wednesday; when Abel Smith, by Knights's directions, turned it all out of the sacks again on to the heap from which it was taken, so as to be undistinguishable from the rest of the heap.

On Thursday, 25th September, in consequence of information which the plaintiff had received, he went himself to Ipswich, and saw Knights at his own house. He remonstrated with him for not sending the barley; and after some conversation, Knights stated that he was sorry to say he was in trouble, and had a notice of bankruptcy served upon him. On 29th September, Knights filed a petition for arrangement under the 211th section of the Bankrupt Law Consolidation Act, 1849. And at the first sitting which was held in the matter of that petition, on the 4th November following, Knights was adjudicated a bankrupt; and the defendant was then named and made the official assignee of his estate and effects.

On 18th November this action was commenced, the plaintiff having previously demanded the barley of the defendant, and tendered to him the difference between the price of the barley and the price of the bullocks.

The barley remained at Knights' granary until Christmas, when it was removed.

Bittleston, for the plaintiff.

Prentice, contra.

LORD CAMPBELL, C. J. In cases of this sort there often is great doubt and great difficulty; but the present case seems to me on both points free from all doubt and difficulty. I think that no portion of what remained in bulk ever vested in the plaintiff. We cannot tell what part of that is to vest. No rule of the law of vendor and purchaser is more clear than this: that, until the appropriation and separation of a particular quantity, or signification of assent to the particular quantity, the property is not transferred. Therefore, except as to what was put into the 155 sacks, there must be judgment for the defendant. It is equally clear that, as to what was put into those sacks, there must be judgment for the plaintiff. Looking to all that was done, when the bankrupt put the barley into the sacks, *eo instanti* the property in each sackful vested in the plaintiff. I consider that here was *a priori* an assent by the plaintiff. He had inspected and approved of the barley in bulk. He sent his sacks to be filled out of that bulk. There can be no doubt of his assent to the appropriation of such bulk as should have been put into the sacks. There was also evidence of his subsequent appropriation by his order that it should be sent on. There remained nothing to be done by the vendor, who had appropriated a part by the direction of the vendee. It is the same as if boxes had been filled and sent on by the bankrupt, in which case it cannot be disputed that the property would pass; and it can make no difference that the plaintiff ordered the sacks to be forwarded by the vendor. As to the question of conversion, the property being in the plaintiff, he has done nothing to divest himself of it. It is not like the case of confusion of goods, where the owner of such articles as oil or wine mixes them with similar articles belonging to another. That is a wrongful act by the owner, for which he is punished by losing his property. Here the plaintiff has done nothing wrong. It was wrong of the bankrupt to mix what had been put into the sacks with the rest of the barley; but no wrong has been done by the plaintiff. That being so, the plaintiff's property comes into the hands of the defendant as the bankrupt's assignee. If the defendant had a

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lien, he does not detain the barley on that ground. He denies the plaintiff's property altogether, and cannot therefore claim a lien. He claims all the barley, and claims all of it as being the property of the bankrupt. He therefore has converted the plaintiff's property.

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COLERIDGE, J. I am of the same opinion. I think the property in that portion which was put into the plaintiff's sacks passed to the plaintiff. That portion was subtracted by the vendor from the bulk, in part performance of the contract; and there is abundant evidence of appropriation, as far as the bankrupt could appropriate. There is also abundant evidence of assent by the plaintiff. He had before assented to the quality of the bulk; and, after the portion was put into the sacks, he desired that they should be sent to him. There is thus evidence of the completion of the act of appropriation. Atkinson *v.* Bell, 8 B. & C. ?? ?? 277, is a very different case. There the goods were in the course of being made; and many alterations had taken place; and the purchaser had never done any act by which he adopted the particular thing made. Here is a complete appropriation. As to the conversion, nothing that either the bankrupt or the assignee could do without the plaintiff's consent could divest the plaintiff's property; and the removal is abundant proof of the conversion.

ERLE, J. I also am clearly of opinion that the property in what was put into the sacks passed to the plaintiff. It is clear that, where there is an agreement for the sale and purchase of a particular chattel, the 1. case chattel passes at once. If the thing sold is not ascertained, and something is to be done before it is ascertained, it does not pass till it is 2nd case. ascertained. Sometimes the right of ascertainment rests with the vendee, sometimes solely with the vendor. || Here it is vested in the vendor only, the bankrupt. When he had done the outward act which showed which part was to be the vendee's property, his election was made and the property passed. That might be shown by sending the goods by the railway; and in such case the property would not pass till the goods were despatched. But it might also be shown by other acts. Here was an ascertained bulk, of which the plaintiff agreed to buy about half. It was left to the bankrupt to decide what portion should be delivered under that contract. As soon as he does that, his election has been indicated; the decisive act was putting the portion into the sacks. If it were necessary to rest the decision on the assent of the vendee in addition to this, I am of opinion that there is abundant evidence of such assent; for the vendee demanded, over and over again, the portion which had been put into the sacks. I think Mr. Blackburn has expressed the law with great clearness and accuracy. He first takes the case where one party appropriates and the other assents, and then the case where, by virtue of the original agreement, the authority to appropriate is in one party only. As to the question of conversion, I am of opinion, on the grounds which have already been stated, that the assignee has converted the plaintiff's property.

CROMPTON, J. As to the first point, respecting the part not put into the sacks, I never felt any doubt. As to the second point, I do not feel so clear as the other members of the court, though I do not say that I disagree with them. It is suggested that the plaintiff said to the bankrupt, in effect, I will buy what you will put into the sacks. After that was done, I much doubt whether the bankrupt could meddle with the sacks and turn out what had been put in. It may be that the bargain was as my lord and my brother Erle put it, that the plaintiff would take what the vendor should put in. On that view, when the barley was put into the sacks it was just as if it had been sent by a carrier. Also I agree that, if the plaintiff sent for the barley after it was in the sacks, that would be an assent to the appropriation. But I doubt whether, as the case is stated, it is quite clear that the plaintiff knew that the barley had been put into the sacks: if he did, there was clear evidence of assent. Then it is argued, on behalf of the defendant, that the contract was entire, and that either all or none of the barley must pass. I do not agree to that. There was an appropriation of so much; and so much passed. As to the conversion, the law is, beyond question, as my lord puts it; a prior conversion does not prevent a subsequent conversion. The true owner may waive the first conversion. Is is difficult to say what the assignee was to do. But I think that, if he removes all, it is a conversion of the part which belongs to the plaintiff: if he sells all, an action for money had and received may be brought in respect of that part. I think, therefore, that, as he has removed all, he has been guilty of a conversion.

Judgment for plaintiff as to the part put into the sacks: as to the residue, judgment for defendant.

ELIZABETH LANGTON *v.* HIGGINS.

IN THE EXCHEQUER, MAY 5, 1859.

[*Reported in* 4 *Hurlstone & Norman,* 402.]

THE first count of the declaration was in detinue for cases and bottles of oil of peppermint. The second count was in trover for the same goods.

Pleas. — First: not guilty. Secondly: that the goods were not, nor were any or either of them, the plaintiff's, as alleged.

At the trial before Martin, B., at the London sittings after last Hilary term, the following facts appeared: The plaintiff was a wholesale druggist in London, and the defendant was a wholesale druggist at Liverpool. For many years past the plaintiff had been in the habit of contracting with one Carter, a farmer at Leverington in Cambridgeshire, for the purchase of all the oil of peppermint to be distilled from the crop of peppermint which might be grown on his farm in that

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year. The contracts were made in the early part of the year, and Carter obtained from the plaintiff advances in respect of them. On the 27th January, 1858, the plaintiff and Carter entered into the following agreement: —

LONDON, Jan. 27, 1858.

The undersigned, Frederick Carter of Leverington, agrees to sell to Messrs. William Langton & Co., of London, the whole of his crop of oil of peppermint grown in the year 1858, at the rate of 21*s.* per lb.

But should the said crop amount to 250 bottles of oil, he agrees to deduct 6*d.* per lb. from the said 21*s.*, and above that quantity 1*s.* per lb., provided the Messrs. Langton find the said 21*s.* per lb. is more than they can reasonably afford.

This agreement is made upon the condition that Messrs. Langton & Co. advance the said Frederick Carter £1,000 on account of the above-named crop, and pay the amount due at time of delivery by two, four, and six months' bills.

FRED. CARTER.

Previously to this agreement advances had been made by the plaintiff to Carter, to the extent of £310, and on the day the agreement was signed Carter gave to the plaintiff a bill of sale of his live and dead stock, crop of oil of peppermint, crops of corn, furniture, &c., as a security for the £310, and further advances to the extent of £1,000. It was usual for the plaintiff to send to Carter bottles to be filled with the oil of peppermint, and, in September, Carter applied for the bottles and some gut-skin to cover them. The plaintiff accordingly sent him two gross of bottles with gut-skin. On the 8th of October, Carter wrote to the plaintiff, "We shall lose no time in getting the oil off." It was the business of Mrs. Carter to put the oil of peppermint in the bottles, which, as on previous occasions, she did in the following manner: She first weighed the empty bottles and then filled them with the oil. She then weighed them again, having previously marked the tare and weight of each bottle on a piece of paper pasted on it. She then marked the gross weight of the oil and the bottle, and added them together on the same paper. She then subtracted the tare, and placed the net weight and the number of the bottle upon the paper, and laid the bottle aside. After the bottles were filled, by Carter's direction, she made out invoices and address cards, which she placed in Carter's desk. She was engaged in these operations about nine days, and finished on the 29th of September. On all previous occasions, the bottles, when filled, were placed in cases and delivered to a carrier to take to the railway station, to be forwarded to the plaintiff in London. Carter left his home on the 15th of October, and has not since been heard of. The defendant purchased of Carter fifteen cases of the oil of peppermint, nine of which were delivered to him at Liverpool on the 16th of September, and the others on the 23d.

It was submitted on behalf of the defendant that under these circumstances the property in the oil of peppermint did not vest in the plaintiff. The learned judge directed a verdict for the plaintiff for £626 15*s.*, reserving leave to the defendant to move to enter a nonsuit, or to reduce the amount to the value of the bottles.

Atherton and *Quain* showed cause.

Edward James and *Leofric Temple*, in support of the rule.

Bramwell, B. I am also of opinion that the rule ought to be discharged. The contract is to sell the whole of the vendor's crop of oil of peppermint grown in a certain year. I do not think that when the oil was made the property passed, — possibly there may have been an *obligatio certi corporis ;* but it appears to me that when the oil was put into the plaintiff's bottles the property in it vested in her. I do not dissent from what was said by my brother Martin with respect to the delivery to a carrier. It may be that the vendor would be bound to show some act of delivery before he could sue for the price ; but, however that may be, I am of opinion that the property vested in the plaintiff when the oil was put into her bottles. Looking at the principle, there ought to be no doubt. A person agrees to buy a certain article, and sends his bottles to the seller to put the article into. The seller puts the article into the buyer's bottles ; then is there any rule to say that the property does not pass? The buyer in effect says, "I will trust you to deliver into my bottles, and by that means to appropriate to me, the article which I have bought of you." On the other hand the seller must be taken to say, "You have sent your bottles, and I will put the article in them for you." In all reason, when a vendee sends his ship, or cart, or cask, or bottle to the vendor, and he puts the article sold into it, that is a delivery to the vendee. If we could suppose the case of a metal vessel filled with a commodity which rendered the vessel useless for subsequent purposes, it would be monstrous if the vendor could say, "I have destroyed your vessel by putting into it the article you purchased, but still the property in the article never passed to you." Or suppose a vendor was to deliver a ton of coals into the vendee's cellar, could he say, "I have put the coals in your cellar, but I have a right to take them away again"? But independently of reason, there is an authority on the subject. In Blackburn on Contracts, it is said that the property does not pass unless there is an intention to pass it, and various cases are cited in support of that position. It is then said, p. 151, that two rules have been laid down on the subject. The first is, "that where by the agreement the vendor is to do anything to the goods, for the purpose of putting them into that state in which the purchaser is to be bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of those things shall (in the absence of circumstances indicating a contrary intention) be taken to be a condition precedent to the vesting of the property." The second rule is, "that where anything remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of those things also shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they ought to be accepted." That is not only good law, but good sense. Then can there be more complete evidence of intention to pass the property than when the vendee sends her bottles to be filled with the article purchased, and the vendor puts it into the bottles? Therefore, both upon principle and authority, I think that the property in the oil passed to the plaintiff when it was put into the bottles. The case of Aldridge *v.* Johnson, 7 E. & B. 885, is precisely in point. Lord Campbell, C. J., there said: "Looking to all that was done when the bankrupt (the vendor) put the barley in the sacks, *eo instanti* the property in each sackful passed to the plaintiff." It is true that in the Law Journal, Erle, J., is reported to have said that the outward act indicating the vendor's intention was by filling the sacks "and directing them to be sent to the railway." But Crompton, J., who doubted upon another point, said that "when the barley was put into the sacks, it was just as if it had been sent by a carrier." Therefore there is not only reason and general authority, but also the case of Aldridge *v.* Johnson, to warrant our judgment. The only difficulty I had was this: Suppose the oil of peppermint had been badly manufactured, I am not prepared to assent to the argument that the plaintiff would not have had a power of rejection. Again, suppose only a portion of the oil had been put into the bottles, inasmuch as the plaintiff was not bound to take a part only, would the property vest? Aldridge *v.* Johnson is an authority on that point. It may be that the plaintiff would have the option of refusing to take a part only of the oil or of accepting it, but that right is not inconsistent with the property vesting at his election. It might vest in him conclusively, but at all events it would vest when he exercised his option. For these reasons, I think that the rule ought to be discharged. *Rule discharged.*[1]

CAMPBELL *v.* THE MERSEY DOCKS AND HARBOR BOARD.

IN THE COMMON PLEAS, APRIL 21, 1863.

[*Reported in* 14 *Common Bench Reports, New Series,* 412.]

THIS was an action brought by the plaintiff to recover the value of 250 bales of Surat cotton alleged to be the property of the plaintiff, and to have been converted by the defendants under the following circumstances: —

A cargo of cotton *ex* "Bosphorus," consisting of 500 bales, arrived in one of the company's docks early in September, 1862. The plaintiff was the broker for the goods, and had himself bought 250 bales, and had sold the rest to other parties. The landing commenced on the 8th, and was continued on the 9th and 10th, when the whole were landed. All had one mark, but no numbers; the numbers being affixed by the company's officers at the time of landing and weighing. The course of business was, for the broker to take a sample from each bale, and to submit the samples to the inspection of two indifferent brokers, and on their fiat the contracts were affirmed or disaffirmed. On the present occasion the contracts were affirmed. On the 13th of September, a warrant, or certificate of warehouseing, pursuant to the 228th section of the company's act (20 & 21 Vict. c. 162), was sent to the plaintiff for 250 bales described as being numbered from 1 to 250, and as "entered by J. P. Campbell on the 10th of September, 1862; rent payable from the 15th of September." The plaintiff thereupon paid for the 250 bales getting the warrant indorsed to him, with a delivery order "for the above-mentioned goods," dated the 15th of September. On the 7th of October, the plaintiff resold the cotton, and sent the warrant, indorsed, with a delivery order for the cotton therein mentioned. The buyer repudiated the contract, on the ground that the cotton did not correspond with the samples; and then, upon the plaintiff demanding back the warrant, the company's officers for the first time informed him that 200 of the bales numbered 1 to 250 had been inadvertently delivered on the 11th and 13th of September to other persons, and they offered him a fresh warrant for other numbers. The plaintiff, however, declined to accept it, and brought this action.

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[1] POLLOCK, C. B., and MARTIN, B., delivered concurring opinions.

At the trial, before Keating, J., at the last assizes at Liverpool, it was insisted on the part of the plaintiff that the bales mentioned in the warrant were so ear-marked and appropriated to him by the act of the company as to vest the property in him as from the 10th of September.

On the other hand, it was submitted that the mere act of appropriation by the company of 250 out of a larger number of bales was not sufficient to vest the property in the specific bales in the plaintiff without an assent to such appropriation on his part.

To this latter argument the learned judge inclined, and he directed the jury accordingly.

One of the jury asked his lordship whether the indorsement of the warrant by the plaintiff did not amount to an assent on his part to the appropriation. The learned judge said it was not conclusive; but that it was open to the company to show that the appropriation was a mistake on the part of one of their clerks.

A verdict having been found for the defendants,

Edward James, Q. C. (with whom was *J. A. Russell*), moved for a new trial.

Erle, C. J. I am of opinion that there should be no rule in this case. This was an action for the alleged conversion by the defendants of 250 bales of cotton out of a cargo consisting of 500 bales; and the question is whether or not the property in those 250 bales ever vested in the plaintiff. For the affirmative of that proposition, the plaintiff relies on a delivery order from the vendors and the fact that the defendants by their warrant, or certificate of warehousing, had specifically appropriated to him the bales *ex* "Bosphorus" numbered from 1 to 250. If there was no appropriation by the company to the plaintiff of the specific numbers, his case entirely fails. There certainly was some evidence of appropriation; and the question left to the jury upon that was, whether the evidence of that appropriation did not arise from a mistake on the part of the company's clerk. The learned judge is not dissatisfied with the finding of the jury upon that question. Then it is said that the learned judge misdirected the jury in telling them that the mere act of appropriation by the company would not vest the property in the plaintiff, unless he had assented to that appropriation. If there was no appropriation, this point becomes immaterial. But if it be material, I venture to say that the law as laid down by the learned judge was well laid down. It has been established by a long series of cases, — of which it will be enough to refer to Hanson *v.* Meyer, 6 East, 614; Rugg *v.* Minett, 11 East, 210; and Rohde *v.* Thwaites, 6 B. & C. 388, 9 D. & R. 293, — that the purchaser of an unascertained portion of a larger bulk acquires no property in any part until there has been a separation and an appropriation assented to both by vendor and vendee. Nothing passes until there is an assent, express or implied, on the part of the vendee. The warehouseman may, in some cases, be the agent of the vendee for the purpose of such assent; but nothing passes until there has been a separation and an appropriation assented to.

WILLES, J. I am entirely of the same opinion. The real question was, whether the appropriation of numbers 1 to 250 was not a mistake. The jury found in substance that it was. No property in the goods therefore ever vested in the plaintiff. Mr. James complains of the alternative which was put, — assuming that there was an appropriation, was that appropriation assented to by the plaintiff? The cases to which my lord has referred show what the law on the subject is. And perhaps the case of Godts *v.* Rose, 17 C. B. 229, is even more in point to show that there must not only be an appropriation, but an appropriation assented to by the vendee. The assent of the vendee may be given prior to the appropriation by the vendor; it may be either express or implied; and it may be given by an agent of the party, — by the warehouseman or wharfinger, for instance. In stating the proposition as he did, I think my brother Keating stated a proposition which is in strict accordance with law.

BYLES, J., concurred. *Rule refused.*[1]

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[1] In the report of this case in 8 Law Times, N. S. 845, the following additional fact appears: "It was said to be the practice at Liverpool, that after the bales are numbered the first purchaser takes those which are first discharged from the ship, and consequently marked with the lowest numbers."

YOUNG AND ANOTHER v. MATTHEWS.

IN THE COMMON PLEAS, NOVEMBER 3, 1866.

[*Reported in Law Reports, 2 Common Pleas,* 127.]

TROVER for bricks.

Pleas, not guilty and not possessed.

This case was tried before Erle, C. J., at the sittings for London after last Trinity term, when the following facts were proved: —

The plaintiffs were the assignees of Moxon, a bankrupt. Moxon was a builder and brickmaker, and in the early part of 1865 had drawn several bills of exchange on one Northen, who had accepted them for his accommodation. When the bills became due Moxon was unable to pay them, and agreed to sell Northen 1,300,000 bricks, and an invoice of them was made out to him.

Northen sent an agent to the brickfield with an order from Moxon for the delivery of the bricks, and Moxon's foreman then stated that the ecclesiastical commissioners, who were the owners of the field, had put in a distress for rent, but that if the man in possession were paid out, he should be ready to deliver the bricks, and he pointed out three clumps from which he should make the delivery, of which one consisted of finished bricks, a second was still burning, and the third consisted of bricks which had been moulded, but not burnt. Northen's agent then said, "Do I clearly understand that you are prepared, and will hold and deliver this said quantity of bricks?" and Moxon's foreman said, "Yes." Subsequently on November 24, 1865, Moxon became bankrupt, and the ecclesiastical commissioners then sold, under the distress, sufficient bricks to cover the rent, and Northen afterwards sold the remainder to the defendant, who removed them from the field.

A verdict was found for the defendant, and leave was reserved to the plaintiffs to move to enter the verdict for them, on the ground that there was no such appropriation of the goods as to pass the property in them under the contract of sale.

ERLE, C. J. I am of opinion that there should be no rule in this case. The question is, whether the property in the bricks passed to Northen or not, and in determining this we are to look at the intention of the parties. It is very material that Northen had made large advances to Moxon, and when the latter became embarrassed he might well wish to have all he could appropriated to him. The well-known general rule, that the property does not pass to the buyer while anything remains to be done by the seller, either to complete the goods or to ascertain the price, does not, therefore, apply to the present case. There is no doubt that the parties could pass the property in all the bricks, whether finished or not, if such was their intention; and what passed amounted to this: Northen's agent said, "Are all these appropriated to my principal?" and the seller's agent said, "Yes." Even if this were not so, it might be contended, on the authority of Langton v. Waring, 18 C. B. (N. S.) 315, that the defendant had an equitable right to the goods as a security for the price he had paid for them; and that the assignees, who must have an equitable as well as legal title, cannot therefore recover. Under the circumstances, however, it is unnecessary to decide this.

WILLES, J. I am of the same opinion.

BYLES, J. This is not like a sale of unascertained goods; the goods were ascertained and pointed out, though not finished; and it appears to have been the intention of the parties that the property in them should pass to Northen.

KEATING, J., concurred. *Rule refused.*[1]

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JENNER v. SMITH.

IN THE COMMON PLEAS, APRIL 30, 1869.

[*Reported in Law Reports, 4 Common Pleas, 270.*]

ACTION for goods bargained and sold and goods sold and delivered. Pleas: Never indebted, payment, and payment of 8*s.* 2*d.* into court. Replication, taking issue, and damages *ultra*.

The cause was tried before Brett, J., at the sittings at Westminster after last Michaelmas term. The facts were as follows: On the 14th of October, 1867, the plaintiff, who is a hop-merchant in London, met the defendant, a maltster of Devizes, at Weyhill Fair, Hants. The defendant wished to buy of the plaintiff four pockets of Carpenter's Sussex hops which the plaintiff had there; but, as the plaintiff had already sold two of them, he proposed to sell the defendant in lieu of them two pockets of Thorpe's, of which he showed him a sample, offering to let the defendant have the two pockets of Carpenter's at £9 per cwt. (the price of that day's fair being £9 9*s.*), if he would take two pockets of Thorpe's at £7 15*s.* per cwt. The plaintiff at the same time or shortly after informed the defendant that the last-mentioned two pockets were lying at Prid & Son's warehouse, Kentish Buildings, Southwark, and agreed that he should have them upon the same terms as if they had been in bulk at the fair, — that is, that he should be at no expense for warehousing or carriage. The defendant consented to purchase the four pockets upon these terms, and took away with him the two pockets of Carpenter's, but requested that the two pockets of Thorpe's should not be sent until he wrote for them.

The plaintiff had at this time three pockets of Thorpe's hops at the warehouse of Prid & Son. On the 21st of October, the plaintiff's son

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[1] It is a fair inference from the facts stated in the report of this case in 36 L. J. C. P. 61, that all the bricks in the three clumps were less than the number called for by the contract.

f any of these [illegible], then buyer could not reject if goods
up to sample; or sufficient in weight. Here buyer did

went to the warehouse, and instructed the warehouseman to set apart two of the three pockets of Thorpe's for the defendant; and the warehouseman thereupon placed on two of them, numbered respectively one and three, what is called a "wait order card," — that is, a card upon which was written, "To wait orders," and the name of the vendee. No alteration, however, was made in the warehouse books; and the plaintiff, the original depositor, still remained liable for the rent.

On the 4th of November, the plaintiff sent the defendant an invoice as follows, at the same time inclosing a draft for acceptance: —

Mr. S. SMITH, Bought of CHARLES JENNER,

2 pockets Sussex hops (Carpenter, 1867),
No. 2 . . . 1 cwt. 2 qrs. 26 lbs.
4 . . . 1 cwt. 2 qrs. 13 lbs.
3 cwt. 1 qr. 11 lbs. @ £9 per cwt. £30 2*s.* 8*d.*

2 pockets Sussex hops (Thorpe, 1867),
No. 1 . . . 1 cwt. 2 qrs. 27 lbs.
3 . . . 1 cwt. 0 qr. 21 lbs.
2 cwt. 3 qrs. 20 lbs. @ £7 15*s.* per cwt. £22 13*s.* 10*d.*
£52 16*s.* 6*d.*

The two last pockets of hops are lying to your order.

On the 8th of November the defendant wrote to the plaintiff as follows: —

SIR, — I have returned your bill unsigned; but, as I have never received the two pockets of hops or heard anything about them, I concluded you had not thought of sending them, and have made an exchange for some malt, and shall not require them. As I will never sign a bill, I will pay, as was agreed, in February, the weight of the two Carpenter's.

The defendant subsequently paid the price of the two pockets which he had received, all but a small balance which was covered by the payment into court.

It was objected on the part of the defendant that, as to the two pockets of Thorpe's hops, there was no contract binding within the Statute of Frauds, no delivery or acceptance, or part payment, and no evidence of goods bargained and sold.

For the plaintiff it was insisted that the whole was one bargain, and consequently that there had been a part delivery and part payment, and that the property in the whole four pockets passed by the contract.

The learned judge ruled that it was one entire contract, and that, therefore, there had been a part delivery so as to make a contract binding within the Statute of Frauds; that the plaintiff could not rely upon the part payment, because the defendant, at the time of making the payment, repudiated the bargain as to the two pockets in question; that, though there was a binding contract, the property did not pass thereby, inasmuch as the contract was to deliver two out of a larger number of pockets of Thorpe's hops equal to sample, the price to be determined according to the weight; and that there had been no sufficient appropriation afterwards to pass the property, because Prid & Son never bound themselves to hold for the defendant instead of for the plaintiff. He thereupon nonsuited the plaintiff, reserving him leave to move to enter a verdict for £22 13*s.* 10*d.*, the court to draw inferences of fact.

H. T. Cole, Q. C., and *Bromley* showed cause.

Morgan Lloyd, in support of the rule.

KEATING, J. I am of opinion that this rule should be discharged. The action is brought to recover the price of two pockets of hops as sold and delivered and bargained and sold. It appears that the parties met in October, 1867, at Weyhill Fair, and that it was orally agreed between them that the defendant should purchase of the plaintiff two pockets of Carpenter's Sussex hops, which were then in the fair, and had been inspected by the defendant, at £9 per cwt., and also two pockets of Thorpe's hops, of which a sample was shown, at £7 15*s.* per cwt. After the purchase had been agreed on, the defendant was informed that the latter were lying in a warehouse in London, and he requested that they might be left there until he sent word that he was ready to receive them. On the 4th of November the plaintiff sent an invoice describing the numbers, weight, and price of the four pockets, with an intimation that the two pockets of Thorpe's were lying at the warehouse to the defendant's orders. The plaintiff had three pockets of Thorpe's hops at the warehouse; and he had in the mean time gone to the warehouse and directed the warehouse-keeper to put certain marks upon two of them, to indicate that they were sold and were to wait the orders of the purchaser. No alteration, however, was made in the books of the warehouse-keeper; nor was any intimation of this appropriation of the two pockets given to the defendant until the 4th of November, when the invoice was forwarded to him. The defendant declined to accept the two pockets. At the trial various objections were urged. It was said, amongst other things, that there was no contract as to the two pockets of Thorpe's hops to bind the defendant within § 17 of the Statute of Frauds; that the contracts for the purchase of the two pockets of Carpenter's hops and for the two pockets of Thorpe's were distinct contracts; and that, consequently, there had been no delivery or part-payment to take the case out of the statute. My brother Brett ruled that the contract was entire, and the objection founded upon the Statute of Frauds was thus got rid of. Then came the question whether the count for goods sold and delivered or goods bargained and sold could be maintained, the property in the goods not having passed. Upon this my brother Brett nonsuited the plaintiff but gave leave to move to enter a verdict for the plaintiff for the price of the two pockets in dispute, reserving power to the court to draw such inferences as a jury might draw. The question before us, therefore, is, whether, upon the facts proved, we can see that the property in the hops passed to the defendant so as to make him liable in this action. The general rule of law was not contested on the part of the plaintiff, that, where an article (not specific) is sold, but something remains to be done by the vendor before it is despatched to the vendee, no property passes by the contract of sale. It was contended on the part of the defendant that much remained to be done before the property could pass, — that, the hops having been sold by sample, they would require to be inspected, and to be weighed, in order to ascertain the price. On the other hand, it was urged that, though that may be so as a general rule, Aldridge *v.* Johnson, 7 E. & B. 885, 26 L. J. (Q. B.) 296, and other cases, show that, if it appears from the contract that the vendee has made the vendor his agent for the purpose of weighing and doing all the other acts necessary to be done to pass the property, the property in the goods will pass so soon as those acts are done. It is, however, observable that in Aldridge *v.* Johnson the bulk of the barley had been inspected and approved, and all that remained to be done was to sever and measure the portion to be appropriated to the vendee; and that the vendor had filled a number of sacks which had been sent by the vendee, thereby measuring it. The barley which was to be appropriated to the fulfilment of the contract was therefore severed from the bulk and measured with the assent of both parties. There could be no doubt that the property in the barley so dealt with passed. Mr. Lloyd sought to bring the present case within that by saying that a similar extensive authority was conferred by the defendant on the plaintiff in this case. I cannot draw any such inference from the facts proved here; on the contrary, I think they negative it. I cannot suppose that the defendant meant to part with the right of objecting to the correspondence of the hops with the sample, or of insisting on the weight being ascertained, before the property passed. It is true, there was an intimation to the warehouse-keeper that the two pockets numbered one and three had been sold to the defendant; but no transfer was made in his books, and he still held them at the charge and at the risk of the vendor. I think it is impossible for the court to draw the inference that an authority such as was given in Aldridge *v.* Johnson, 7 E. & B. 885, 26 L. J. (Q. B.) 296, was given here; and if no such authority was given, the case is brought within the multitude of authorities in which it has been held that, where there is a sale of unascertained goods with reference to which something remains to be done by the vendor before delivery to the vendee, no property passes until that has been done.

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Brett, J. At the trial I proposed to nonsuit the plaintiff, on the ground that there was no evidence to go to the jury in support of the count for goods bargained and sold. It was not then suggested that there was any authority from the defendant to the plaintiff to select the two pockets for him. If it had been, I should not have nonsuited the plaintiff, but would have left that question to the jury. The question now is, not whether there was any evidence for the jury, but whether the court can infer from the facts proved that the property in the two pockets of Thorpe's passed. It is clear that no property passed by the contract itself. The contract was for a sale by sample of unascertained hops, the price depending on the weight. Then comes the case put by my brother Blackburn in the passage at p. 127, to which I referred in the course of the argument. Here there was no previous authority given to the plaintiff to appropriate; and, if not, what evidence was there to show that the appropriation of the two pockets in Prid & Son's warehouse was ever assented to by the defendant? The defendant's assent might have been given in either of two ways, — by himself, or by an authorized agent. By himself, after the receipt of the letter containing the invoice; or by the warehouse-keepers, if there had been any evidence of agency or authority in them to accept, and assent by them to hold the hops for him. I think the defendant's letter refusing to accept the draft was strong, if not conclusive, to show that there had been no such assent by the defendant. And, as to Prid & Son, the evidence fails on both points. They never agreed to hold the two pockets on behalf of the purchaser; and, if they did, there is no evidence of any authority from him that they might do so. Mr. Lloyd has strongly put forward a point which was not made at the trial, viz., that there was evidence that, by agreement between the parties, the purchaser gave authority to the seller to select the two pockets for him. If he did so, he gave up his power to object to the weighing and to the goods not corresponding with the sample; for he could not give such authority and reserve his right so to object; and indeed it has not been contended that he gave up those rights. That seems to me to be conclusive to show that the defendant never gave the plaintiff authority to make the selection so as to bind him. Under the circumstances, therefore, it is impossible to say that the property passed; consequently the plaintiff cannot recover as for goods bargained and sold.

Rule discharged.

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ANDERSON v. MORICE.

IN THE EXCHEQUER CHAMBER, JUNE 26, 1875.

[*Reported in Law Reports*, 10 *Common Pleas*, 609.]

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THE judgment of Blackburn and Lush, JJ., was delivered by BLACKBURN, J. In this case the defendant is an underwriter for £100 on a policy in the ordinary form of a Lombard Street policy "at and from Rangoon to any port or place of discharge in the United Kingdom or Continent," on the ship "Sunbeam."

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The subject-matter of the insurance is described as "£5,500 (part of £6,000) on rice as interest may appear. Amount of invoice and 15 per cent to be deemed the value; average payable on every 500 bags."

The policy contained the usual printed words, "Beginning the adventure upon the said goods and merchandises from the loading thereof on board the said ship." The "Sunbeam," at Rangoon, foundered at anchor with 8,878 bags of rice on board. And this rice was totally lost. . . .

The first question, then, to be determined is, whether the plaintiff was so situated with respect to the rice in question at the time of its loss that he would, if uninsured, have suffered any loss from the destruction of the rice; and, if any loss, whether that loss was of such a nature as to be included in this policy.

The facts which are material as to this are not in dispute. The plaintiff, Anderson, had made a contract with Messrs. Borrodale, contained in a bought note set out in the 6th paragraph of the case. The material parts are these: "Bought the cargo of rice per 'Sunbeam' at 9*s.* 1½*d.* per cwt. cost and freight. Payment by sellers' draft on purchasers at six months' sight, with documents attached."

The "Sunbeam," which had been taken up by Guben, Christian, & Co., the sellers of the cargo to Borrodale & Co., arrived at Rangoon within the time mentioned in the contract, and Guben, Christian, & Co. proceeded to put the rice on board. They had, by the 31st of March, when the ship was lost, put 8,878 bags on board; but this was only a portion of what they intended to ship. The remainder — it does not distinctly appear whether 400 bags or 1,600 bags, but, at all events, a substantial portion of what they intended to be the lading of the "Sunbeam" — was in lighters or on the shore, intended for the "Sunbeam," but not yet on board of her.

The time for preparing the shipping documents had not yet arrived; and by the terms of the bought note, Anderson was to pay by accepting drafts with documents attached.

The question therefore arises, what loss, if any, did Anderson sustain by the perishing of this rice at this time? It was admitted by Mr. Williams in the argument, and, as we think, could not be disputed, that if the rice intended for the "Sunbeam," and put on board the lighter, had perished before it was put on board, Anderson would have sustained no loss, his vendors being still bound, as before, to supply him with rice, though that which they had intended to give him had perished to their loss, not his, because it was then at their risk, not his.

It was not admitted by Mr. Butt, but was very faintly denied, that as soon as the intended lading was completed, and the shipping documents were either prepared, or things in such a position that they could be prepared, Anderson would have been bound to pay for the cargo, though from subsequent disaster it perished either at Rangoon or on its way home. We all think it is the plain intention of the parties to this contract that, from the time the lading was complete, at least, the rice was to be at the risk of Anderson, and that it is not material to consider whether he would have had the full property before the drafts were accepted. But there remains the disputed question whether each separate bag was at the risk of Anderson from the time it was put on board the "Sunbeam," or whether it remained at the risk of the sellers until the whole intended loading was complete, and the shipping documents were ready, or at least everything was done to enable them to make out the shipping documents. This, we think, depends entirely on the intention of the parties to the contract, as appearing from it.

There is nothing to prevent the parties from agreeing that, as the goods are shipped bag by bag, each bag shall be at the risk of Anderson, though the payment is postponed till the whole is on board; and if they have sufficiently expressed such an intention, then Castle *v.* Playford, Law Rep. 7 Ex. 98, is an express authority in this court that Anderson must bear the loss, though it occurred before the stipulated time for payment had arrived. In that case the words of the contract were express, and left no doubt that the intention was that the buyer was to bear the risk; but we think the same result follows if the intention sufficiently appears, though it is not in express terms.

On the other hand, Appleby *v.* Myers, Law Rep. 2 C. P. 651, is an express authority that, if from the contract it appears that the intention of the parties is that the payment is to be only on the completion, nothing can be recovered, though that completion is prevented by an accident for which neither party is to blame. Both decisions are binding on us, even if we disapproved of them; but we agree with both.

In the present case there is nothing in the terms of the contract to indicate that the parties had present to their minds the possibility of a loss happening at the time when this did, and consequently there are no words used expressly providing for it. We must collect the intention from the words used, applying to them the general rules which the courts have from time to time adopted, as rules to enable them to ascertain the intention.

The cases bearing on this subject are collected in Mr. Benjamin's book on Sales, B. 2, chaps. 2 to 6. In Gilmour *v.* Supple, 11 Moo. P. C. 551, 566, Sir C. Cresswell, delivering the judgment of the Privy Council, says, we think very truly: "It is impossible to examine the decisions on this subject without being struck by the ingenuity with which sellers have contended that the property in goods contracted for had or had not become vested in the buyers, according as it suited their interest; and buyers, or their representatives, have, with equal ingenuity, endeavored to show that they had or had not acquired the property in that for which they had contracted, and judges have not unnaturally appeared anxious to find reasons for giving a judgment which seemed to them most consistent with natural justice. Under such circumstances, it cannot occasion much surprise if some of the numerous reported decisions have been made to depend upon very nice and subtle distinctions, and if some of them should not appear altogether reconcilable with each other. Nevertheless, we think that in all of them certain rules and principles have been recognized, by the application of which to this case we may be enabled to arrive at a correct judgment upon it." One of these rules is thus stated in Blackburn on Sales, p. 151 (see Benjamin on Sales, p. 235): "The first is, that where by the agreement the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of these things shall (in the absence of circumstances indicating a contrary intention) be taken to be a condition precedent to the vesting of the property." This is in effect repeated in the judgment in Gilmour *v.* Supple, 11 Moo. P. C., at p. 568, and is, we think, consistent with all the cases.

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Now, the completing the lading so that shipping documents could be made out seems to us a thing to be done by the vendor for the purpose of putting the goods into a deliverable state, or, to substitute the language of Sir C. Cresswell, an act to be done by the seller for the benefit of the buyer, to place the goods in a state to be delivered; and, therefore, "until he has done it the property does not pass."

But we agree that this is only a *prima facie* indication of the intention, and that it must yield to anything sufficiently indicating a contrary intention. We must, therefore, look to the contract to see if there are any indications of a contrary intention in this case.

It may be observed that risk and property generally go together, and consequently in many of the cases, though the important point was, at whose risk is the thing, it is treated as if the sole question was, whose property is it? In the present case, however, the real question is, at whose risk was it? and we do not, therefore, attach any weight to the stipulation that the seller was to attach the shipping documents to the drafts, thereby certainly preserving to the sellers a lien on the goods till the drafts were accepted and the bill of lading handed over, and perhaps preserving in them, till then, the property, so as to enable them to confer a title on a purchaser for value without notice as good in equity, and preferable at law to that of Anderson. This would not prevent the risk from being on the purchaser from the time the loading was complete. Nor do we proceed on the ground that the word "cargo" has any technical sense requiring that the whole ship should be filled up. But we do proceed on the ground that the *prima facie* rule of construction is that the parties intended that the risk should become that of the buyer, Anderson, when, and not till, the whole lading was complete, so as to enable the shippers, by getting the shipping documents, to call on the buyer to accept and pay for the cargo; and that there is nothing in this contract to rebut the presumption that such was the intention. We do not think that the fact that the

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vessel was designated, and that, unless under exceptional circumstances, the seller could not, without the consent of the shipowner, take any goods once on board out of her, affects the question as between the vendor and purchaser.

The court below say that putting any rice on board the "Sunbeam" "was such an appropriation of the rice on board as to prevent the sellers from withdrawing that rice without the consent of the buyer."

If we could see anything in the contract to give the buyer a right to object, we should think it indicated an intention that the property so put on board should be at the buyer's risk; but we cannot find anything to that effect. If we could see anything to indicate an intention that as each bag was shipped it should be at the buyer's risk, we should think it indicated an intention that it should not be taken out without his consent. But we cannot reason in a circle.

We have, therefore, come to the conclusion that no part of this rice ever was at the plaintiff's risk, and that he never could have been called upon to pay for it, notwithstanding its loss.

Judgment reversed.[1]

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[1] BRAMWELL, B., delivered a concurring opinion for himself and POLLOCK and AMPHLETT, BB. On appeal to the House of Lords, the decision was affirmed, the Lords being equally divided in opinion.

In regard to the vessel in which the rice was shipped the following statements appear in the report of the decision in the Common Pleas: —

"The Sunbeam did not belong either to the sellers or the purchaser. She was chartered by the sellers' agents 'to proceed to Rangoon to ship and carry a cargo of rice to any port in the United Kingdom or Continent.'"

"It is true that the ship was to be taken up and the freight in the first place paid by the vendors. But the freight was specifically included in the price to be paid by the purchaser. He was in the end to pay the estimated cost of the hire of the ship." L. R. 10 C. P. 58, 63, 72.

Compare with Anderson *v.* Morice, Colonial Ins. Co. *v.* Adelaide Ins. Co., 12 A. C. 128; Rochester Oil Co. *v.* Hughey, 56 Pa. 322. In Colonial Ins. Co. *v.* Adelaide Ins. Co., Sir Barnes Peacock said: "In Anderson *v.* Morice . . . the cargo to be purchased was an entire thing, and was not in existence at the time when the contract was entered into, and would not be in existence until the whole cargo should be put on board. . . . The firm who agreed to sell the cargo of rice by the Sunbeam were themselves the charterers of that vessel, and were to receive freight for the carriage of the rice, such freight being included in the purchase money. In putting the rice on board the Sunbeam the sellers were not delivering it to Anderson, but were putting it on board a vessel of which they were the charterers, for the purpose of completing the cargo which they had agreed to sell. The master of the Sunbeam received it on their account and not on account of the purchasers. The purchasers' right was to depend on the shipping documents which were to be under the direction of the sellers."

DOWNER *v.* THOMPSON.

SUPREME COURT OF NEW YORK, OCTOBER TERM, 1841.

[*Reported in* 2 *Hill,* 137.]

ASSUMPSIT, tried at the Oneida circuit on the 8th of October, 1840, before Gridley, C. J. The declaration contained counts for goods bargained and sold, and also for goods sold and delivered. The facts appearing on the trial were as follows: —

The defendant, who resided at Hastings, Westchester County, on the 21st of August, 1838, addressed an order to the plaintiff, who resided at Chittenango, Madison County, for 250 barrels of cement, to be forwarded as soon as practicable. On the 4th of September following, the plaintiff shipped on board a canal-boat 260 barrels, which arrived at Hastings on the 17th of the same month, and were offered to the defendant. He objected, among other things, that there were more barrels than he had ordered, and finally refused to receive any of the cement. The boatmen having it in charge proceeded to New York, and there stored it.

The defendant's counsel insisted at the trial that the evidence did not sustain either the count for goods bargained and sold, or that for goods sold and delivered. He therefore moved for a nonsuit, which was granted, and the plaintiff excepted. The latter now moved for a new trial on a bill of exceptions.

W. McCall and *S. Beardsley*, for plaintiff.

C. P. Kirkland and *J. A. Spencer*, for defendant.

By the court, COWEN, J. The difficulty of the plaintiff lies in his not having numerically complied with the order, which was for 250, not 260 barrels. Had he shipped the 250 barrels, no doubt the property would have passed, and the count for goods sold and delivered been well sustained; because a delivery to the carrier for the account and risk of the consignee, is in law a delivery to the latter. Coxe *v.* Harden, 4 East, 211. But neither count was satisfied by the shipment or offer of the 250 barrels from among a larger number, the true amount being neither counted nor weighed out. The property yet remained to be specified before the defendant could know what to call his own; and it is entirely settled, that where any act yet remains to be done by the vendor, such as weighing, measuring, or counting out of a common parcel, no property passes. Short of this there is no sale, much less a delivery. Long on Sales, 267 *et seq.*, ed. of 1839. The exception at page 274, mentioned by the plaintiff's counsel, of a certain number of dollars sent in a barrel among others not intended for the consignee, is a different case. It went on the ground that the dollars were all of the same value, which cannot be predicated of the barrels in question. Beside, there is perhaps some difficulty in sustaining the exception without running foul of a strong current of cases.

We think no action will lie, unless it be a special assumpsit for not accepting the cement. *New trial denied.*[1]

SMITH *v.* EDWARDS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH 2–MAY 6, 1892.

[*Reported in* 156 *Massachusetts*, 221.]

HOLMES, J. This case comes before us on the exception of the Old Colony Railroad Company to a ruling of the court below, that it should be charged as trustee of the defendants. The defendants have been defaulted. The bill of exceptions purports to state the evidence introduced on the motion to charge the trustee, but does not disclose the findings of the judge. We assume them to have been the most favorable for the ruling which the bill of exceptions warrants. The defendants in Ohio ordered of the plaintiffs, who are manufacturers of boots and shoes in Massachusetts, through the plaintiffs' travelling salesman, certain calf and buff shoes, to be made according to a sample shown to the defendants. It was assumed at the argument, and we assume, that the contract bound the defendants, that there is no question under the Statute of Frauds, and that the shoes were made according to sample. They were forwarded over the Old Colony Railroad, we must assume, if it be material, at the defendants' expense, and were delivered to the defendants. This mode of forwarding undoubtedly was authorized by the contract. The defendants accepted the buff shoes, but refused to accept the calf shoes, and shipped the latter back to the plaintiffs by the same railroad. The plaintiffs refused to accept them, sued the defendants for the price of the shoes, and trusteed the railroad company. The calf shoes mentioned are the goods for which the railroad company was charged.

It is argued for the trustees, that, although the defendants were guilty of a breach of contract in refusing to accept the calf shoes, yet, as the shoes were not in existence at the date of the contract, they did not become the defendants' property until tendered to and accepted by the defendants after they were made.

Of course the title to the shoes could not be vested in the defendants without their consent. But in the present state of the law it does not need argument to show that a contract can be made in such a way as subsequently to pass the title, as between the parties, to goods unascertained at the time when the contract is made, without a subsequent acceptance by the buyer, if the contract commits the buyer in advance to the acceptance of goods determined by other marks. Middlesex Co. *v.* Osgood, 4 Gray, 447, 449; Nichols *v.* Morse, 100 Mass. 523; Brewer *v.* Housatonic Railroad, 104 Mass. 593, 595; Rodman *v.* Guilford, 112 Mass. 405, 407; Goddard *v.* Binney, 115 Mass. 450; Blanchard *v.* Cooke, 144 Mass. 207, 227; Aldridge *v.* Johnson, 7 El. & Bl. 885, 899.

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[1] Reversed in 6 Hill, 208, because the question should have been left to the jury (1) whether the 260 barrels were not tendered for the price of 250 barrels. (2) Whether if the tender was faulty the defect had not been waived.

In accord with the principal case are Cunliffe *v.* Harrison, 6 Ex. 903; Croninger *v.* Crocker, 62 N. Y. 151; Perry *v.* Mount Hope Iron, 16 R. I. 318; Barton *v.* Kane, 17 Wis. 728. See also Dixon *v.* Fletcher, 3 M. & W. 146; Hart *v.* Mills, 15 M. & W. 85; Levy *v.* Green, 8 E. & B. 575, 1 E. & E. 969; Rommel *v.* Wingate, 103 Mass. 327. Compare Martz *v.* Putnam, 117 Ind. 392; Iron Cliffs Co. *v.* Buhl, 42 Mich. 86; Brownfield *v.* Johnson, 128 Pa. 254; McHenry *v.* Bullifant, 207 Pa. 15.

In the case of goods to be manufactured, the seller, as he has to tender them, generally has the right to appropriate goods to the contract so far that, if he tenders goods conformable to it, the buyer's refusal to accept them is a breach. The buyer cannot say that he would have accepted some other goods had they been tendered. When goods are to be manufactured and forwarded by a carrier to a buyer at a distance, the seller's delivery of such goods to the carrier as bailee for the purchaser passes the title. The seller cannot forward them until they are specified. The delivery is an overt dealing with the goods as those to which the contract applies, and puts them into a possession adverse to the seller. Although not strictly a delivery, it is an act having the legal effect of a true delivery, which in common legal language it is said to be. Orcutt *v.* Nelson, 1 Gray, 536, 543; Merchant *v.* Chapman, 4 Allen, 362, 364; Kline *v.* Baker, 99 Mass. 253, 254; Hallgarten *v.* Oldham, 135 Mass. 1, 9. The act is required of the seller by the terms of the contract, and thus is assented to in advance by the buyer, on the condition that, as supposed, the goods answer the requirements of the contract. Therefore it is a binding appropriation of the goods to the contract, and passes the title as we have said. Putnam *v.* Tillotson, 13 Met. 517, 520; Merchant *v.* Chapman, 4 Allen, 362, 364; Odell *v.* Boston & Maine Railroad, 109 Mass. 50; Wigton *v.* Bowley, 130 Mass. 252, 254; Fragano *v.* Long, 4 B. & C. 219; Wait *v.* Baker, 2 Exch. 1, 7.

The present case could be disposed of upon a narrower ground. It would be enough to say that, so far as we can see, the judge who heard the motion to charge the trustee was warranted in finding as a fact that the defendants authorized the plaintiffs to appropriate the shoes to the contract, even if the inference was not necessary as matter of law. The question always is what intent the parties have expressed, either in terms or by reasonable implication. Anderson *v.* Morice, 1 App. Cas. 713; Calcutta & Burmah Steam Navigation Co. *v.* De Mattos, 32 L. J. Q. B. 322, 328; s. c. 33 L. J. Q. B. 214.

Exceptions overruled.

W. F. Kimball, for the plaintiffs.
C. F. Choate, Jr., for the trustee.

McNEAL *v.* BRAUN.

NEW JERSEY COURT OF ERRORS AND APPEALS, JUNE TERM, 1891.

[*Reported in* 53 *New Jersey Law*, 617.]

ON error to the Supreme Court.

For the plaintiff in error, *Samuel H. Grey.*

Contra, *Charles E. Hendrickson.*

The opinion of the court was delivered by

DEPUE, J. Braun, the plaintiff below, in 1883 was a wholesale dealer in coal at Philadelphia. McNeal, who is now plaintiff in error, was engaged in the foundry business at Burlington, in this State.

On the 14th of June, 1883, McNeal ordered from the plaintiff ninety-eight tons of lump and steamboat coal, to be delivered at Burlington, at $4.10 a ton delivered. The coal was shipped in a barge called "The Wayward," on the 21st of June. The barge arrived at Burlington on the 23d, but it was not until the 26th that she was laid alongside of the wharf. On the afternoon of that day the defendant's foreman notified the captain of the barge to place it alongside of the defendant's wharf In order that the boat might be so placed that the steam-hoist could be used for unloading, the boat was separated into its two parts. The forward part was made fast to the wharf, being separated from the wharf by a float about three feet wide, furnished by the defendant, for the purpose of steadying the boat in a position that was necessary for the working of the iron buckets on the steam elevator. The after part of the boat was moored on the river side of the other part.

When the forward compartment of the boat was placed in position, the buckets of the hoisting-works were lowered upon the boat, and preparations were made by the defendant's servants for unloading the coal. They completed their preparations about ten minutes before six o'clock, and stopped work at six, the usual time for quitting work. During the night this compartment of the boat sank with the coal that was in it.

The compartment that was moored in the river remained in safety. After the sinking of the forward compartment, the coal that was in the other compartment, was unloaded and taken by the defendant. The suit was for the whole quantity of coal sold, but the controversy at the trial was with respect to the coal that was sunk and entirely lost. Under the charge of the court, the jury found for the plaintiff the full contract price for the entire shipment.

The order for the coal was given by the defendant to Arkless, the agent of the plaintiff, at the plaintiff's place of business in Philadelphia. The order was for a cargo of coal of an approved size and quality. The coal was not, at that time, separated from the plaintiff's stock on hand. The price to be paid was $4.10 per ton delivered at Burlington. The

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carrier was selected by the plaintiff, and he took from him a bill of lading, signed by the master, in these words: "Shipped by Charles Braun, in good order, on board the boat called 'Wayward,' now lying at Philadelphia, and bound for Burlington, N. J., ninety-eight tons of Thomas Lehigh coal, which I promise to deliver at the aforesaid port of Burlington, in like good order, the dangers of the seas only excepted, unto A. H. McNeal or —— assigns, he or they paying freight for the same at the rate of twenty one-hundredths dollars per ton.

25 tons lump.
73 tons steamboat.
——
98 Captain to tend guy."

The contract price of $4.10 a ton was the price of the coal delivered at Burlington. If the defendant paid freight pursuant to the direction in the bill of lading, the freight paid was to be deducted from the contract price.

Responsibility for loss in transportation, in carriage by sea, has occasioned considerable discussion in the English courts. The rules on this subject are stated by Lord Cottenham in Dunlop *v.* Lambert, 6 Cl. & F. 600, 619, 620, 621, and by the Court of Queen's Bench and the Exchequer Chamber in The Calcutta Company *v.* De Mattos, 32 Law Jour. Q. B. 332; 33 id. 214; and particularly by Mr. Justice Blackburn, whose opinion in that case is quoted at considerable length in 1 Benj. Sales (Corbin's ed.), § 503, and more fully in Blackb. Sales (Blackstone ed.), * 234.

It is sometimes stated, as a general rule, that delivery to the carrier is delivery to the consignee, and that the goods are to be carried to their destination at his risk. But an examination of the decisions to that effect will show that this doctrine prevails only where the contract of sale, as between the consignor and consignee, was concluded at the place of shipment, and the undertaking to ship was collateral to the contract of sale, as in Tregelles *v.* Sewell, 7 Hurlst. & N. 573. It will also be found that the rule, uniformly adopted in the line of decisions, is that the risk of loss in transportation depends upon the nature of the transaction, the terms of the contract and the intention of the parties. In Dunlop *v.* Lambert, Lord Cottenham said: "When the party undertaking to consign undertakes to deliver at a particular place, the property till it reaches that place, and is delivered according to the terms of the contract, is at the risk of the consignor." In Calcutta Company *v.* De Mattos, Mr. Justice Blackburn said: "There is no rule of law to prevent the parties from making whatever bargain they please. If they use words in the contract showing that they intend that the goods shall be shipped by the person who is to supply them, on terms that when shipped they shall be the consignee's property and at his risk, so that the vendor shall be paid for them whether they are delivered at the port of destination or not, this intention is effectual. . . .

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If the parties intend that the vendor shall not only deliver them to the carrier, but also undertake that they shall actually be delivered at their destination, and express such intention, this is also effectual. In such a case, if the goods perish in the hands of the carrier, the vendor is not only not entitled to the price, but he is liable for whatever damage may have been sustained by the purchaser in consequence of the breach of the vendor's contract to deliver at the place of destination."

The De Mattos Case, above cited, was decided in the Queen's Bench by an equally divided court, and in the Exchequer Chamber there was a diversity of opinion among the judges. But on the question of law pertinent to this case there was entire unanimity of opinion among the judges in both courts. The contract of sale had been negotiated by correspondence, and the material facts were briefly these: DeMattos contracted to deliver the company one thousand tons of coals, delivered at Rangoon, alongside, &c., at forty-five shillings a ton — payment, one-half by bill at three months on handing over bill of lading and policy of insurance on the cargo to cover the payment, and the balance in cash on delivery at Rangoon. De Mattos chartered a ship, and shipped on board eleven hundred and sixty-six tons of coal and delivered to the company the bill of lading and the policy of insurance, and the company paid the half of the invoice price. On the voyage the ship became disabled, and, in fact, the coals were not delivered under the contract. Cross suits were brought — the one by De Mattos to recover the unpaid contract price, the other by the company to recover back the money paid on the contract. The Queen's Bench (Cockburn, C. J., and Wightman, J.) decided that De Mattos could not recover the residue of the contract price, and that the company was entitled to recover back the money paid as damages arising from the breach of contract. Blackburn and Mellor, JJ., concurred in the view that De Mattos could not recover, but held that the company was not entitled to recover back the half contract price it paid, for the reason that, by their construction of the contract, the portion of money paid to De Mattos was to be absolutely his on handing over the policy and the bill of lading. In delivering his opinion, Cockburn, C. J., said: "In every contract of sale, there is, on the part of the vendor, an obligation not only to transfer the property in the thing sold, but also to deliver possession to the buyer. When and how that delivery of possession shall take place, whether in the interval the thing sold shall be at the risk of the buyer or of the seller, so that if it be lost without default on the part of the latter, he shall nevertheless be entitled to demand the price or to retain it if already paid, must depend on the agreement of the parties as expressed or to be gathered from the contract. If, by the terms of the contract, the seller engages to deliver the thing sold at a given place, and there be nothing to show that the thing sold was in the meantime to be at the risk of the buyer, the contract is not fulfilled by the seller unless he delivers it accordingly."

In the Exchequer Chamber the majority of the court concurred in the views of Blackburn and Mellor, JJ., in the company's case, by a divided court, but all the judges concurred in the judgment of the Queen's Bench, that De Mattos' action could not be maintained. It will be observed, that of the ten judges who sat in both courts, Cockburn, C. J., and Wightman, Blackburn, and Mellor, JJ., in the Queen's Bench, and Erle, C. J., Willes, J., Channell, B., and Williams, J., held that the property in the coals passed to the company by force of those terms of the contract in relation to insurance of the cargo and the transfer of the policy and the delivery of the bill of lading, but that the vendor was nevertheless debarred from recovering the unpaid contract price as a consequence of his failure to deliver the coals according to contract.

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It was undisputed in the case now before the court, and, in fact, was conceded by the plaintiff's counsel, that delivery of the coal by the plaintiff, at Burlington, at his own expense, was a material term in the contract of sale. Under a contract of this sort, delivery of the coal on board the barge was delivery to the master as the plaintiff's bailee or agent to perform for him the act of delivery in execution of his contract. 1 Benj. Sales (Corbin's ed.), § 566. Meanwhile, and until delivery was consummated in such a manner as to be effectual as between vendor and purchaser, the coal was at the plaintiff's risk.

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On the main issue, which the learned judge declared to be the question whose loss was the coal which sank, his instruction was that this issue would depend upon whether the sale had been completed before the loss occurred; that where parties have bargained, the one that he will sell and the other that he will buy, the duty rests upon the seller to deliver the article in pursuance of the agreement he has made, and that to complete the sale there must be an acceptance by the purchaser of the article which he purchased, in accordance with that agreement; that when that has been done "the sale is completed, and any loss after that time falls upon the man who bought. I mean any loss which is the result of no wrongful or intentional negligence of the parties."

The court also instructed the jury that if there was an acceptance by the defendant, then the position of the captain became changed, and his duty as the agent of the plaintiff was at an end. And this question was left to the jury upon the acts and conduct of the defendant's servants before they stopped work that night, with the instruction that if the jury should determine from the testimony "that the defendant or his employes so acted that they recognized that that coal was there at their disposal, under their dominion, within their power, and that they so acted as to show that they were dealing with it as if it were McNeal's, from those acts you may determine that there was an acceptance of the coal as being the coal which had been bought under that bargain."

The transaction between the parties was an order for a certain quantity of coal, part lump coal and part steamboat coal, of an approved quality. It was in effect a contract of sale by sample. On such a sale of goods it is a condition implied by law that the buyer shall have a fair opportunity, by examining the goods, to satisfy himself that they are in accordance with the contract. 2 Benj. Sales (Corbin's ed.), §§ 910, 1025, 1042; Isherwood *v.* Whitmore, 11 Mees. & W. 347; Startup *v.* McDonald, 6 Man. & G. 593; Croninger *v.* Crocker, 62 N. Y. 152. And under a shipment of goods by a carrier the consignee is entitled to inspect and examine the goods to ascertain whether they correspond with the invoice, and to a reasonable time within which to receive and remove the goods. For that purpose a reasonable time within usual business hours must be allowed, and during that period the liability of the carrier as carrier remains undischarged. Bradstreet *v.* Heron, Abb. Adm. 209, 214; Salmon Falls Manufacturing Co. *v.* The Bark Tangier, 1 Cliff. 396; Dibble *v.* Morgan, 1 Wood, 406; The Tybee, id. 358, 363; The Barque Idd *v.* Kemball, 8 Ben. Adm. Pr. 297; 5 Myer Fed. Dec., "Carriers," §§ 802, 803, 846, 852, 1009; The Eddy, 5 Wall. 481, 493; Price *v.* Powell, 3 Comst. 322; Dunham *v.* B. & A. R. R. Co., 46 Hun, 245; Miller *v.* Steam Navigation Co., 6 Seld. 431; Hedges *v.* H. R. R. Co., 6 Robt. 119; reversed in Court of Appeals, but not on this point, 49 N. Y. 223; Moses *v.* B. & M. R. R. Co., 32 N. H. 523; Graves *v.* The H. & N. Y. Steamboat Co., 38 Conn. 143, 152; Richardson *v.* Goddard, 23 How. 28, 39; Bourne *v.* Gatliffe, 3 Man. & G. 643, 687; s. c., 11 Cl. & F. 45, 70; 3 Lew. Annot. R. R. & Corp. Rep. 54; note to Columbus & Western R. R. Co. *v.* Luddem.

The acts done by the defendant's servants before they quit work were of a twofold character. First. In directing the barge to be laid alongside of the wharf for unloading. The captain made the boat fast to the wharf and remained in charge during the night. The designation by the defendant of his wharf as the place for unloading, was an act in performance of the defendant's duty as consignee to provide a place for the discharge of the cargo. Second. In the preparations for unloading. The barge was laid alongside the float about ten minutes before six. The buckets were lowered down upon the barge, and possibly a small quantity of coal was unloaded. The hands quit work at six, and replaced the buckets on the wharf. In these acts there was no evidence of an acceptance of the entire cargo, nor of a discharge of the carrier from his responsibility. Under the rules of law I have stated, the defendant was entitled to a reasonable opportunity to unload the entire cargo for examination, to ascertain whether the coal corresponded with his order and had arrived in good condition. By law he was secured these rights without discharging the liability of the carrier. Even if the goods had been accepted so as to pass title as between vendor and purchaser, the defendant, under the plaintiff's undertaking to deliver them at Burlington, still had a right to a reasonable time to unload them under the plaintiff's contract to transport and deliver the goods.

For affirmance — None.

For reversal — THE CHANCELLOR, CHIEF JUSTICE, DEPUE, DIXON, KNAPP, MAGIE, REED, VAN SYCKEL, BROWN, CLEMENT, SMITH. 11[1]

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[1] A portion of the opinion is omitted.

SECTION VI.

TRANSFER OF PROPERTY BY DOCUMENTS OF TITLE AND RESERVATION OF JUS DISPONENDI BY THE VENDOR.

EVANS *v.* MARLETT.

IN THE KING'S BENCH, MICHAELMAS TERM, 1697.

[*Reported in* 1 *Lord Raymond*, 271.]

IF goods by bill of lading are consigned to A, A is the owner, and must bring the action against the master of the ship if they are lost. But if the bill be special, to be delivered to A to the use of B, B ought to bring the action. But if the bill be general to A and the invoice only shows that they are upon the account of B, A ought always to bring the action, for the property is in him, and B has only a trust, *per totam curiam.* And *per* Holt, Chief Justice, the consignee of a bill of lading has such a property as that he may assign it over. And Shower said that it had been adjudged so in the Exchequer.

SNEE ET AL. *v.* PRESCOTT ET ALS.

IN CHANCERY, FEBRUARY 23, 1743.

[*Reported in* 1 *Atkins*, 245.]

THE plaintiffs made the following case by their bill: That Tollet in 1740 consigned to Ragueneau and Company, residing at Leghorn, German serges amounting to £2,062 11*s.* besides the insurance made by Tollet, with directions to the partners to sell the goods as soon as they could; and also consigned to them other goods to the value of £181 14*s.* 6*d.* The partners not being able to sell all the goods, Tollet gave orders to barter them for Italian goods, and the copartners agreed that part of the goods should be disposed of for those of the growth of Italy to half the value of the Italian goods, and the other to be paid for in money; and afterwards, by letter of the 18th of November, 1741, they advised Tollet thereof, and that they should load the goods, which were silks, on board the "Prince Edward," and inclose a bill of lading for 12 bales. Tollet in 1741 received the bills of lading indorsed by the said partners, but intended for the use of Tollet only.

Tollet, in 1741, borrowed of the defendants, Julian and Le Blon, £505, and by way of security assigned the bills of lading for the 12 bales. Tollet being also indebted to the other defendants the Thomases in several sums, for securing thereof he assigned invoices for five bales and three bales, and delivered the same to the Thomases.

Soon after a commission of bankruptcy issued against Tollet, and the plaintiffs were chosen assignees, and received a letter, directed to Tollet from Ragueneau and Company, mentioning that they had bought four bales of silk more for him, and had given in payment for it four bales of serges, and sent him the invoice of 2448 dollars, which they had placed to Tollet's debt.

On the 10th of February, 1741, Dawson, the captain of the "Mermaid," on board of whose ship were the bales of silk, arrived, and these goods were consigned to Tollet, and were shipped at the risk and in the name of Tollet; the defendants, Julian and Le Blon, and the Thomases showed Dawson the bills of lading, and demanded the goods, but he refused to deliver them, and Prescott, partner of Ragueneau, who lived in London, on Tollet's being a bankrupt, wrote to his partners, desiring them to send the bills of lading that Dawson had signed and left with them, which they sent to him accordingly, and at the same time sent an order to Dawson to deliver the goods to Prescott, who sets up a right thereto.

But the plaintiffs insist, that the bills of lading, though made to the order of Ragueneau and Company, yet being indorsed by them in blank and sent to Tollet, it did, according to the custom of merchants, vest the property in Tollet; and further, that it is the custom of merchants at Leghorn, to send bills here filled up as aforesaid, in order to conceal the persons' names to whom the goods are sent, that the public may not know the persons in England with whom such houses deal, or to whom the property belongs.

That at the instant the goods were loaded on board the "Prince Edward," the property vested in Tollet, who was then in good circumstances, and the reason of the master of the ship's signing several bills of lading is for fear of losing one: that it is the custom of merchants to borrow money upon bills of lading, which have been looked upon as a good security; that Tollet was made debtor for the goods in Ragueneau and Company's books, and the delivery to Dawson was for the use of Tollet, whose loss it would have been, if lost in the voyage.

That the defendants Le Blon and the Thomases, notwithstanding they have an assignment of the bills from Tollet, yet do admit they were only pledged to them for what was owing on the sums they had lent, and upon payment of that, and the expense of the insurance, they are willing the goods should be delivered to the plaintiffs, who pray by their bill, that the goods brought by Dawson, and delivered to Prescott, may be sold, and after paying what shall appear to be due to Le Blon and the Thomases, that the remainder may be paid to plaintiffs for the benefit of Tollet's creditors; and also, that the bills of lading for the four bales sent in the "Mermaid," may be delivered to the plaintiffs.

The defendant Prescott insisted that the bills of lading in the "Prince Edward" were not to deliver the goods to Tollett, but to the order of

Ragueneau and Company, and that it is usual among merchants, to require the master of the ship, by which the goods are consigned, to subscribe his name to three parts of every bill of lading, and that there is a clause in each, that one being accomplished the other two shall be void, and says, on the delivery of the goods, he wrote a receipt for them, by indorsement of the bills of lading transmitted to him, and delivered the same to Dawson.

That it is usual among merchants and factors at Leghorn, when they ship goods for persons who have not remitted them the money beforehand, or for which they draw bills of exchange or where they run a risk, not to fill up the bill of lading directly to the order of such person, but to the order of the shippers or factors; so that if any accident happen to their principal, before the delivery of the goods, they may get back the same, and thereby reimburse themselves, and that there was the greater reason for such precaution, in regard Ragueneau and Company had, and were to draw on Tollet for £2757 19*s.* 3*d.* for money advanced on the barter of the woollen goods for silk.

That being informed Tollet had stopped payment, and was in danger of failing, and that the silk was about to be shipped by the partners at Leghorn, for the account of Tollet, he resolved to prevent the silk falling into Tollet's hands till satisfaction was made, and thereupon wrote by the next post to his partners, who in their answer sent the two parts of the bill of lading to be delivered to Dawson, and an order for him to deliver the silks to Prescott, according to the bills of lading, in preference to any other claim.

That his partners at Leghorn having notice of Tollet's circumstances soon after shipping the four bales of goods, applied to the person with whom they made the barter, and prevailed with him to relinquish the bargain, and they took the serges back again, and the silks to their own account, and paid for them in money, and then sent them to the defendant Prescott in London, who insists he hath a right to claim the same for himself and his partners.

By his answer he saith he is willing to sell the silks he received of Dawson as the court shall direct, but submits that the delivery of the silks to Dawson was not a delivery to the use of Tollet.

The defendants the pawnees insisted that Ragueneau and Company's indorsement on the bills of lading was, according to the usage of merchants, as much a transfer of all their right to Tollet, as if the same had been sold in an open exchange, and that the subsequent assignment made by Tollet to them vested the property of the goods in the defendants for repayment of the money so lent.

Lord Chancellor. This is as harsh a demand against Ragueneau and Company, as can possibly come into a court of equity: to insist on taking their goods for which they have paid half the price, without reimbursing them what they are out of pocket, and then telling them that they shall come in as creditors, perhaps for half a crown in the pound only, under the commission of bankruptcy against Tollet, notwithstanding they have the goods now in their own custody, and a specific lien upon them; and to be sure, in such a case, a court of equity will lay hold on anything to save this advantage to Prescott and the partnership,

If Tollet the bankrupt had gained any legal property in the silks, it was gone by his assignment, or pledge or pawn to the defendants Le Blon, &c., call it which you will, and if it had not been for this circumstance of their being so pledged, the assignees' bill ought to have been dismissed with costs.

But this court is obliged to retain bills for redemption, because the parties have no other way of coming at justice.

There are twelve parcels or bales for which bills of lading are sent, and four parcels or bales for which no bills of lading were sent, and therefore I will deliver the case from the latter, as there can be no pretence that Tollet had a legal property in these, for a promise to send a bill of lading, if it amounted to anything, would be only to be carried into execution in equity.

As to the twelve bales, they will fall under a different consideration.

Ragueneau and Company having advanced a moiety of the price for the silks, there can be no question, while the goods remained in their hands, but they were liable to this debt, and Tollet could never have compelled them to deliver the goods, without paying the money so advanced.

If a factor sells goods for a principal, he may bring an action in his own name, or an action may be brought in the name of the principal against the vendee, and the factor may make himself a witness.

On the other hand, a vendor of goods to a factor for the use of his principal, may maintain an action against the principal for goods sold, and the factor may be made a witness for the vendor; it has been often so settled at Guildhall.

Therefore while the goods remained in the hands of Ragueneau and Company, no doubt but they had a lien upon them, for the moiety of the price advanced by them; and he who would have equity, must do equity, by reimbursing them first, before he can entitle himself to the silks, and thus it would have stood, if there had been no consignment, which it is insisted makes a considerable alteration, and vests the property in Tollet.

I admit the case mentioned by the plaintiff's counsel, of inland dealers in England, that if goods are delivered to a carrier or hoyman to be delivered to A and the goods are lost by the carrier or hoyman, the consignee can only bring the action, which shows the property to be in him, and it is the same where goods are delivered to a master of a vessel.

But suppose such goods are actually delivered to a carrier to be delivered to A, and while the carrier is upon the road, and before actual delivery to A by the carrier, the consignor hears A, his consignee, is likely to become a bankrupt, or is actually one, and counter mands the delivery, and gets them back into his own possession again, I am of opinion that no action of trover would lie for the assignees of A, because the goods, while they were *in transitu*, might be so countermanded.

In the present case there was no consignment to any particular person, but bills of lading indorsed in blank to the order of consignor, and therefore rather in the nature of an authority than anything more.

Promissory notes and bills of exchange are frequently indorsed in this manner, "Pray pay the money to my use," in order to prevent their being filled up with such an indorsement as passes the interest. Mr. Lutwych, who was an experienced practiser in this court, always did so in his bills of exchange.

The question of law is, Whether before the actual delivery of the goods it was not in the power of the consignor to countermand it?

This must depend upon the custom of merchants, and here indeed there is a contrariety of evidence. For the defendant Prescott the evidence is, that if agents are in disburse for the goods bought for their principal, they generally make bills of lading to their own order, indorsed in blank, especially where they are in doubt of the principal's circumstances, that they may by this means have it in their power, if they should see occasion, to vary the consignment.

The evidence for the plaintiff is, that indorsing bills of lading in blank does not retain the property in the consignor, any more than if they were indorsed to the consignee by name, but is done only to conceal the amount of the quantity of the goods consigned, it being detrimental to the consignee that it should be known.

But then the proof on the part of the plaintiff does not speak as to the particular circumstances, where the agents suspect their principals to be failing.

The question is, On which side the evidence is strongest?

The strongest proofs are certainly on the part of the defendants, and there is no occasion to send it to law on this account.

Though goods are even delivered to the principal, I could never see any substantial reason why the original proprietor, who never received a farthing, should be obliged to quit all claim to them, and come in as a creditor only for a shilling perhaps in the pound, unless the law goes upon the general credit the bankrupt has gained by having them in his custody.

But while goods remain in the hands of the original proprietor, I see no reason why he should not be said to have a lien upon them till he is paid, and reimbursed what he so advanced; and therefore I am of opinion the defendant Prescott had a right to retain them for himself and company.

It has been objected, that in case of any loss or accident to the goods, it was Tollet's risk only.

But suppose any damage had happened to these goods during the voyage, and *in transitu*, there had been an alteration of the consignment, the loss clearly must have been borne by the consignor.

Consider this case in the next place, under the act of parliament of the 5 Geo. 2, upon the clause of mutual credit.

"Where it shall appear to the commissioners that there hath been mutual credit given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person, at any time before such person became bankrupt, the commissioners or the assignees shall state the account between them, and one debt may be set against another, and what shall appear to be due on either side on the balance of such account, and on setting such debts against one another, and no more, shall be claimed or paid on either side respectively."

The construction of this clause has always been that an account must be taken of their respective demands, and that the balance only, if in favor of the bankrupt, shall be proved under the commission.

Suppose Tollet had never assigned these goods and the assignees under the commission of bankruptcy had brought an action of trover in his right, and by strictness of law had recovered, would even the courts of law have suffered execution to be taken upon the whole goods? I think they would not, and in that case I would have directed that out of the damages, upon a writ of inquiry, there should have been deducted the half price, paid by Ragueneau and Company for the silks; *a fortiori* this ought to be done in a court of equity.

As to the cases cited, Wiseman *v.* Vandeput, 2 Vern. 203, is much stronger than the present. There "A, being beyond sea, consigns goods to B, then in good circumstances in London, but before the ship sets sail news came that B was failed, and thereupon A alters the consignment of the goods, and consigns them to the defendant; the court held, that if A could by any means prevent the goods coming into the hands of B or his assignees, it is allowable in equity, and B or his assignees shall have no relief in equity." And so is the case *ex parte* Clare, before Lord Chancellor King, for the goods there had been actually delivered.

If the defendant Prescott had got the goods back again by any means, provided he did not steal them, I would not blame him; and I am of opinion that to take them from him would be extremely unequitable.

In the case *ex parte* Frank, before Lord Talbot the goods were actually delivered, here they are not.

Upon the whole, from the justice of the case, and from the evidence on the custom of merchants, I declare as to the four bales of silk, that the same being in the possession of Prescott and his partners, the said bales or the value ought not to be taken from them, without satisfaction made them for the money laid out by them on the last mentioned bales and charges incident thereto, and for their commission thereon.

Let the Master take an account of the money received by Prescott by sale of the silks, and he and his partners to be charged with the same. Let the silk remaining in specie be sold, and the Master is to distinguish what is the produce of the silk comprised in the pledges to the several pawnees, let the same be ratably applied to pay what shall be due to Prescott and partners, for the money advanced for the last mentioned bales, charges, and commission, according to the proportion which the same bears to the respective values of the particular bales of silk comprised in each of the pledges, and after such proportion as is to be borne out of the value, the residue to go towards paying Julian and Le Blon for their principal and interest, and also after the like deduction to Prescott for the silks pledged to the Thomases, the residue to be applied towards payment of principal and interest to the Thomases, and if not enough to pay Julian and Le Blon and the Thomases, they to come in as creditors under the commission in proportion; and if any overplus by the sales of the silk, the same to go towards paying the costs of Prescott and partners, Julian, Le Blon, and the Thomases; if no overplus, the Master to rate the costs between them; and if any overplus after payment of the said debts and costs, the same to be paid to the assignees of the bankrupt, for the use of the other creditors.

CALDWELL *v.* BALL.

IN THE KING'S BENCH, MAY 17, 1786.

[*Reported in* 1 *Term Reports*, 205.]

TROVER for fifty hogsheads and one hundred and twenty tierces of sugar, and thirty puncheons of rum.

On a motion to set aside the verdict which had been given for the defendant in this cause, and to grant a new trial, Willes, J. before whom this cause was tried at the last Assizes at Lancaster, made the following report: —

The question arises upon two bills of lading, signed by the defendant who was captain of the ship Tyger, under one of which bills of lading the plaintiffs claim.

Thompson, the shipper of the goods in question, was a considerable planter in the island of Jamaica, and corresponded with Fairbrother, a merchant residing at Liverpool. Previous to the 19th of August, 1784, Fairbrother had acted as the general agent or consignee of Thompson, but from that time his general agency ceased in consequence of a power of attorney to Dorothy Thompson and Bromfield, which superseded his authority. From that time, whatever act was done by Fairbrother on behalf of Thompson was by virtue of a special order or commission for that specific purpose.

The above-mentioned power of attorney to Dorothy Thompson and Bromfield authorized them to raise money for the use of Thompson, whose affairs were then much involved, and to make a mortgage upon his estate in Jamaica. It likewise empowered them to enter into any contract that they should think fit for consigning and shipping any sugar or produce made on any of the plantations.

At the time that this power arrived in England, Thompson was indebted to the house of Caldwell and Company, the present plaintiffs, who were merchants of Liverpool, in the sum of £4,000. By way of a security for this debt, Dorothy Thompson and Bromfield gave the plaintiffs a mortgage dated the 20th of March 1785, for £7,000 upon the plantations in Jamaica, and likewise entered into a covenant for the future consignment of Thompson's sugars to them.

By a subsequent indenture, dated 10th of May, 1785, and executed between the same parties, after reciting the above-mentioned mortgage, it was declared, "that whereas the sum of £4,000 or thereabouts, part of the said sum of £7,000 at the time of the execution of the said indenture, was actually owing by the said T. P. Thompson to the said C. Caldwell and Company, for which they have the bond of the said T. P. Thompson and others, and the further sum of £100 has been also advanced to the said T. Bromfield, as the attorney of the said T. P. Thompson, and the remainder of the said sum of £7,000 was intended to have been so advanced; but doubts having arisen as to the force and validity of the power of the said T. Bromfield to charge with effect the said plantation and premises, and it being uncertain what sum of money the said plantation and premises are already mortgaged for, and what other circumstances affect the same, it has been agreed that the said indentures of lease and release (meaning the before-mentioned mortgage) shall be sent out to Jamaica, to the correspondent of the said Charles Caldwell and Thomas Smyth, to be recorded in the said island, and for information how the said estate is affected by former incumbrances; and that so soon as the said plantation, lands, and premises are effectually made liable to the payment of the said sum of £7,000 and interest, according to the terms of the said indenture of release, and the said Charles Caldwell and Thomas Smyth are well satisfied that the same are a good and sufficient security for the said sum of £7,000 and interest, and are also satisfied that the said Thomas Pepper Thompson will consign the produce of the said plantation to the said Charles Caldwell and Thomas Smyth according to the terms of the said indenture of release, then and not until then, the said Charles Caldwell and Thomas Smyth are to advance unto the said Thomas Bromfield, as attorney for the said Thomas Pepper Thompson, the remainder of the said sum of £7,000; and in the mean time no interest for more than is or may be actually advanced is to be charged or payable. But it is fully understood amongst the parties, that the said Charles Caldwell and Thomas Smyth are not to be under any obligation of advancing any more money than they have done already, until they are fully satisfied with the propriety thereof, and are content to do so."

At the time this indenture bore date the house of France and Company, merchants at Liverpool, were also creditors of Thompson to the amount of £3,000 for money advanced to him some time before through the hands of their agents in Jamaica, Messrs. Coppell and Goldwin; and Thompson, to discharge this demand, had drawn two bills of exchange, bearing date the 28th July, 1784, upon Dorothy Thompson and Thomas Bromfield, payable at ninety days' sight, in favor of Messrs. Coppell and Goldwin, who indorsed the same to the order of France and Company.

Extract of a Letter from Thompson to Fairbrother, dated the 6th of December, 1784, *from Jamaica.*

I have now the pleasure to inform you that I have the most pleasing prospect of a crop, which, avoiding accidents, I hope will enable me to take up those heavy bills when due, which my sister (Dorothy Thompson) will inform you of, and for which I shall ship 200 casks on the "Tyger," Captain Ball, who expects to sail in all next month.

Extract of a Letter from Thompson to Fairbrother, dated Jamaica, 23d January, 1785.

I shall wait upon Messrs. Coppell and Goldwin, to desire them to write to Messrs. France and Company, relative to the bills drawn in their favor. We are making fine sugar, and a large quantity of it. I hope you will make Messrs. Caldwell and Company satisfied, until I have the pleasure of seeing them, which will be soon, as I am, please God, determined to leave this island in all July next in the packet.

Extract of a Letter from Thompson to Fairbrother, dated Jamaica, 15th March, 1785.

I shall have on board the "Tyger" one hundred and seventy hogsheads and tierces, and thirty puncheons, most of which are already on board. She will sail the beginning of April.

N. B. With respect to insuring what I shall have on board the "Tyger," I shall leave it to your own option. Should she be long on her passage you might get insurance for £2,000, as we could not well bear a loss just now.

On the same day on which the last mentioned letter from Jamaica was written to Fairbrother, he, being applied to by Messrs. Caldwell and Company for payment of Thompson's debt, wrote the following answer to them: —

Messrs. CALDWELL AND COMPANY.

In consequence of your application to me for money on account of Mr. Thompson, I am sorry to inform you that I have nothing wherewith to pay. A letter from that gentleman acquaints me that he will ship two hundred casks of sugar and rum on board the "Tyger," Captain

Ball. I will be obliged to you if you will order insurance on these goods. T. FAIRBROTHER.

LIVERPOOL, 15th March, 1785.

On the 18th of March, 1785, the defendant signed the bills of lading in question.

One of these bills of lading for the whole cargo, which was acknowledged to have been the first signed by the defendant, was to deliver to Messrs. Thompson and Fairbrother, or their assigns; this was indorsed by Thompson in Jamaica, and sent by him to Fairbrother in England, where it arrived on the 20th of May, enclosed in the following letter:

JAMAICA, 18th March, 1785.

I send you enclosed a bill of lading for what goods I have got on board the "Tyger." This will acquaint you of my being obliged to assign the other bills of lading to Coppell and Company for the security of the payment of the bills drawn in their favor, etc.

A short time after the receipt of this letter, Fairbrother indorsed the bill of lading above mentioned to Messrs. Caldwell and Company, the present plaintiffs; who, after they were in possession of it, advanced two sums amounting together to £219 13*s.* 8*d.* for the use of Thompson.

The other two bills of lading for different parts of the cargo, making up the whole together, were to deliver to the order of the shipper or his assigns, and indorsed by Thompson as follows: "Deliver the within to Messrs. Thompson and Fairbrother, provided they engage to pay the net proceeds to Messrs. France and nephew, otherwise deliver them to the order of James France nephew on account of Coppell and Goldwin."

These last bills of lading had been delivered into the hands of Coppell and Goldwin by Thompson at the time when he wrote the letter of the 18th of March, 1785, to Fairbrother, as appeared by that letter, and were afterwards received by France and Company on the 6th June, 1785, in a letter from Messrs. Coppell and Goldwin, dated 16th April.

Captain Ball, the defendant, arrived at Liverpool on the 19th June, 1785, having on board his ship the goods in question.

The day after his arrival the plaintiffs demanded the goods of him, when he acknowledged the bill of lading, but said that he could not deliver the goods without the consent of the owners of the ship, who were France and Company.

On the next day the plaintiffs saw France, and repeated their demands, tendering at the same time all charges of freight, etc. France said, that neither he nor the Captain would deliver the goods, unless upon a promise that the net proceeds should be paid to him. This was refused by the plaintiffs.

WILLES, J., then observed, that on the trial several points had been made by the plaintiffs: —

1st. That the Captain had no right to retain the goods in question, for that he was liable in an action of trover on the bill of lading signed by him.

But in answer to it, he had considered this in reality as an action between the plaintiffs and France and Company, and that the defendant who was captain of the ship was merely a trustee for one or the other, and was indemnified in the mean time. That he was in a similar situation to a sheriff, when contrary demands are made by the assignees of the bankrupt and a creditor claiming under an execution.

2dly. It was insisted that the defendant had done wrong, in refusing to deliver the goods according to the first bill of lading signed, by which he had bound himself.

As to this point, he had left it to the jury to consider under the particular circumstances in which all the parties stood. He had represented to them that the defendant was master of France and Company's ship, and was charged to deliver the goods to them by Coppell and Goldwin.

That the conduct of Fairbrother was in some degree culpable, in assigning the bill of lading over to the plaintiffs immediately after he had received it, against what he knew to be the design of his principal.

And that as the plaintiffs, and France and Company, were both fair creditors, and *bonâ fide* holders of the bills, he who had first got possession by a legal title ought to be preferred; and that for this purpose the possession of Coppell and Goldwin was to be considered as the possession of France and Company.

3dly. It was objected that France and Company were not creditors of Thompson, because the bills of exchange were not due, and therefore that they had no equitable lien on the goods.

But that was answered by saying, that the consideration for these bills had actually been advanced by France and Company.

4thly. It was insisted that the consignment of these goods was bound by the mortgage to the plaintiffs, executed by Bromfield under the power of attorney.

This was answered, by saying that the mortgage did not affect this transaction, being subsequent in point of time. That at all events it was only a covenant which bound the covenantor personally.

Under these directions the jury had given their verdict for the defendant, of which he had no reason to disapprove.

Scott, *Wood*, and *Law* showed cause against the rule.

Wilson, *Chambre*, and *S. Heywood*, contra.

WILLES, J., gave no further opinion, but declared himself satisfied with the verdict.

ASHHURST, J. I do not think upon the whole of this transaction that this can be considered as a verdict either against evidence or law, and therefore there ought not to be a new trial.

There is no reason for saying that either the plaintiffs or France and Company are not equitable holders of the several bills of lading.

When equity is equal between the parties, a legal title must prevail. This reduces the question to a mere point of law. I shall put out of the question all the letters, which ought not to prejudice the plaintiffs, because they were not proved to have had actual notice of them; neither are they guilty of negligence in not having endeavored to learn their contents. They knew that Fairbrother acted as the agent of Thompson, and had no reason to be suspicious of his authority.

Upon the merits of the case, the leaning of my inclination would rather be in favor of the defendant, whom I consider as the servant of France and Company, than in favor of the plaintiffs, because they have got another security.

But in point of law also the plaintiffs are not entitled to recover. Three bills of lading were signed by the captain: the first is a general one, consigning the whole cargo to the order of Thompson and Fairbrother; the other two are partial consignments of different parts of the same cargo to the order of the shipper. If it could be proved, or there was any reason to infer that the defendant meditated a fraud on any person, that would afford an argument as against him; but no fraud can be presumed here.

I do not see indeed the reason of making these bills of lading in a different form, but the captain might suppose them to be the same in effect: for he knew that Fairbrother was merely an agent for Thompson. Therefore I do not think that they can be said to be inconsistent; they are all of them in substance to the order of the shipper. Whoever then was first in possession of either of these bills of lading had the legal title vested in him.

It appeared by the letter of the 18th of March, that at that time Thompson had indorsed two of the bills of lading to the agents of France and Company. In my opinion, that was an immediate transfer of the legal interest in the cargo, and that same letter, which also conveyed the other bill of lading to Fairbrother, gave him notice of this indorsement.

It was argued that the defendant was bound to deliver the cargo according to his undertaking; but, as he knew of this indorsement to Coppell and Goldwin, he considered himself bound to deliver the cargo according to that bill of lading, which was first possessed by one of the parties. He then concluded that he should fulfil his undertaking by delivering to the order of the shipper. As to the plaintiffs being in possession of the bill of lading under which they claim, before the other two arrived in England, the time of their arrival cannot vary the case, for the legal title was vested in Coppell and Goldwin by their being indorsed to them.

Buller, J. Several objections have been made to this verdict; but the case is confined to a very narrow compass.

The first objection was, that the defendant had no right to withhold the goods after demand made by the holder of the bill of lading. The answer given to it was, that he was indemnified, and that it ought to be considered as an action between the plaintiffs and France and Company. But I do not think that the doctrine of indemnity applies to such cases as these. Besides, it always applies against a defendant, and not for him. If it appear that a defendant stands in the place of a third person, he shall not be permitted to avail himself of any objection against the merits of the case, which such third person could not have availed himself of.

The 2d objection was, that, as there were different bills of lading, the defendant was bound to deliver the cargo according to the first bill of lading actually signed.

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This being the real point of the case, I shall reserve it till last.

3d Objection. That as the plaintiffs and France and Company were *bonâ fide* holders of these bills of lading, they who first got possession, as between these parties, were to be preferred.

But bare possession conveys no title, as between persons claiming under different rights. The question here is, who has the legal title? For the person who first gets possession under the legal title must prevail.

4thly. That France and Company were not creditors to Thompson at the time that the bills were indorsed to them. But that is not so. For they stood in the situation of payees of the bills of exchange, for which they had given a valuable consideration.

The last objection was, that the plaintiffs were entitled under the covenant contained in the mortgage to consign to them. The answer given to that was right; that the mortgage had nothing to do with this question. It was subsequent to the transaction; and besides, it was only a covenant to consign, which could not bind third persons.

Now as to the principal point, it is material to consider the nature of a bill of lading. It is an acknowledgment under the hand of the captain, that he has received such goods, which he undertakes to deliver to the person named in that bill of lading. It is assignable in its nature; and by indorsement the property is vested in the assignee. It is now clearly settled that goods at sea may be so assigned. This doctrine is laid down in Evans and Marlett, 1 Lord Ray. 271, and is recognized by Lord Mansfield in Wright and Another *v.* Campbell and Another. 4 Burr. 2051.

It is argued that the captain must be answerable at all events in this action, because he signed the first bill of lading to the order of Thompson and Fairbrother, who indorsed it to the plaintiffs. I think it very material to consider who Fairbrother was. He had no interest in these goods; and he was known to all the parties to be the agent of Thompson. Then Fairbrother must be considered as Thompson himself. The bills of lading were all to the order of Thompson; he had then the absolute control over the goods, and might have unshipped them if he had so pleased. So that they are not like goods consigned to a third person, for they remained under the power of Thompson all the time till he indorsed the bills of lading. If Thompson and Fairbrother are to be considered as the same person, it is the same as if the bills of lading were to the order of Thompson alone. Then the question is, who has the prior right under him?

It was said by the plaintiff's counsel, that the defendant was the agent of France and Company, and that they must be taken to know what he did; but that makes against the plaintiffs; for at the time when Thompson assigned the two bills of lading to Coppell and Goldwin, the defendant knew that he had the other in his hands, and could not therefore have assigned it to any other person. The defendant then acted fairly, and it could only happen by the subsequent misconduct of Thompson, namely, by his afterwards indorsing one of the bills of lading to another party, that any difficulty could arise.

Then the question is, whether this bill of lading, being made in favor of Thompson and Fairbrother jointly, can be distinguished from one made in favor of Thompson only? I think it cannot, because Fairbrother was known to the parties to be the agent of Thompson.

As therefore this transaction is to be considered in the same light as if all the bills of lading had been made to the order of Thompson alone, how does the question stand as between the plaintiffs and France and Company? Both parties claim under Thompson: but France and Company have the first legal right; for two bills of lading were first indorsed to them, and the letter which conveyed the other bill of lading to Fairbrother apprised him at the same time of this indorsement. *Rule discharged.*

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WALLEY v. MONTGOMERY.

In the King's Bench, May 21, 1803.

[*Reported in* 3 *East*, 585.]

In trover for a cargo of timber of the value of above £800; it appeared in evidence at the trial before Lord Ellenborough, C. J., at the sittings in London after last term, that the plaintiff, a merchant at Liverpool, gave an order for the timber to Schumann & Co., merchants, residing at Memel; in pursuance of which Schumann & Co. informed the plaintiff by letter of the 1st of May, 1802, that they had chartered on his account the ship "Esther," Captain Rose, of Liverpool; and on the 15th of May they wrote him another letter, enclosing him the bill of lading and invoice of the timber after mentioned, and saying that they had sent the charter-party in a letter which Captain Rose would deliver, and advising the plaintiff further that they had drawn on him certain bills at three months for the value of the timber. The invoice enclosed was of this tenor: —

MEMEL, 4th May, 1802.

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Invoice of a cargo of timber shipped by order and for account and risk of Mr. T. Walley at Liverpool, in the "Esther," Captain Rose.

And the bill of lading was dated 14th of May, 1802, and mentioned the shipping of the cargo in the usual form: "to be delivered unto order or assigns, he or they paying freight for the said goods according to charter-party;" which was signed by Rose, the captain, and indorsed in blank by Schumann & Co. The charter-party, though produced, could not be proved at the trial for want of the subscribing witness. Schumann & Co. sent another bill of lading of the timber to the defendant at the same time, who appeared from the circumstances to have acted as their agent, though he did not avow himself to be acting in that character at the time; by virtue of which bill of lading the defendant obtained the delivery of the timber from the captain before the plaintiff was apprised of the circumstance, or had made any demand of the same under his own bill of lading; but on the 21st of June, two days after the arrival of the timber, finding that the defendant had obtained possession of it, he applied to him, offering to accept the bills drawn on him by Schumann & Co. and demanding the timber, which the defendant refused, unless the plaintiff would pay for it immediately. The plaintiff, however, declined such a mode of payment, insisting on the mode stipulated for by Schumann & Co. in their letter to him, by giving his acceptances at three months; in consequence of which the defendant retained possession, and afterwards sold the cargo under the authority of Schumann & Co. Upon the refusal of the defendant, the plaintiff demanded the cargo from the captain, telling him that he was ready to perform his part of the contract; but the captain said that he had before delivered it to the defendant, conceiving that he acted by the authority of the shippers: but there was no proof of any tender of the freight having been made to the captain, for want of which the plaintiff was nonsuited.

Gibbs and *Park* showed cause against a rule for setting aside the nonsuit and granting a new trial.

Erskine, *Garrow*, and *Scarlett*, contra.

LORD ELLENBOROUGH, C. J. If it were not for one piece of evidence which was mentioned late in the cause, and to which my attention was not before particularly directed, I should still be inclined to think that the plaintiff was not entitled to recover; and that is the invoice, by which it appears that the goods were shipped for account and at the risk of the plaintiff: that is a material piece of evidence on a question, in whom was the property of the goods at the time of their arrival here; whether then vested in the plaintiff, subject to a defeasance in case of the non-performance by him of certain conditions on which the consignment was made, or whether to vest in him at a subsequent time on performance of those conditions? Laying the invoice out of the question, I should still have been of the same opinion as before upon the letter of advice and the bill of lading, that they were conditional. Two things were required of the plaintiff to be done: first, the acceptance of the bills drawn on him at three months, which having been tendered to be performed on his part must be taken as done; secondly, the payment of the freight, which was neither made nor tendered. I will not consider whether the defendant were the agent of Schumann & Co.; for whether so or not, he cannot be considered as a wrong-doer if he have obtained possession of the cargo under a competent bill of lading and upon a performance of the conditions, which the plaintiff neglected to perform. If, having no notice of a better title, he were not a wrong-doer when he received the goods, and he has paid the freight and performed the conditions required of him, the goods cannot be taken out of his hands without paying those charges. But taking him to be the agent of Schumann & Co. and bound by their engagement, yet he had a right in their name to stipulate for the performance of the two conditions on which the shipment and delivery of the goods were to be made to the plaintiff, namely, the acceptance of the bills, and the payment of the freight. And though the defendant cannot object to the non-acceptance of the bills which was offered to be done by the plaintiff, yet he may make his stand in point of law on the non-performance of the other condition, without which the plaintiff could not be entitled to recover if the question rested there. But here I think the invoice vested the property in the plaintiff; for if there had been a loss at sea, that loss must have been borne by him. Then if the property were vested in him, subject only to a defeasance if he did not perform the conditions required of him, I think the plaintiff would be entitled to recover. The doctrine in the case of Lempriere *v.* Pasley only applies to the case of a mere wrong-doer possessing himself of the goods of another without authority, and paying freight for them: but without the invoice in this case the act of the defendant even as the agent of Schumann & Co. would not have been tortious, the plaintiff not having performed the conditions required by the letter of advice and the bill of lading: the invoice, however, vested the property in him.

Rule absolute.[1]

OGLE *v.* ATKINSON AND ANOTHER.

IN THE COMMON PLEAS, NOVEMBER 15, 1814.

[*Reported in* 5 *Taunton*, 759.]

TROVER for a quantity of hemp and flax. The cause was tried before Mansfield, C. J., at the sittings after Michaelmas term, 1813, and a verdict was found for the plaintiff, subject to a case. In 1809, the plaintiff consigned wines to Smidt & Co. at Riga, for sale on his account, and next year ordered them to purchase for him the hemp and flax in question. In April, 1810, the plaintiff sent his own ship, the Bremen packet, to receive the goods so ordered. On her arrival at Riga, the captain received from Smidt & Co. the goods in question, with others, on behalf of the plaintiff, and as the plaintiff's own goods, which Smidt & Co. stated to the captain that they were. These goods not fully loading the ship, Smidt & Co. procured other goods to be shipped on freight; the captain, by agreement with the plaintiff (his owner), was to have £15 per cent primage upon the ship's homeward freight, to be estimated as well upon the plaintiff's own goods as upon those which were actually to pay freight, the rate of which last was £10 per ton, but Smidt & Co. required the captain to estimate the freight upon the goods received for the plaintiff at £8 per ton only. The captain objected to this distinction, but Smidt & Co. insisted that his owner was entitled, that the freight upon the goods belonging to the plaintiff should not be estimated at the same rate which the other goods were to pay; at length the captain consented. Before the ship left Riga, Smidt & Co. wrote a letter without date to the plaintiff, apprising him of having shipped the hemp and flax in question by the Bremen packet, and stating that they enclosed the bills of lading and invoices of that shipment, for which they debited the plaintiff's account, and requested that, being found right, the plaintiff would have them noted in conformity therewith. In that letter were enclosed four invoices, dated 18–30 June, expressing the flax to be shipped on board the Bremen packet, for the account and the risk of the plaintiff; and Smidt & Co., after enumerating all the charges on the cargo and ship, therein charged to the plaintiff a commission of two and a half per cent on the amount of the goods and charges. In a letter of 15–27 June, they promised to furnish the plaintiff with the vouchers of the whole shipment; and in another mentioned having before sent him the bill of lading and invoices of those shipments, performed on the plaintiff's account on board the Bremen packet, and they annexed the duplicate of the vouchers. After the captain had received the goods, he was requested by Smidt & Co. to sign a bill of lading for them, deliverable to —— or his order, for which he was to receive freight at the rates therein specified. The captain objected to sign the bills of lading with a blank for the name of the consignee, until Smidt & Co. assured him that was of no consequence, as the goods were to be delivered to his owner, upon which he signed it. The first-mentioned letter to the plaintiff, which contained the invoices and bill of lading, was sent by Smidt & Co. to Lehr, their agent in this country, in a letter dated Riga, 4–16 June, wherein they stated respecting the Bremen packet, that they should make out Ogle's bills of lading to order, that in case of his not accepting the drafts, Ruckers might become possessors of the bills of lading; and after stating the amount of the goods loaded for the plaintiff, and charges, and that there would be very little of the proceeds of his wines remaining at his disposal, they added that they drew on him only £2,500, which bills they remitted to Messrs. Ruckers. They conceived that sum to be the balance due to them, which the plaintiff disputed. In a letter 2–14 July, Smidt & Co. instructed Lehr to take the necessary measure, that in case Smidt & Co.'s drafts of £1,300 and £1,200 at three months, drawn on the 4–16 June, were not accepted, he should otherwise dispose of the bills of lading he had in hand, and let Messrs. Ruckers receive the goods and dispose of them. Lehr, in pursuance of these instructions, called upon the plaintiff before the ship arrived, and delivered to him the letter enclosing the four invoices, and stated that Smidt & Co. had drawn two bills upon him, the one for £1,200, the other for £1,300, which were in the hands of Messrs. Ruckers, and requested the plaintiff would accept them; the plaintiff refused, and Lehr in consequence indorsed the bill of lading to Messrs. Ruckers. On the ship's arrival in England, before any of the goods had been delivered to the plaintiff, Messrs. Ruckers claimed the goods as indorsees of the bill of lading, but the captain refused to deliver to them, and delivered the goods to the plaintiff, who deposited them with the defendants as warehouse-keepers on his account. He had since demanded them back from the defendants, and tendered them the amount of their charges, but they had refused to deliver them. There was no tender of any freight for the goods. Smidt & Co. were alien enemies at the time of the shipment and trial. The plaintiff had obtained a license from the crown to import these goods, upon which license Smidt & Co. had, before the ship left Riga, indorsed that the goods were shipped on British account. If the plaintiff were not entitled to recover the value of the goods so deposited with the defendants, a nonsuit was to be entered.

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[1] GROSE, J., delivered a concurring opinion, and LAWRENCE and LE BLANC, JJ., also concurred.

Vaughan, Serjt., for the plaintiff.

Lens, Serjt., for the defendant.

GIBBS, C. J. This is an action by Ogle against Atkinson, into whose hands Ogle had delivered goods, brought for the purpose of recovering from them the value of the goods, which they refuse to re-deliver, insisting that the property of the goods is in Smidt & Co., from whom they have had notice to detain them. There are two preliminary points made by the plaintiff: first, that the defendants cannot refuse to deliver up the goods to the plaintiff from whom they received them; but, if the property is in others, I think they may set up this defence. Secondly, it is said, Ogle has a lien for freight; he might have had such a lien, but if he wrongfully gets the goods into his hands on a claim of property, he cannot afterwards set up a lien for freight. This brings us to the true question, which is, in whom the property is vested. It is true that the goods might have been delivered aboard the ship on the terms on which the defendant contends they were delivered; and if they had been, no doubt the plaintiff could not have obtained the goods, without accepting the bills; but were they so delivered? Smidt & Co., in their letter to Ogle, never make mention of any bills to be accepted by Ogle. No doubt, a delivery on board this ship was an absolute delivery to Ogle, unless qualified. Does the case, therefore, state any such qualification? The case states that the captain received them as the plaintiff's own goods, which means his own goods absolutely; not with any qualification; and Smidt & Co. represent them to the captain to be goods of Ogle, and as such they are delivered. If Smidt & Co. had said, We deliver the goods to you, to be the goods of Ogle if he accepts cer-

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tain bills, the defence would avail; but no such thing passes. I cannot annex to this delivery the qualification that they are to be the plaintiff's own goods if he does certain things. The captain, then, receives them as Ogle's absolutely. Is this state altered? The goods go on board; bills of lading are tendered to the captain to sign in blank; the captain objects. According to the defendant's argument, the answer should have been, I leave the bills in blank, because it is as yet uncertain to whom the bills may be deliverable, for that the cargo is to go to Rucker, unless the plaintiff accepts certain bills; but the answer given is, The blank in the bill is immaterial, for the goods are at all events to be delivered to your owner. If the blank was immaterial, it imported no alteration in the terms of the delivery; if it was material, a fraud was practised on the captain, which cannot avail the consignors. I therefore think that the property of the goods entirely vested in the plaintiff, and that the subsequent acts of the consignors and their agents cannot prevent him from recovering against the defendants; the judgment therefore must be for the plaintiff.

Judgment for the plaintiff.[1]

WILMSHURST AND ANOTHER *v.* BOWKER AND ANOTHER.

In this [illegible]
or a contract
[illegible]
delivery of [illegible]
performance

IN THE COMMON PLEAS, MAY 8, 1841.

[*Reported in 2 Manning & Granger*, 792.]

IN THE EXCHEQUER CHAMBER, FEBRUARY 3, 1844.

[*Reported in 7 Manning & Granger*, 882.]

CASE. The first count stated in substance that, on the 25th October, 1836, the plaintiffs bargained with the defendants to buy of them, and the defendants sold to the plaintiffs, 500 quarters of wheat at 51*s.* per quarter; that on the 27th of said October, the defendants, by order of the plaintiffs, caused said wheat to be shipped on board of a certain vessel then lying at the port of Lynn, in the county of Norfolk, to wit, a vessel called the "Ramsgate," of which one Lightowler was then master, to be carried from said Lynn to Maidstone, in the county of Kent, for the account and at the risk of the plaintiffs, and there to be delivered to the plaintiffs; and the defendants then parted with the possession of the said wheat, and delivered the same out of their possession to the said Lightowler, in and on board of the said vessel; and the said Lightowler then received the said wheat, and had possession of the same, for the purposes aforesaid. That afterwards, on the said 27th of October, the said Lightowler executed and delivered to the defendants a bill of lading, whereby he undertook, on the arrival of said vessel at Maidstone, to deliver the said wheat to the order of the defendants;

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[1] HEATH, CHAMBRE, and DALLAS, JJ., delivered brief concurring opinions.

and the defendants made out an invoice of said wheat, stating the same to be shipped by order and for the account and risk of the plaintiffs, and wrote a letter to the plaintiffs, requesting them to add to said invoice the charge for insuring said wheat, and remit the amount to the defendants in due course; and thereupon the defendants enclosed said invoice and bill of lading (having indorsed the latter to the plaintiffs) in said letter, and sent said letter, invoice, and bill of lading to the plaintiffs, and the plaintiffs afterwards, on the said 27th of October, received the same, and then became and were, and thence hitherto had been and still were, the owners thereof respectively; of all which the defendants had notice. Breach: That afterwards, on the said 27th of October, the plaintiffs then being the holders of the said bill of lading, and not being bankrupts or insolvents, but being then lawfully entitled to have the said wheat delivered by the said Lightowler to them the plaintiffs, the defendants, well knowing the premises, but contriving and intending to injure and defraud the plaintiffs, did not nor would suffer or permit the said wheat to be delivered to the plaintiffs, but wrongfully and injuriously, without the license or consent, and against the will of the plaintiffs, revoked and rescinded the said sale of the said wheat to the plaintiffs, and caused and procured the said wheat to be stopped in its passage to the plaintiffs, and forthwith upon such stoppage, and without the plaintiffs having notice thereof or of their intention so to do, hindered and prevented the same from being delivered to the plaintiffs; *per quod*, &c., laying special damages.

Pleas: first, not guilty. Secondly, that the plaintiffs did not bargain with the defendants to buy of them, nor did the defendants sell to the plaintiffs the said wheat in the declaration mentioned, at the said price in that behalf therein mentioned, in manner and form as the plaintiffs had in the first count of the declaration alleged; concluding to the country.

Thirdly, that upon the said 25th of October, 1836, in the first count mentioned, the plaintiffs bargained with the defendants to buy, and the defendants then sold to the plaintiffs, the said quantities of wheat in the said first count mentioned, at and for the price in that behalf in the said first count alleged, upon the terms and conditions for the payment thereof as follows: (that is to say) that the payment thereof should be made by bankers' draft on London at two months' date, to be remitted by the plaintiffs to the defendants upon receipt by the plaintiffs of the invoice and bill of lading, and the defendants then caused the said wheat to be shipped on board of the said ship or vessel, and the possession thereof to be delivered to the said master and commander in pursuance of the said bargain, to be by him carried to Maidstone in the county of Kent, and to be then delivered to the plaintiffs according to the said agreement, and the terms and conditions thereof; that the plaintiffs upon the day and year in that behalf in the said first count alleged, and before the committing of the said supposed grievance in that count mentioned, received the said invoice and bill of lading, as in the said declaration alleged, but that the plaintiffs did not nor would, upon the receipt of the said invoice and bill of lading, remit or tender, or offer to remit to the defendants any bankers' draft on London for the payment of the price of the said wheat, but, on receipt of the said invoice and bill of lading, wholly failed and neglected so to do, contrary to their agreement in that behalf as aforesaid; whereupon the defendants caused and procured the wheat to be stopped, and then hindered and prevented the same from being delivered to the plaintiffs, as they lawfully might for the cause aforesaid. Verification.

The plaintiffs joined issue on the first and second pleas, and replied *de injuria* to the third.

At the trial of the cause before Maule, J., at the adjourned sittings in London, after last Michaelmas term, 1839, the plaintiffs' counsel opened the following as the facts of the case. The plaintiffs are corn-merchants at Cranbrook in Kent, carrying on business under the firm of John Wilmshurst & Son; and are also partners in a banking-house there under the firm of Wilmshurst, Hague, & Co. The defendants are corn-merchants at Lynn, in the county of Norfolk. On the 25th of October, 1836, the defendants contracted to sell to the plaintiffs a quantity of wheat on the terms mentioned in the following sold note signed by the defendants. A corresponding bought note was, at the same time, signed by the plaintiffs.

"Sold, the 25th of October, 1836, to Messrs. John Wilmshurst & Son, about 300 quarters of wheat, as per sample, at 51*s.* per quarter on board. Payment by bankers' draft on London at two months' date, to be remitted on receipt of invoice and bill of lading."

Terms

On the 27th of October, the wheat, which consisted of 310 quarters, was shipped on board of a vessel, called the "Ramsgate," W. Lightowler, master, for Maidstone, deliverable "unto order, or to assigns, he or they paying freight," &c. On the same day the defendants, in pursuance of an arrangement to that effect with the plaintiffs, whereby the defendants were to charge the plaintiffs with the premium in addition to the cost price of the wheat, gave orders to their agents in London to effect an insurance on the wheat, and to hand the policy to the plaintiffs. The defendants forwarded to the plaintiffs the bill of lading, indorsed in blank, and an invoice of the wheat in a letter, wherein they requested the plaintiffs to remit to them the amount of the invoice, after having added to it the charges for insurance. The wheat was described in the invoice "as a cargo of wheat shipped on board the 'Ramsgate,' W. Lightowler, master, for Maidstone, by order, and for the account and risk, of Messrs. John Wilmshurst & Son." On the 29th, the plaintiffs received the policy of insurance on the wheat from the defendants' agents, with an account of the charges thereon, amounting to £5 12*s.* 1*d.* On the 30th, the plaintiffs transmitted to the defendants by post a bill for £796 2*s.* 1*d.* (being the

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invoice price of the wheat and the charges for insurance), in the following form: —

LYNN, October 27, 1836.

£796 2*s.* 1*d.*

Two months after date pay to our order seven hundred and ninety-six pounds, two shillings, and one penny, value received.

Messrs. WILMSHURST & SON, Merchants, Cranbrook.

At Weston and Young's,
Bankers, Borough,
John Wilmshurst and Son

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By return of post on the 1st of November the defendants sent back this bill to the plaintiffs, inclosed in the following letter: —

"Gentlemen, — We have your favor of the 30th ult., inclosing your acceptance, which, being contrary to agreement, we return, and have arranged otherwise for the disposal of the cargo."

On the 3d of November, Wilmshurst the son wrote the following reply: —

"Gentlemen, — I was much surprised at the tenor of your letter this morning. It was altogether an error of my father's in sending a bill drawn on us as merchants. However, we now send you a bankers' acceptance, and trust you will see the wheat forwarded immediately.

In this letter a bill was enclosed as follows: —

LYNN, October 27, 1836.

£796 2*s.* 1*d.*

Two months after date pay to our order seven hundred and ninety-six pounds, two shillings, and one penny, value received.

Messrs. WILMSHURST, HAGUE, & Co., Bankers, Cranbrook.

At Weston and Young's,
Bankers, Borough,
Wilmshurst, Hague, and Co.

By the same post the younger Wilmshurst sent a second letter to the defendants, offering, in case the defendants should not be "agreeable" to take the bill last sent, to pay cash for the wheat, less the discount. The defendants, considering the second draft not to be a compliance with the terms of the contract, returned it also in a letter, repeating that the cargo was otherwise disposed of.

Immediately after they returned the first draft, the defendants got the wheat back from Captain Lightowler. They subsequently sold it at 56*s.* a quarter.

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Upon this statement of facts the learned judge observed that the third plea must be taken as proved, and that the only question was, whether such plea would be an answer to the action after verdict. It was thereupon agreed that a verdict should be entered for the plaintiffs on the first and second issues, and for the defendants on the third, with liberty to the defendants, in the event of the plaintiffs obtaining a rule for judgment *non obstante veredicto* on the third plea, to move that the verdict might be entered for them upon the second issue, on the ground of the misstatement of the contract in the declaration (the omission of the stipulation as to the terms of payment), the court to have the same power of amendment as the judge at *nisi prius.*

The damages were assessed contingently at £77.

Greenwood now showed cause.

Butt in support of the rule. *Cur. adv. vult*

Tindal, C. J., now delivered the judgment of the court. . . . The question is, whether after the sale of the wheat to the plaintiffs, and such constructive delivery thereof to them as is stated in the declaration, the defendants were justified in stopping the wheat *in transitu*, upon the ground set forth in the plea.

That the defendants cannot justify the stoppage of this wheat *in transitu*, upon the ordinary ground on which such right is exercised, may be readily admitted. The ordinary right of countermanding the actual delivery of goods shipped to a consignee, is limited to the cases in which the bankruptcy or insolvency of the consignee has taken place. The law as to this point is very clearly laid down by Lord Stowell, in the case of The Constantia, 6 Rob. Adm. Rep. 321, and in many cases in the common law reports (*vide* 2 N. & M. 644); and as, in the present case, the first count directly alleges that the plaintiffs were neither bankrupt nor insolvent at the time when the stoppage took place, and as no traverse is taken upon this allegation, it must be taken that the common ground of stopping *in transitu* is wanting in the present case. But the question in this case is, whether, under the particular terms of this contract, the consignors have not reserved to themselves the power of withholding the actual delivery of the wheat, until the consignees should comply with the mode of payment stipulated by the contract. There is no doubt that the property in the wheat passed to the plaintiffs under the contract, upon which point much of the argument before us has turned; but the question is as to the intention of the parties, as evidenced by the contract, with reference to the delivery of possession. And we are of opinion that the intention of the parties, under this contract, was, that the consignors should retain the power of withholding the actual delivery of the wheat, in case the consignees failed in remitting the bankers' draft, not upon the delivery of the wheat, but on the receipt of the bill of lading, which, in the ordinary course of business would precede the arrival or delivery of the wheat. And we think the object of making the receiving of the invoice and bill of lading and the remitting of the bankers' draft to be simultaneous or concurrent acts could have been no other than to afford security to the consignors, so that in case the consignees failed in the performance of the latter stipulation, the consignors might withhold the actual delivery of the cargo. When goods are sold, and nothing is said about the time of delivery or the time of payment, the seller is bound to deliver them whenever they are demanded on payment of the price; "but the buyer," as is observed by Mr. Justice Bayley in Bloxam *v.* Sanders, 4 B. & C. 948, 7 D. & R. 405, "has no right

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to have the possession of the goods until he pays the price." In the present case, it is part of the stipulation that something shall be done by the buyer before the time when, in the usual course of business, the goods can be actually delivered; namely, upon the handing over of the bill of lading to the buyers, which ordinarily precedes the arrival of the ship; so that the right to the possession of the goods could not vest until the buyers either remitted, or tendered, or offered to remit the bankers' draft in payment. And we think this view of the case not inconsistent with the judgment of the court in Walley *v.* Montgomery, 3 East, 585; in which, although it was held that the consignors had no right to stop *in transitu*, it is to be observed, that the consignees had never refused to accept the bills which had been drawn on them for the price of the timber, but, on the contrary, were ready and offered so to do; nor, indeed, does it appear in that case to have been a condition that the bills should be accepted at any certain time before the actual delivery. In the present case we hold that upon the proper construction of the plea, the contract of sale entered into between the parties was conditional as to the right of possession of the cargo; and that the condition not having been performed on the part of the plaintiffs, the consignees, the defendants, the consignors, were justified in preventing the wheat from being delivered. *Rule discharged.*

The plaintiffs brought a writ of error upon the foregoing judgment, and assigned errors which were argued in the Exchequer Chamber before LORD ABINGER, C. B., PARKE, B., PATTESON, J., ALDERSON, B., COLERIDGE, J., ROLFE, B., WIGHTMAN, J.

M. D. Hill (with whom was *Butt*), for the plaintiffs.

Greenwood, for the defendants.

LORD ABINGER, C. B. We are quite unanimous; and, however reluctant we may be to overturn a considered judgment of the Court of Common Pleas, we find ourselves unable to come to any other conclusion than that the plaintiffs are entitled to recover. We accede to the general principle laid down by the court below; and if the facts had been before a jury, we are not prepared to say that they might not have drawn the inference that the remitting of a banker's draft was a condition precedent to the vesting of the property in the wheat in the plaintiffs. But we draw no such inference from what appears upon the record. The delivery of the bill of lading and the remitting the banker's draft could not be simultaneous acts; the plaintiffs must have received the bill of lading and invoice before they could send the draft. The default on the part of the plaintiffs amounts to no more than this, that they have omitted to perform one part of their contract.

ALDERSON, B. It is quite consistent with the decision of the Court of Common Pleas that the remitting the banker's draft was a condition subsequent. *Judgment reversed.*

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WAIT AND ANOTHER v. BAKER.

IN THE EXCHEQUER, FEBRUARY 5 & 7, 1848.

[*Reported in 2 Exchequer Reports, 1.*]

TROVER for 500 quarters of barley. Pleas, not guilty, and not possessed; upon which issue was joined.

At the trial, before Williams, J., at the last spring assizes for Somersetshire, the following facts appeared: The defendant, a corn-factor at Bristol, had occasional dealings with a person of the name of Lethbridge, who was also a corn-factor at Plymouth, and on the 5th of December, 1846, wrote to him the following letter: —

"I hear that the crop of barley in the south of Hampshire is good this year, and that at Kingsbridge the price is low, compared with the markets further eastward. If you are doing anything in the article this season, and can make me an offer of a cargo, I have no doubt but we may have a transaction Let me hear from you in due course. Send me sample in letter, describing weight, &c."

To which Lethbridge wrote the following answer on the 9th of that month: —

"I beg to inform you that I have not yet commenced buying barley in Kingsbridge market, farmers there standing out for 10*s.* a bag. After Saturday's market I will send you a sample and an offer, if possible."

On the 14th Lethbridge wrote the following letter to the defendant:

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"I herewith hand you samples of common and chevalier barley of the neighborhood of Kingsbridge, and will engage to sell you from 400 to 500 quarters f. o. b. barley at Kingsbridge, or neighboring port, at 40*s.* per quarter common, and 42*s.* per quarter chevalier, in equal quantities, for cash, on handing bills of lading, or acceptance at two months' date, adding interest at the rate of £5 per cent per annum, subject to your reply by course of post."

On the 16th, the defendant returned the following reply: —

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"I beg to accept your offer of 250 quarters of chevalier barley, at 42*s.* per quarter, and 250 quarters common, at 40*s.* per quarter f. o. b., for cash payments, on receipt of bill of lading and invoice, or acceptance at two months' date, adding interest at the rate of £5 per cent per annum, subject to your reply by course of post."

On the 18th, Lethbridge wrote the defendant as follows: —

"Your favor of the 16th came duly to hand, and note by it your acceptance of my offer of barley. I suppose I am to take up a vessel at the best possible freight I can get her for. Please instruct me in this, and say if for Bristol or any other port."

On the 19th the defendant wrote in answer: —

"I took it for granted that you would get a vessel for the barley I have bought of you f. o. b., and therefore did not instruct you to seek one. I trust that you will be particular to select a good ship, and at the lowest possible freight, for this port; and, above all, take care that the quality of the barley is fully equal to sample. A party, who will take part of it, is extremely particular in these matters; and the samples are sealed and held in the custody of a third party. Please to advise when you have taken up a vessel, with particulars of the port she loads in, so that I may get insurance done correctly."

After some further correspondence respecting the amount of the freight, Lethbridge wrote on the 23d to the defendant: —

"I now send you copy of charter-party of the 'Emerald,' which vessel will sail for the port of loading to-day or to-morrow, and I will lose no time in getting her loaded."

The defendant, by letter dated the 24th, acknowledged the receipt of the charter-party (not under seal), which was dated on the 22d, and was in the name of Lethbridge, to load at Dartmouth, a portion to be filled up at Salcombe, to proceed to Bristol or any other port.

On the 28th, Lethbridge wrote to the defendant: —

"The 'Emerald' will commence loading to-day. I hope to hand you bill of lading in the course of the week."

And again on the 1st of January, 1847: —

"I hope to be able to send you invoice and bill of lading of 'Emerald' on Tuesday or Wednesday."

And on the 6th of January he wrote to the defendant as follows: —

"The 'Emerald' is nearly loaded; expect the bill of lading to-day or to-morrow. I expect to be in Exeter on Friday, when it is very likely I shall run down and see you."

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The vessel was loaded with common and chevalier barley; and on the 7th of January, Lethbridge received from the master the bill of lading of the cargo, which was therein expressed to be deliverable at Bristol to the order of Lethbridge or assigns, paying the freight as per charter. On the 8th, Lethbridge called upon the defendant at Bristol early in the morning, and left at his counting-house the invoice and an unindorsed bill of lading. At a subsequent part of the day, Lethbridge called again upon the defendant, when the defendant raised some objections to the quality of the cargo, and asserted that it was the Δ

inferior to the samples; he also threatened he would take the cargo, but sue Lethbridge for eight shillings a quarter difference. After some further dispute upon the matter, the defendant offered Lethbridge the amount of the cargo in money, and said that he accepted the cargo. Lethbridge, however, refused to accept the money, and to indorse the bill of lading to the defendant; but took the bill of lading from the counter and immediately proceeded to the plaintiffs', who were corn-factors, and had a house of business in the neighborhood, and indorsed the bill of lading to them, and received an advance upon it. The market at that time had risen considerably. The "Emerald" arrived on the 16th, and on the 18th the defendant proceeded on board and claimed the cargo as the owner, and unshipped 1,240 bushels of the barley, worth £422 14*s.*; but the plaintiffs, coming on board during the time the cargo was being unshipped, presented the bill of lading and obtained the rest of the cargo, and paid the captain the freight.

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The jury found that the defendant did not refuse to accept the barley from Lethbridge; that the tender was unconditional; and that Lethbridge was not an agent intrusted with the bill of lading by the defendant. His lordship thereupon directed a verdict to be entered for the plaintiffs for £422 14*s.*, reserving leave to the defendant to enter a verdict for him.

A rule to show cause having been obtained,

Crowder, *Barstow*, and *Greenwood* appeared to show cause, but were stopped by the court, who called upon

Butt and *Montague Smith*, in support of the rule.

Parke, B. I am of opinion that the rule in the present case ought to be discharged. It is perfectly clear that the original contract between the parties was not for a specific chattel. That contract would be satisfied by the delivery of any 500 quarters of corn, provided the corn answered the character of that which was agreed to be delivered. ① By the original contract, therefore, no property passed; and that matter admits of no doubt whatever. In order, therefore, to deprive the original owner of the property, it must be shown in this form of action — the action being for the recovery of the property — that, at some subsequent time, the property passed. It may be admitted, that if goods are ordered by a person, although they are to be selected by the vendor, and to be delivered to a common carrier to be sent to the person by whom they have been ordered, the moment the goods, which have been selected in pursuance of the contract, are delivered to the carrier, the carrier becomes the agent of the vendee, and such a delivery amounts to a delivery to the vendee; and if there is a binding contract between the vendor and vendee, either by note in writing, or by part payment, or subsequently by part acceptance, then there is no doubt that the property passes by such delivery to the carrier. It is necessary, of course, that the goods should agree with the contract. In this case, it is said that the delivery of the goods on shipboard is equiv-

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alent to the delivery I have mentioned, because the ship was engaged on the part of Lethbridge as agent for the defendant. But assuming that it was so, the delivery of the goods on board the ship was not a delivery of them to the defendant, but a delivery to the captain of the vessel, to be carried under a bill of lading, and that bill of lading indicated the person for whom they were to be carried. By that bill of lading the goods were to be carried by the master of the vessel for and on account of Lethbridge, to be delivered to him in case the bill of lading should not be assigned, and if it should, then to the assignee. The goods, therefore, still continued in the possession of the master of the vessel, not as in the case of a common carrier, but as a person carrying them on behalf of Lethbridge. There is no breach of duty on the part of Lethbridge, as he stipulates under the original contract that the price is to be paid on the delivery of the bill of lading. It is clearly contemplated by the original contract, that, by the bill of lading, Lethbridge should retain control over the property. It seems to me to follow that the delivery of the 500 quarters to the captain, to be delivered to Lethbridge, is not the same as a delivery of 500 quarters to a common carrier by order of the consignee. The act of delivery, therefore, in the present case, did not pass the property. Then, what subsequent act do we find which had that effect? It is admitted by the learned counsel for the defendant, that the property does not pass, unless there is a subsequent appropriation of the goods. The word appropriation may be understood in different senses. It may mean a selection on the part of the vendor, where he has the right to choose the article which he has to supply in performance of his contract; and the contract will show when the word is used in that sense. Or the word may mean that both parties have agreed that a certain article shall be delivered in pursuance of the contract, and yet the property may not pass in either case. For the purpose of illustrating this position, suppose a carriage is ordered to be built at a coachmaker's; he may make any one he pleases, and, if it agree with the order, the party is bound to accept it. Now suppose that, at some period subsequent to the order, a further bargain is entered into between this party and the coach-builder, by which it is agreed that a particular carriage shall be delivered. It would depend upon circumstances whether the property passes, or whether merely the original contract is altered from one which would have been satisfied by the delivery of any carriage answering the terms of the contract, into another contract to supply the particular carriage, — which, in the Roman law was called *obligatio certi corporis*, where a person is bound to deliver a particular chattel, but where the property does not pass, as it never did by the Roman law, until actual delivery; although the property after the contract remained at the risk of the vendee, and, if lost without any fault in the vendor, the vendee, and not the vendor, was the sufferer. The law of England is different: here property does not pass until there is a bargain with respect to a specific article, and everything is done which, according to the intention of the parties to the bargain, was necessary to transfer the property in it. "Appropriation" may also be used in another sense, and is the one in which Mr. Butt uses it on the present occasion: *viz.*, where both parties agree upon the specific article in which the property is to pass, and nothing remains to be done in order to pass it. It is contended in this case that something of that sort subsequently took place. I must own that I think the delivery on board the vessel could not be an appropriation in that sense of the word. It is an appropriation in the first sense of the word only; the vendor has made his election to deliver those 500 quarters of corn. The next question is, whether the circumstances which occurred at Bristol afterwards amount to an agreement by both parties that the property in those 500 quarters should pass. I think it is perfectly clear that there is no pretence for saying that Lethbridge agreed that the property in that corn should pass. It is clear that his object was to have the contract repudiated, and thereby to free himself from all obligation to deliver the cargo. On the other hand, as has been observed, the defendant wished to obtain the cargo, and also to have the power of bringing an action if the corn did not agree with the sample. It seems evident to me that, at the time when the unindorsed bill of lading was left, there was no agreement between the two parties that that specific cargo should become the property of the defendant. If that is so, the case remains, as to the question of property, exactly as it did after the original contract. There is a contract to deliver a cargo on board, and probably for an assignment of that cargo by indorsing the bill of lading to the defendant; but there was nothing which amounted to an appropriation, in the sense of that term which alone would pass the property. The result is, that, in this action of trover, the plaintiffs, claiming under Lethbridge by the indorsement of the bill of lading, are entitled to the property; and then Mr. Baker has his remedy against him for the non-fulfilment of his contract, which he certainly has not fulfilled.

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ROLFE, B., and PLATT, B., concurred. *Rule discharged.*[1]

TURNER *v.* TRUSTEES.

IN THE EXCHEQUER CHAMBER, MAY 20, 1851.

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[*Reported in* 6 *Exchequer Reports*, 543.]

PATTESON, J. This was an action to try the right of the plaintiffs, as assignees of Messrs. Higginson & Deane, who were merchants in Liverpool, trading under the name of Barton, Irlam, & Higginson, and had become bankrupts, to the possession of a quantity of cotton and timber, as against Messrs. Menlove & Co., who were merchants at

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[1] ALDERSON, B., delivered a brief concurring opinion.

Charleston, in America, and the real defendants in this suit. The property in dispute constituted the cargoes of two vessels, of which the bankrupts were owners, called the "Charlotte" and the "Higginson;" and, as it is agreed that the same questions arise with respect to both, and that the circumstances are similar, it will be only necessary to advert to the leading facts relating to one of them, the "Charlotte."

It appears, that in August, 1847, the bankrupts sent orders to Menlove & Co., at Charleston, to ship, on their (the bankrupts') account, a quantity of cotton for the homeward cargo of the "Charlotte," a ship belonging to the bankrupts, which had been sent to America with a cargo of coals and salt, and which arrived at Charleston on the 19th of September. In the meantime, Menlove & Co. had made considerable purchases of cotton in execution of the order, and continued to make further purchases until within a day or two of the sailing of the "Charlotte" on her homeward voyage with the cotton on board, on the 13th of October. On the 12th of October, the master of the "Charlotte" signed a bill of lading of the cotton, "to be delivered at Liverpool unto order or to our assigns, paying freight for cotton nothing, being owners' property;" and Menlove & Co. indorsed the bill of lading in these terms: "Deliver the within to the Bank of Liverpool, or order. Edward Menlove & Co."

Messrs. Menlove & Co. informed the bankrupts, from time to time, of these purchases as they were made; and on the 16th of October they informed the bankrupts of the sailing of the "Charlotte," and that they had drawn bills upon them of several dates (the earliest being of the 23rd of September), being for the cargo "on their account," by the "Charlotte," and desiring them to insure the cotton. On the 19th of October, Menlove & Co. sent an abstract invoice of the cotton, dated the 13th of October; in which it was stated, that the cotton was shipped by Menlove & Co. on board the "Charlotte," for Liverpool, "by order, and for account and risk of Messrs. Barton, Irlam, & Co. there, and addressed to order." And on the 23rd of October, Menlove & Co. sent to the bankrupts a full invoice of the cotton, dated the 13th of October, stating that the cotton was shipped for Liverpool by order and for account of Barton & Co. there, and to them consigned. It appeared that Menlove & Co., having no sufficient funds of the bankrupts' in their hands to pay for the cotton, sold the bills they had drawn upon them to the Bank of Charleston, and delivered to them the bill of lading, indorsed as before mentioned, as security for the due honor of the bills, which, with the exception of one very small one, were dishonored by the bankrupts, and taken up by Menlove & Co.; and by letter of the 23rd of October, Menlove & Co. informed the bankrupts, that the bank to whom they had sold the bills required the delivery of the bill of lading to them, and that they had so delivered it. On the 13th of November, Higginson & Deane became bankrupts. The "Charlotte" arrived at Liverpool on the 26th of November; and on the 27th notice was given to the master, that Menlove & Co. claimed to stop the cargo *in transitu*, and required him to deliver it to the Bank of Liverpool on their account.

The question is, whether Menlove & Co. could, under the circumstances, insist upon the delivery of the cargo to them or their agents unless the bills were duly honored. It was contended for the plaintiffs, the assignees, that, by delivery of the goods on board the bankrupts' own ship, specially appointed for the purpose of bringing home those goods, and such delivery being made to the master, who was the bankrupts' agent for the purpose of receiving them, the absolute property vested in them, the sale being complete by the acceptance of the order and the terms of the invoice; and that the terms of the bill of lading, by which the goods were to be delivered at Liverpool to order or to *our* (Menlove & Co.'s) assigns, did not prevent such absolute property vesting in the bankrupts, nor entitle Menlove & Co., the unpaid vendors, to any right of stoppage *in transitu,* or any other right over them whatever; and more especially as it was stated that no freight was to be paid for the cotton, being owners' property, which was inconsistent with the property remaining in Menlove & Co. It was also further contended for the plaintiffs, that the captain had no power to bind the bankrupts by the special terms of the bill of lading, and that the delivery must be taken to be absolute to the vendees; and further, that if Menlove & Co. had any lien, the assignment of the bills of lading to the bank divested that lien, and deprived Menlove & Co. of all power over the goods.

The cases mainly relied upon by them in support of their principal point were Ogle *v.* Atkinson, 5 Taunt. 759; Coxe *v.* Harden, 4 East, 211; the case of The Constantia, 6 Rob. Adm. Rep. 327; Bohtlingk *v.* Inglis, 3 East, 381, and the case of Fowler *v.* Kymer cited in it. All these cases, however, are clearly distinguishable from the present.[1]

On the part of the defendants it was contended, that Menlove & Co. had never parted with the property in the goods to the bankrupts, but had reserved it until they were paid the purchase-money, notwithstanding the terms of the invoice, and the statement in the bill of lading that no freight was payable for the cotton, being owners' property; and we are of opinion that, upon the facts of the case, the judge was right in directing the verdict to be entered for the defendants upon the trial; and that they are now entitled to our judgment.

It appears by the bill of exceptions, that it was agreed on both sides at the trial that there was no question of fact for the jury, and that the judge should direct them how they should give their verdict; and he being of opinion, upon all the facts of the case, that Menlove & Co. had not delivered the cotton on board the ship to be carried for and on account and at the risk of the bankrupts, but that they intended to preserve their right as unpaid vendors, directed the verdict to be entered for the defendants. There is no doubt, that a delivery of goods on board of the purchaser's own ship is a delivery to him, unless the vendor protects himself by special terms restraining the effect of such delivery. In the present case the vendors by the terms of the bill of lading made the cotton deliverable at Liverpool to their order or assigns; and there was not, therefore, a delivery of the cotton to the purchasers as owners, though there was a delivery on board their ship. The vendors still reserved to themselves, at the time of delivery to the captain, the *jus disponendi* of the goods, which he by signing the bill of lading acknowledged, and without which it may be assumed that the vendors would not have delivered them at all.

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[1] His lordship here stated the cases cited.

The question really is, whether any and what effect is to be given to the terms in the bill of lading making the goods deliverable to the order of the vendors; for, if by those terms they reserved to themselves the dominion over the cotton, it would not pass to the assignees. The invoice would pass no property whatever its terms might be, the property would only pass upon delivery, and the only effect to be attributed to the form and expressions of the invoice or bill of lading would be as indicating the terms upon which the goods were delivered.

The plaintiffs in error rely upon the terms of the invoice and the expression in the bill of lading, that the cotton is free of freight, being owners' property, as showing that the delivery on board the ship was with intention to pass the property absolutely; but the operative terms of the bill of lading, as to the delivery of the goods at Liverpool, and the letter of Menlove & Co. of the 23rd of October, show too clearly for doubt, that notwithstanding the other terms of the bill of lading and the invoice, Menlove & Co. had no intention, when they delivered the cotton on board, of parting with the dominion over it, or vesting the absolute property in the bankrupts. Upon this part of the case, the decisions of the Court of Exchequer in Van Casteel *v.* Booker, 2 Exch. 691, and Wait *v.* Baker, 2 Exch. 1, are authorities directly in favor of the defendants.

The plaintiffs further insisted, that the captain had no power to bind the bankrupts by such terms in the bill of lading as would leave the property still in the control of the vendors, and yet engage that the cotton should be freight free. Whether, as the cotton was actually carried, the owners of the ship as such might not be entitled to freight upon a *quantum meruit*, notwithstanding the terms of the bill of lading, is a point not necessary now to determine; but with respect to the question, whether the plaintiffs could set up the want of authority in the master as a ground for contending that there was an absolute delivery of the goods, so as to vest the property in the bankrupts immediately upon the delivery, notwithstanding the special terms upon which they were delivered and accepted by the captain, we are clearly of opinion that it is not competent to them to do so; and that as Menlove & Co. delivered the cotton on board upon special terms, which the captain was not bound to accept, but without which they would not have delivered them, and which would preserve to themselves the control over them, the bankrupts cannot treat the delivery to the captain as a delivery to them as their property, when it was expressly agreed that they were not to be delivered to the bankrupts but to the order of the vendors; and the want of authority of the master to accept them on such terms will not have the effect of vesting the property absolutely in the bankrupts. The case of Mitchel *v.* Ede, 11 A. & E. 888, is a strong authority in favor of the defendants.

With respect to the question whether the transfer of the bills of lading by themselves to the bank of Charleston divested their power over the goods, we are of opinion that it did not; Menlove & Co. were the vendors of the goods, and reserved to themselves, by the terms upon which they delivered them on board the ship, the property in those goods until payment duly made. By indorsing and depositing the bills of lading with the bank of Charleston as a security, they did not divest themselves of the property in the goods which they had reserved, and were in a situation to claim the goods as against the bankrupts by their agents at Liverpool. They never had divested themselves of the property in the goods, nor of the possession except by delivery to the captain. This is not the case of delivery to a carrier for the purpose of his delivering them to the vendee, but a delivery for the purpose of the carrier delivering them according to the order of the vendor, who retains more than a mere lien upon the goods. Neither the bankrupts nor the assignees ever had the property in the cotton as against the vendors, and the objection to their title may properly be taken under the plea of not possessed. It was said, that as Menlove & Co. had funds of the bankrupts in their hands to some, though to a very small, extent, they were not unpaid vendors to the full extent; but this really makes no difference, as no particular portion of the cotton was bought with those funds; and the bulk generally being purchased by Menlove & Co. with their own funds or credit, they retained their property in the whole of the goods until payment for the whole.

A question was made as to the admissibility of some of the evidence; but as no matter of fact was in question for the jury, and we are of opinion that, independently of the evidence objected to, there was sufficient unobjectionable evidence to warrant the direction of the judge. it has become immaterial to consider whether the evidence that was objected to was receivable or not. Our judgment, therefore, is for the defendants in error, and the judgment in the court below must be affirmed.

Judgment affirmed.

hes v Nicholson p 213 contra.

KEY AND OTHERS *v.* COTESWORTH AND OTHERS.

IN THE EXCHEQUER, MAY 8, 1852.

[*Reported in* 7 *Exchequer Reports*, 595.]

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ASSUMPSIT for money received by the defendants for the use of the plaintiffs. Plea, *non assumpserunt;* upon which issue was joined.

At the trial before Martin, B., at the London sittings after last Trinity term, it appeared that the action was brought to recover

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the sum of £671 15*s.* 9*d.*, being the proceeds of two cargoes of Indian silk handkerchiefs, consigned by the plaintiffs, merchants at Madras, carrying on business under the firm of Bunny & Co., to the defendants, merchants in London, under the following circumstances, which were mainly admitted on both sides: In the year 1845, Messrs. Kilgour & Leith, merchants at Glasgow, were desirous, through the defendants, their London agents, of procuring Indian silk handkerchiefs from the plaintiffs at Madras; and accordingly, on the 7th August, 1845, Kilgour & Leith wrote to the defendants as follows:

"We beg to acknowledge the receipt of your favors of 31st ult. and 5th inst. We find it does not answer your views to execute our friends' order for India goods. We thought you would have considered this not as an isolated transaction, but as one connected with our account, and that of our friends, whose other business we have directed to come through your house, and which will extend to £12,000 or £15,000 *per annum*. It certainly will take some time before the first order can be brought forward, but afterwards the same quantity would be required every three or four months. We did not think the liability great, as the goods would of course remain under your control till settled for. However, to save all trouble in the ordering, &c., we have arranged to have the goods made in Madras, and shipped from thence to England; we presume you will take them as a consignment, and on receipt of bill of lading accept for same. We will thank you to say as to this soon."

In answer to that letter, the defendants, on the 9th of August, wrote to Kilgour & Leith in these terms: —

"We will answer your proposition respecting the credit for the purchase of Madras handkerchiefs; in the mean time please to inform us at what date your friends would draw on us for the cost; whether you contemplate putting us in funds at their maturity, or do you intend the credit we have granted to you to be made available in part for this business."

On the 11th of August, Kilgour & Leith wrote to the defendants as follows: —

"The drafts for the Indian goods would be at six months' sight, and accompanied by bill of lading. We propose you accept for these goods as against a consignment of produce, we providing funds at drew maturity, or before if reshipped to the West Indies. We do not intend that the credit we have at present with you shall be made available for this business; we want the handkerchiefs to represent the draft against them till shipped for our friends in the West."

On the 18th of August, the defendants wrote to Kilgour & Leith in these terms: —

"With reference to the credit you require for the cost of India goods to be ordered from Madras, we are willing to grant it you, knowing the firm to whom you transmit the order; we will send you the necessary letter of credit."

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On being informed that the plaintiffs were the persons to whom Messrs. Kilgour & Leith desired the letters of credit to be given, on the 17th of September, the defendants wrote to the plaintiffs as follows: —

"At the request of Messrs. Kilgour & Leith, of Glasgow, we beg to open credit in your favor to the extent of £1,500, to be applied to the execution of an order they have given you for Madras handkerchiefs, and for cost of which, as produced, you may draw on us at the customary date, on forwarding bills of lading to our order, and timely orders for insurance."

On the 7th of November, the plaintiffs wrote to the defendants: —

"We have the pleasure to acknowledge the receipt of your letter on the 17th of September, handed to us by Messrs. Scott, Bell, & Co., authorizing us to draw on you to the extent of £1,500, in execution of an order for handkerchiefs, on account of Messrs. Kilgour & Leith, of Glasgow. We shall gladly avail of this authority, shipping the goods to your order, and giving you timely advice, that you may effect insurance on your side."

The plaintiffs accordingly executed the order, and forwarded the goods and bill of lading to the defendants, who received, accepted, and paid the bills drawn on them, in accordance with the letter of the 17th of September, to the extent of £1,500 therein mentioned; and this transaction was closed.

On the 5th of February, 1847, Messrs. Kilgour & Leith wrote to the plaintiffs as follows: —

"Inclosed are patterns of a third order for handkerchiefs, which we will thank you to have put in hand immediately on receipt. This order has been too long delayed; and if you can by any means hurry execution, we shall feel particularly obliged. You will draw for cost, and consign goods as before."

The patterns were inclosed, together with a detail of the order. The goods thus ordered were shipped for England in two vessels, the "Providence" and the "Essex." The goods by the "Providence" were shipped on the 21st of August, 1847; and they, as well as the goods shipped in the "Essex," were stated in the admissions to have been shipped on the said order, and on account of Messrs. Kilgour & Leith.

On the same day (21st of August, 1847) the plaintiffs wrote to the defendants as follows: —

"By the desire of our mutual friends, Messrs. Kilgour & Leith, of Glasgow, we beg to hand you herewith invoice and bill of lading for nine cases Madras handkerchiefs, shipped on the 'Providence,' Captain S. Hicks, to your address, and against which we have as usual drawn upon you at six months for the equivalent of the amount of invoice, in £369 2*s.* 1*d.*, being at the current exchange of 2*s.* per rupee, and which will no doubt be duly protected. These goods have been placed in a cabin to prevent the chance of their sustaining injury from the cargo, and as they have not been insured, we trust you will cover the risk on your side."

The bill of lading and invoice mentioned in this letter were enclosed, and the letter and its contents received by the defendants on the 26th of October in due course. By the bill of lading, which bore date the 21st of August, the goods were deliverable at London to the defendants or their assigns, they paying freight, &c. The invoice, which was also dated August 21, stated that the goods were consigned to the defendants, "on account and risk of Messrs. Kilgour & Leith, Glasgow."

The goods by the "Essex" were shipped on the 9th of October. A bill of lading, indorsed in blank by the plaintiffs, and an invoice substantially in the same form as the above, were enclosed in a letter from the plaintiffs to the defendants, dated the 12th of October, and which was received by the defendants on the 22d of November. This letter was as follows: —

"By desire of our mutual friends, Messrs. Kilgour & Leith, of Glasgow, we have the pleasure to hand you herewith invoice and bill of lading for eight cases Ventapollam handkerchiefs, shipped in the 'Essex,' Captain W. N. Howard, to your care; and we have as usual drawn upon you at six months for the equivalent of the amount of invoice in £302 13*s.* 8*d.*, being at the current exchange of 1*s.* 11½*d.* per rupee, and which will doubtless meet due honor. We leave the insurance to be effected on your side."

On the 27th of October, Messrs. Kilgour & Leith stopped payment, The goods by the "Providence" arrived in London on the 21st of October, the goods by the "Essex" on the 3d of March, 1848. Both parcels were received by the defendants under the bills of lading, and both were sold by them, and the proceeds, amounting to £671 15*s.* 9*d.*, sought to be recovered in this action, received by the defendants. Messrs. Kilgour & Leith were before and at the time, and still are, indebted to the defendants on a balance of account in a larger sum.

On the 21st of October, Scott, Bell, & Co., the plaintiffs' correspondents in London, having received the bill drawn against the goods by the 'Providence,' caused it to be presented for acceptance to the defendants, who ultimately refused to accept it. The second bill was also presented for acceptance on the 22d of November, and dishonored, and both bills were duly protested.

Upon the foregoing evidence, the learned judge was of opinion that there was no question for the jury, and nonsuited the plaintiffs.

Against a rule *nisi* to set aside the verdict and for a new trial,

Knowles and *Willes* showed cause.

The Attorney-General (*Montague Smith* with him), in support of the rule. *Cur. adv. vult.*

The judgment of the court was now delivered by

PARKE, B. [After stating the facts, his lordship proceeded:] It was contended at the trial, on behalf of the plaintiffs, that the sale of the handkerchiefs was a sale on a condition, either precedent or subsequent, that the defendants should accept the bills drawn on them in respect of the handkerchiefs; that, upon their refusal to accept, the condition precedent was never performed, and the property in the handkerchiefs never passed out of the plaintiffs, and that they were therefore entitled to them or their proceeds; and that, if this were not so, at all events it was subject to the condition subsequent, that the defendants should accept the bills, and, if not, the property should revert, which condition was broken; so that thereby the plaintiffs became entitled to the goods or their proceeds; and whether the sale was on a condition or not, was a question for the jury, and ought to have been left to them. On the other hand it was contended, on behalf of the defendants, that it was not a sale upon a condition at all; that it was an absolute sale by the plaintiffs to Messrs. Kilgour & Leith; and that, upon the shipment of the goods by the plaintiffs on account and risk of Messrs. Kilgour & Leith, followed up by the transmission of the bills of lading to the defendants, — one bill of lading making them the consignees, and the other the indorsees, — the property and possession absolutely vested in Kilgour & Leith, and these goods thereby became theirs, and were at their sole risk, and they alone were entitled to them and their proceeds; and that, if the plaintiffs had any right of action against the defendants, which on their part was denied, it was upon a contract to accept the bills, to be implied from the acceptance of the goods, with notice of the contents of the letters of the 21st of August and 12th of October; and that, whether it was a sale upon a condition or not, was a question of law for the judge, and not one of fact for the jury; the entire case, so far as related to the contract of sale, being contained in written documents, and the parties never having had any personal communication with each other. The learned judge was of opinion that there was no question for the jury in this case, and that it was for him to decide what the contract was; and he thought the sale to Messrs. Kilgour & Leith was an absolute, not a conditional one; that the property vested in them upon the delivery on board the ship, and the transmission of the bills of lading to the defendants; and that the plaintiffs could not maintain the present action against the defendants, who have received the goods and disposed of them under the authority

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of Kilgour & Leith, and could not bring an action for the proceeds; and, by his direction, the plaintiffs were nonsuited.

We are of opinion that the ruling of the learned judge was correct. We think that the question, what was the contract between the parties, was, in this case, entirely one of law for the judge to decide upon; nor was there any evidence of usage to which the letters refer, which would be matter to be left to the jury. Looking at the written documents alone, the learned judge was quite right in the view he took at the trial, that the property vested by the transmission of the bills of lading in the manner described to the defendants, with the invoices at the same time. If it had been the intent of the vendors to preserve their right in that property until the bill drawn against it was accepted, they ought to have transmitted the bills of lading indorsed in blank to an agent, to be delivered over only in case the acceptance took place Having delivered them without that qualification, the property vested in Kilgour & Leith, or the defendants as their agents. Our judgment in this case is in conformity with that of the Court of Exchequer Chamber in the case of Wilmshurst *v.* Bowker, 7 M. & Gr. 882; but there is a passage in the judgment of Lord Abinger which was much relied on by the learned counsel for the plaintiffs. The circumstances of the two cases are very similar; and Lord Abinger stated, that, if the facts had been before a jury, he was not prepared to say that they might not have drawn the inference that the remitting of the banker's draft, the mode of payment agreed on in that case, was a condition precedent to the vesting of the property. In that case there may have been some particular facts to go to the jury, but at all events it was only the *obiter dictum* of Lord Abinger. It is sufficient to say, for the reasons before given, we think that in this case there was no question of fact as to the contract to be submitted to the jury. Several other cases were cited on collateral points, to which it is unnecessary to refer. The rule is therefore discharged. *Rule discharged.*

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GODTS *v.* ROSE.

IN THE COMMON PLEAS, NOVEMBER 22, 1855.

[*Reported in 25 Law Journal Report, Common Pleas,* 61.]

TROVER for casks of oil. Pleas, first, not guilty; and, secondly, that the goods were not the goods of the plaintiff. Issues thereon.

The action was tried before Jervis, C. J., at the sittings for London after last Trinity term, when it appeared that the plaintiff, a commission merchant, on the 12th of March, 1855, sold to the defendant, an oil and color merchant, through Soanes & Sons, brokers, acting on behalf of both the plaintiff and the defendant, five tons of foreign rape oil on the following contract: —

LONDON, March 12, 1855.

Bought for account of Mr. W. A. Rose, of U. A. Godts, five tons of first quality foreign refined rape oil, at 53*s.* per cwt., usual allowances. To be free delivered and paid for in fourteen days by cash, less £2 10*s.* per cent discount.

(Signed) GEO. SOANES & SON, Brokers.

The plaintiff, on receipt of the sold note from the brokers, gave to the wharfinger, Humphery, at whose wharf he had some oil, the following transfer order: —

No. 1122. LONDON, March 13, 1855.

To the Superintendent of Hibernia Wharf.

Please transfer to the order of W. A. Rose, Esq., ex "Neptune," from Havre, entered with charges, from mark Nos. 46-56, eleven pipes refined rape oil.

(Signed) U. A. GODTS.

The wharfinger thereupon gave the plaintiff the following notice of transfer, directed to the defendant: —

HIBERNIA WHARF, SOUTHWARK, March 13, 1855.

Mr. W. A. ROSE.

Sir, — I have received an order from U. A. Godts, for 46–56, eleven casks rape oil, ex "Neptune," from Havre, which are transferred to your name.

(Signed) For John Humphery, T. N. SAMPSON.

The plaintiff's clerk immediately went with this notice of transfer to the defendant's counting-house and delivered it to the defendant's clerk, together with an invoice of the oils, and demanded a check in payment; this was refused by the defendant's clerk, on the ground that the plaintiff was not entitled to be paid until fourteen days after delivery. The plaintiff's clerk then demanded to have the notice of transfer returned to him, but the defendant's clerk refused to do so and retained it, and on the same day sent to the wharfinger, who delivered to the defendant a portion of the oil. Before the whole had been delivered, the plaintiff went to the wharfinger and countermanded the delivery; but the latter, being of opinion that the property in the oil had passed to the defendant, delivered the whole to him, whereupon the plaintiff brought this action.

The broker was called as a witness for the plaintiff, and on cross-examination stated that the commercial meaning of the contract was that the seller would have fourteen days to deliver, and the buyer fourteen days to pay after delivery; that it was customary to require payment on delivery, but that such was not the meaning of the contract. On re-examination, however, he stated that the seller may deliver within fourteen days and require payment. The jury found that the plaintiff's clerk did not intend to part with the oil or the

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notice of transfer without the check, and that he said so at the time. The learned judge directed a nonsuit to be entered, and reserved leave to the plaintiff to move to enter a verdict for £265.

Raymond showed cause.

Byles, Serjt., and *H. James*, in support of the rule.

JERVIS, C. J. I am of opinion that this rule ought to be made absolute. Several objections have been made to the maintenance of this action, but I do not think that any of them are entitled to prevail. It is first said that parol evidence was not admissible to explain the written contract; but it hardly lies in the mouth of the defendant to make that objection, as it was he himself who extracted the evidence on cross-examination of the plaintiff's witness. The result of it was, that the seller may deliver at any time within fourteen days, and at the time of delivery require payment. Then it is said that such a construction conflicts with the decision of this court in Spartali *v.* Benecke; but that is not so. The contract in that case was not, as here, that the goods should be free delivered and paid for within a specified time, but that they should be paid for, without saying when they were to be delivered, within a specified time. The court, therefore, in that case decided, as I think rightly, that the buyer was entitled to a delivery of the goods at any reasonable time after the date of the contract, within the time specified; and that the seller was not entitled to payment of the price before the end of that time. But in this case the goods are to be delivered and paid for, that is, each event is to happen in fourteen days. I think, therefore, that the plaintiff's contention is right, and it was supported by the evidence given at the trial, that the seller had fourteen days within which he might deliver, and that he was entitled to call for payment at the period of delivery. If that construction be correct, the second objection made by Mr. Raymond is answered, viz., that the contract itself passed the property in the goods and vested the right to possession in the defendant; for that could not be if by the contract the goods were to be paid for on delivery, as the property could not pass unless payment were made. But it is further said that this action is not maintainable, inasmuch as there has been a complete delivery. Now, the facts are these: the plaintiff sells to the defendant a certain quantity of oil not ascertained; he has at the time oil lying at the wharfinger's, and on the day following the contract he sends an order to the wharfinger to transfer certain of that oil to the defendant. The wharfinger accordingly makes the transfer in his books to the defendant, and gives the plaintiff's clerk a paper acknowledging the transfer; the clerk goes with this paper to the defendant's counting-house, and demands a check in payment; this is refused, but the defendant retains possession of the paper, and the jury find that the plaintiff's clerk did not intend to part with the paper without receiving a check. There was, therefore, no intention to pass the property in the paper or the goods without payment; and the question is, whether what was done amounted to a delivery. No doubt, if the vendor had given the vendee the transfer order, and the vendee had taken it to the wharfinger, and the latter had assented to the transfer, that would have bound the vendor. There must be shown to have been that kind of triangular contract adverted to in Williams *v.* Everett, 14 East, 582, where the agent of the one party becomes by agreement between all three the agent of the other. In this case there has been no such agreement of attornment: the wharfinger made no bargain with the vendee to hold for him, nor did the vendee make any bargain to accept the wharfinger as his agent. The transfer order was given to the vendee only on a condition with which he refused to comply, and there could be, therefore, no such acquiescence as was necessary to change the property in the goods in the hands of the wharfinger. It did not occur to me at the trial that there was the distinction which has been pointed out by the learned counsel for the plaintiff between this and the cases where the transfer order has been carried by the vendee to the wharfinger: but I am now of opinion that the nonsuit was wrong, and that the plaintiff is entitled to the verdict.

Rule absolute.[1]

FALKE *v.* FLETCHER.

In the Common Pleas, January 16, 1865.

[*Reported in* 34 *Law Journal Reports, Common Pleas,* 146.]

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This was an action tried, before Blackburn, J., at the summer assizes at Liverpool, 1864.

The action was brought for the conversion of 1,000 tons of salt. The defendant pleaded not guilty, and that the salt was not the property of the plaintiff.

It appeared at the trial that the plaintiff was a salt merchant, carrying on business at Liverpool, and that the defendant was the owner of a vessel called the "Savoir Faire." In the month of November, 1863, one De Mattos, a merchant in London, through the plaintiff, chartered the "Savoir Faire" to load a complete cargo of salt and proceed therewith to Calcutta; the captain to apply to the plaintiff for cargo and custom-house business.

It was proved that De Mattos was frequently in the habit of employing the plaintiff to charter vessels for the conveyance of salt, and that the course of business was for the plaintiff to purchase the cargo, and to load it in his own lighters and at his own expense. That in the course of doing so he took the mate's receipts, which were made out in his own name, and, when the whole cargo was loaded, he took bills of lading in his own name. These he sent to De Mattos, with invoices of the price of the salt, and received in exchange De Mattos's acceptances for the amount. The plaintiff charged no commission to De Mattos, but charged such a price for the salt as would remunerate him for his trouble.

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[1] Williams, Crowder, and Willes, JJ., delivered concurring opinions.

This course was followed in the present instance, until about 1,000 tons of salt were loaded, when the plaintiff, having heard that De Mattos had stopped payment, declined to load any more. The defendant thereupon filled up the ship on his own account. The plaintiff demanded of the captain bills of lading in his own name for the salt on board in exchange for the mate's receipts. These the defendant refused to permit him to give, and the plaintiff thereupon sent the mate's receipts to his agents at Calcutta, with directions to them to claim the salt on its arrival. This was done, but the captain refused to deliver up the salt.

The learned judge directed the jury that, if the property in the salt remained in the plaintiff, the sailing away from Liverpool after the demand and refusal of the bills of lading, was a conversion by the defendant; and that, if the plaintiff did not intend to part with the property in the salt when he placed it on board, it remained in him as against De Mattos and also as against the defendant.

The jury found a verdict for the plaintiff, with damages, £582 19*s.* 6*d.*, the damages being estimated on the assumption that there had been, in accordance with the direction of the learned judge, a conversion at Liverpool.

Edward James now moved for a new trial, on the ground of misdirection, and that the damages were wrongly estimated, there having been no conversion until the vessel reached Calcutta.

ERLE, C. J. I am of opinion that there ought to be no rule in this case. The plaintiff was in reality in the situation of an unpaid vendor. Having undertaken to procure salt as agent for De Mattos, he puts it on board a ship chartered by him for De Mattos, and takes the mate's receipts in his own name. Upon this the proper question was submitted to the jury, namely, whether the plaintiff intended thereby to vest the property in the salt in De Mattos, or whether he intended to retain the control over it which he would have if such was not his intention; and the jury have found that question in favor of the plaintiff. Then the question is, whether there was a conversion by the captain's sailing away from Liverpool and refusing to give the plaintiff bills of lading in his own name. By reason of his doing so, goods to which the plaintiff was entitled have been absolutely lost to him; and I think the learned judge was right in saying that, under the circumstances, there was a conversion when the defendant caused the goods wrongfully to be taken out of the control of the plaintiff. *Rule refused.*[1]

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[1] WILLIAMS and WILLES, JJ., delivered concurring opinions, and KEATING, J., also concurred.

MOAKES *v.* NICHOLSON.

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In the Exchequer, May 31, 1865.

[*Reported in* 34 *Law Journal Reports, Common Pleas,* 273, *and in* 19 *Common Bench Reports, New Series,* 290.]

In this case the plaintiff sought to recover damages for the conversion of a cargo of coal; and the following facts were proved at the trial.

On the 9th of December, 1864, at Hull, a person named Pope bought of a person named Josse a quantity of coal, and a great deal of evidence, oral and written, was given at the trial in order to show the terms of the sale, the defendant contending that by the terms of this sale there was to be "payment in cash against bill of lading in the hands of Josse's agent in London," and that it was not the intention of the parties that the property in the goods should pass till payment. The coal at the time of the contract was lying undistinguished in a heap at Josse's yard, containing a much larger quantity than that contracted for, and it was to be shipped on board a vessel which was chartered by Pope in his own name and on his own behalf, to carry it to London. On the 13th of December, whilst the whole or all but a very small portion of the coal was still undistinguished, Pope sold the coal he had contracted for to the plaintiff on the Coal Exchange in London. The plaintiff resold on the same day at a higher price, and before action had paid Pope. By the 19th of December the coal was shipped, and the captain signed three bills of lading, stating the coal was to be delivered to "Pope or order" on being paid freight and demurrage as by charter-party. One only of these bills was stamped, and this Josse retained; the second, together with an invoice and a letter announcing the loading, was sent on the 19th of December to Pope, who received them next day. Josse, not being able to get his money from Pope, sent the stamped bill of lading to the defendant, his agent, with directions to stop the delivery of the coal; and the captain, under the defendant's directions, refused to deliver to those claiming through Pope, and the defendant himself took the cargo.

The jury found that the sale was for cash, and the learned judge directed a verdict for the plaintiff, and gave the defendant leave to move to set this verdict aside and enter one for himself, on the grounds that on the facts admitted and proved the defendant was entitled to the verdict, that the defendant had a right to stop the coals *in transitu*, and that neither Pope nor the plaintiff had any right to the property and possession of the coals.

D. D. Keane and *Barnard* now showed cause.

J. A. Russell and *Thesiger*, in support of the rule.

Erle, C. J. I am of opinion that the rule to enter the verdict for the defendant should be made absolute. Moakes brings his action on the ground that the property in the cargo of coals seized by the defendant belonged to him. It appears that the coals were sold by Josse to Pope, and by Pope to Moakes. One material question is, whether Moakes could have any better title to the coals than Pope had. I think not. That is undoubtedly not clear as a general proposition; because, if Josse had so dealt with Pope as to put him in the position of an ostensible owner, by intrusting him with the documents of title, it might be that Moakes might have acquired a title to the coals, though his vendor, Pope, had none. But no such point can arise here, because by the terms of the contract it was distinctly understood between Josse and Pope that the property in the coals was only to vest in the latter upon the payment by him of cash against the bill of lading; and this condition never was complied with. This being so, whilst the coals remained an unascertained quantity, Moakes entered into a contract with Pope, under which, in my opinion, he took precisely the same title as Pope had as between him and Josse. The sole question therefore is, what was the intention of the parties? The property could not pass out of Josse, unless there was a sale by him with the intention that the property should pass to the vendee. Now, it was clearly the intention of Josse — and the jury have so found — to retain the property until his agent in London should receive the cash against the bill of lading. If that was the clear intention of Josse, the property did not pass. That this was the contract, is clear from the correspondence. The delivery of the coals on board a ship chartered by Pope has no effect whatever in passing the property. If the intention was that the ship should be regarded as the warehouse of Josse until the happening of the event contemplated, viz., the payment of the price, the putting the coals on board did not alter the position of the contracting parties. At the time Moakes made his contract with Pope, there had been no delivery, and no bill of lading existed. He therefore cannot say that he was misled by Pope's being permitted to hold himself out as the true owner. Upon the whole, therefore, I think no property passed to Pope, and that the now plaintiff cannot be in a better position than Pope. *Rule absolute.*[1]

BARBER v. MEYERSTEIN.

IN THE HOUSE OF LORDS, FEBRUARY 21, 22, 1870.

[*Reported in Law Reports, 4 House of Lords,* 317.]

THIS was an appeal, under the Common Law Procedure Act, 1854, against a decision of the Court of Exchequer Chamber, by which a previous decision of the Court of Common Pleas had been affirmed.

The facts were these: In August, 1864, De Souza & Co., of Madras shipped on board the "Acastus" 227 bales of cotton consigned for sale on commission to Azémar & Co., of London. There were three bills of lading making one set. They were in the usual form, except as to the last sentence, which concluded thus: "In witness whereof I, the said master of the said ship, have affirmed to three bills of lading, all of this time and date, one of which being accomplished, the others to stand void." In August, 1864, the vessel sailed for London. De Souza & Co. drew bills of exchange against this cotton upon Azémar & Co. for £3,000, £1,000, £1,000, and £1,000, to fall due between the 12th of January, 1865, and the 22d of March, 1865. These bills were duly accepted by Azémar & Co., and were then, with the three bills of lading, deposited with the London branch of the Chartered Mercantile Bank of India. At the end of 1864, Azémar & Co. transferred their business, including the consignment by the "Acastus," to one Abraham, who had formerly been in their employment.

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[1] BYLES and KEATING, JJ., delivered concurring opinions

The "Acastus" arrived in London on the 31st of January, 1865, and went into the St. Katherine's Docks. On the 2d of February Abraham made an entry of the cargo at Cotton's Wharf (which is a public sufferance wharf) in the form given by one of the Customs Acts, the 16 & 17 Vict. c. 167, s. 60. The Sufferance Wharf Act, 11 & 12 Vict. c. xviii., contains (cl. 5) the following enactment, important for the consideration of this case, that "all goods which after the passing of this Act shall be landed at any of the public sufferance wharves aforesaid" (of which Cotton's Wharf was one), "from, or out of, any ship within the port of London, and lodged in the custody of the wharfinger for the time being in the occupation of such wharf, either at such wharf or elsewhere, shall, when so landed, continue and be subject to the same lien or claim for freight in favor of the master and owner of the ship from or out of which such goods shall be landed, or of any other person interested in the freight of the same goods, as such goods were subject to whilst the same were on board such ship, and before the landing thereof; and the said wharfinger, his servants and agents, are hereby required, on due notice in writing in that behalf given by such master or owner or other person aforesaid to the said wharfinger, &c., to detain such goods in the warehouse of the said wharfinger, &c., until the freight to which the same shall be subject as aforesaid shall be duly paid, together with the wharfage rent and other charges to which the same shall have become subject and liable." There were two "stops" lodged against this cotton from the "Acastus," one by the Chartered Mercantile Bank of India, the other by the master for the freight. On the 9th of February Abraham instructed Barber & Co., as brokers, to sell the cotton, and they obtained from him an order, in virtue of which they were allowed to take samples. On the 4th of March Abraham gave a check which covered the sums due to the Chartered Mercantile Bank, and thereupon the bank delivered up to him the three parts of the bill of lading, and so put an end to the "stop" which had been lodged on account of the bank. On the same day he deposited with Meyerstein (with whom he had other transactions) one of the three parts of the bill of lading for the cotton by the "Acastus," together with the original consignment to Azémar & Co., and thereupon Meyerstein gave to Abraham a check for £2,500, which was duly paid. Meyerstein asked for the second part of the bill of lading, and received it. He did not, however, ask for the third part, believing that the third part was retained by the captain of the vessel.

Barber & Co. were wholly ignorant of these transactions, and on Monday, the 6th of March, Mr. C. Barber advanced to Abraham, by check, £1,500 on the cotton by the "Acastus," and on the next day, the 7th of March, made, by check, a farther advance of £500 upon receiving the third of the set of bills of lading (which had been fraudulently kept by Abraham), and on being at the same time informed of the fact that the stop order for freight had been removed. On the 11th of March Meyerstein heard for the first time that the Barbers had been employed by Abraham to offer the cotton for sale. On that day they lodged their third copy of the bill of lading at the wharf. On the same day Meyerstein obtained from Abraham a letter addressed to Messrs. Barber, requesting them to pay over to him "the surplus net proceeds of the undermentioned goods, after satisfying the advances you have made us (Abraham & Co.) upon the same." Among the goods thus mentioned was the cotton by the "Acastus." Meyerstein, on receiving this note, struck his pen through this item, saying he did not want to have stolen goods transferred to him. He, however, forwarded the note to Messrs. Barber, and stated the fact of his making the advance of £2,500, though the evidence left it doubtful whether he stated the exact date at which it had been made. On the same day Messrs. Barber wrote to Meyerstein: "We have this day received a letter from Messrs. Abraham & Co. requesting us to pay over to you the surplus net proceeds of 324 bales of cotton, as per memorandum at foot, which shall receive our attention in due course." This memorandum was a copy of that sent by Abraham, and the "Acastus" was struck out of it, — the total number of bales in each case being only 324, while if those of the "Acastus" had been retained in the list there must have been 277 added to that number. On the 13th of March the Barbers obtained from the wharfingers at Cotton's Wharf delivery warrants made out in their own names for the 277 bales of cotton, which they sold to different purchasers, who received them under the warrants delivered by the Barbers to them. The Barbers claimed to satisfy themselves in the first instance for their advances out of the proceeds of the sales. Meyerstein, who insisted that his claim took precedence of theirs, thereon brought his action against Barber & Co. The declaration was in the form of money had and received, with a count for wrongful conversion. The defendants pleaded, never indebted, not guilty, and that the goods never were the plaintiff's. Issue was taken on all these pleas.

At the trial, before Lord Chief Justice Erle, in June, 1866, he directed a verdict to be entered for the plaintiff for the whole sum he claimed, reserving leave for the defendants to move to enter a verdict for them. The rule was obtained, and was, on argument, discharged.

On appeal to the Exchequer Chamber, the judgment of the Court of Common Pleas was affirmed. This appeal was then brought.

Sir R. Palmer, Q. C., and *Mr. Grantham*, for the appellant.

Sir G. Honyman, Q. C., and *Mr. Bridge* (*Mr. Watkin Williams* with them), for the respondent Meyerstein, were not called on.

THE LORD CHANCELLOR (Lord HATHERLEY). In this case the House is called upon to reverse unanimous judgments of the Court of Common Pleas and of the Court of Exchequer Chamber. The effect of these judgments is this, — to determine that, as to the plaintiff, the indorsee for value of a bill of lading of goods which, at the time of its being indorsed to him, were landed at a sufferance wharf on the Thames, and were there subject to two stops put upon them (the one by the ship-owner for freight, the other by certain mortgagees), the security so indorsed is available in preference to the claim of the defendants, who, subsequently to such indorsement, obtained possession of the goods under the circumstances I am about to mention. A bill of lading was drawn up in a set of three, and after the indorsement of the first two of the three to the plaintiff had taken place, the consignee of the goods fraudulently retained the third, and obtained advances from the defendants on the security, in the first place, of this third, and proceeded afterwards to the wharf where the goods had been deposited, and after the production of this third bill of lading obtained the removal of a stop which had been put upon the goods for freight. I should have before mentioned the previous removal on the part of the mortgagees (the directors of the Chartered Bank of India) of their stop in respect of their mortgage. Possession of the goods was, under those circumstances, obtained by the defendants, the persons who, on receiving this third bill of lading thus fraudulently retained by the consignee, made to him an advance on the goods represented by this bill of lading.

The question has really turned upon one point, and I may almost say upon one point alone, namely, whether or not the bills of lading had fully performed their office, and were discharged and spent at the time that the plaintiff took his security. Whether, in other words, the landing of those goods at the sufferance wharf in the name of the consignee, but subject to the stop which was put upon them by the ship-owner, and the stop put upon them by the mortgagees, was, or was not, a delivery which had exhausted the whole effect of the bill of lading. That, I think, is the single point to which the case becomes reduced.

It appears to me, my lords, that there are one or two points of law which must be taken to be clearly established, although very able efforts, employed with considerable ingenuity and resource, have been directed to the shaking of those well-established points of law. I refer particularly to the very able argument we have heard from Mr. Grantham in this case with reference to the first step, if I may so call it, in the proceeding, namely, the fact of the first assignment for value of a bill of lading when the goods are not landed, but are still at sea. Now, if anything could be supposed to be settled in mercantile law, I apprehend i would be this, that when goods are at sea the parting with the bill of lading, be it one bill out of a set of three, or be it one bill alone, is parting with the ownership of the goods.

Mr. Grantham has raised this argument upon the frame of the bill of lading itself, which I apprehend is in the common form where three bills are given. The form of the bill of lading to which he specially referred, and upon which he founded the argument I now advert to, is this, that the shipper undertakes to deliver these goods, the cotton, to the Souzas or order, or to their assigns, he or they paying the freight for the goods at the rate there mentioned; and then, at the end of the document we have these words, "In witness whereof I, the master of the ship, have affirmed to three bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void." The argument has been this, that the bill of lading has not accomplished its office until not only the goods are landed, but the freight is paid, and the whole matter which is the subject of the contract of the ship-owner has been achieved; and that, accordingly, if that be law, it follows that if one bill of lading be assigned while the ship is at sea, and a second bill of lading be assigned to a second person, fraudulently of course, and a third bill of lading be assigned to a third person, also fraudulently, of course, it becomes simply a matter of expedition and race between the several parties who have taken those different assignments of the bills of lading; because until the goods have actually been landed and fully delivered, each bill of lading, according to the argument, is to be considered as of equal force until one of the bills has been, according to the argument, accomplished.

Now, I apprehend that it would shake the course of proceeding between merchants, as sanctioned by decided cases (which the learned counsel admitted to have been decided, and never yet to have been altered or reversed), if we were to hold that the assignment of the bill of lading, the goods being at the time at sea, does not pass the whole and complete ownership of the goods, so that any person taking a subsequent bill of lading, be it the second or be it the third, must be content to submit to the loss which would result from that state of facts. I apprehend that no decision can be found to the effect that any person taking an assignment of a bill of lading, knowing that others existed, is to be held to have been guilty of fraud simply from the fact of his so acting. No authority, at all events, has been cited for that proposition. And no authority has been cited at the bar to show that the transaction is not entire and complete when once the bill of lading has been assigned, as respects, at all events, goods *in transitu*, whether the assignment be by mortgage or by sale. If it were by sale other considerations would intervene which would give still greater efficacy to the assignment of the goods without delivery or possession. But when the vessel is at sea and the cargo has not yet arrived, the parting with the bill of lading is parting with that which is the symbol of property, and which, for the purpose of conveying a right and interest in the property, is the property itself. It appears to me that to shake any conclusion of that kind would be entirely to annihilate the course of mercantile procedure which has existed for a long period of time, — far longer, probably, than I can at this moment accurately state.

That being so, the judges have reasonably assumed that proposition as a point of undeniable law. Then, if the property so passes when the goods are at sea, the whole question resolves itself into this: What is the effect of the assignment of the bill of lading under the circumstances of this case, when the goods were not at sea at the time when the interest was passed, but were at a sufferance wharf in the name and by the order of the consignee, Abraham, who represented the original consignees, the Souzas, subject to the stop-order in respect of freight, and subject to the stop-order given to the chartered bank.

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Now the circumstances are briefly these as to the dates: On the 4th of March, the goods being in the situation I have described, Abraham, the person who has been guilty of this fraud, not being then in possession of the bills of lading himself, inasmuch as all three were at that time in possession of the bankers, applies to the plaintiff Meyerstein for a loan; he obtains money from Meyerstein; he first draws a check to meet the claim at the bank, a check provided for by the moneys advanced to him by Meyerstein, and then he obtains the three bills of lading from the bank. And on the same 4th of March, having these three bills of lading for a few minutes or a few hours in his possession, he does nothing with them in the way of claiming possession of the goods; he makes no use of them for that purpose, but he at once pledges two of these bills for value to Meyerstein. And that pledge being so completed, Meyerstein is in possession of these two bills with no other charge or claim whatever upon the goods they represented except the claim for freight, the freight being still unsatisfied. The mortgage had been cleared off, and he had become the owner of the property by this transaction, and he remained the owner subject to the payment of the freight. Then afterwards, fraudulently, Abraham enters into farther dealings with his brokers. His brokers are aware that the goods have arrived. They obtain a partial order from Abraham, by which they are enabled to obtain a sample of the cotton in question; but they decline in the first instance to make him any advance. He proposes to obtain an advance on the bill of lading *simpliciter*, which they decline to make. But they were afterwards induced to make the advances when they had seen the goods themselves at the wharf, and when steps had been taken by Abraham for procuring money to enable him to discharge the stop which existed upon the goods for the freight. The stop which existed in respect of the mortgage had been already discharged, and the property, therefore, became apparently at his disposal. The defendants, being ignorant of the transaction with Meyerstein, on the 11th of March obtained possession of the goods, and on the same 11th of March Meyerstein, for the first time, discovers the fraud which has been perpetrated upon himself. When he wishes to obtain possession of the goods he finds that they have been removed. And hence, of course, a contest arises between the two parties.

Then in that state of things the question that arises is this: The goods, it is urged, were at home when Abraham was empowered by the Act of Parliament to give directions that the goods should be placed on the wharf as the goods of him, the consignee. But, however, the question arises whether these goods could in truth be said then to be at home. It is said that, at all events when for those few hours the three bills of lading were in possession of Abraham, and the goods were at home, as all the symbols of property were also in the hands of Abraham, therefore the symbol and the thing symbolized had become united, and that, in truth, the whole matter might be said to be disposed of. Now is it so? Can it be said that when for those few hours those documents were in the hands of Abraham, he had the control and proprietorship of the goods? Certainly when he first gave directions for their being warehoused in his name he was in no sense proprietor. He had neither the bills of lading, nor had he discharged the freight, nor had he in any other way put himself in a situation to entitle him to demand the goods. But now, having the bills of lading, supposing he had been minded to go down to the wharf to demand the goods, what would have happened? He would have found a stop placed upon the goods for the freight. And what would have been his position? By virtue of the 5th clause of the particular local Act (11 & 12 Vict. c. xviii.) referring to this subject, he would have found that he could not obtain any obedience to any delivery order which he might think proper to give, and that he could not obtain any warrant of delivery, because there had been placed upon the goods this stop for the freight. The Act expressly enacts that when a stoppage has been put at the right time, namely, before the issue of any warrant for delivery, or the acceptance of any order, then no wharfinger shall be authorized to issue any warrant, or to accept any order, for the delivery of any goods thus subject to a lien for freight. Accordingly, therefore, the goods would not have been delivered to him had he made use of those bills of lading instead of delivering them over to Meyerstein, and in that sense, undoubtedly, the goods were not at home as far as he was concerned.

Then, the first proposition of law being clear, that an indorsement of the bill of lading carries with it the property in the goods when the goods are at sea, the next proposition of law that we have to consider is this, laid down by all the judges who have delivered their opinions in this case, and, as it appears to me, correctly laid down by them. It is stated by Mr. Justice Willes in his very elaborate judgment, in which he says: "I think the bill of lading remains in force at least so long as complete delivery of possession of the goods has not been made to some person having a right to claim them under it." Mr. Justice Keating says, in the same way, that he considers that "there can be no complete delivery of goods under a bill of lading until they have come to the hands of some person who has a right to the possession under it."

And afterwards, in the Exchequer Chamber, Mr. Baron Martin, putting the case on somewhat different grounds, says: "For many years past there have been two symbols of property in goods imported; the one the bill of lading, the other the wharfinger's certificate or warrant. Until the latter is issued by the wharfinger the former remains the only symbol of property in the goods. When, therefore, Abraham delivered the bill of lading to the plaintiff on the 4th of March, 1865, as a security for the advance then made to him, such delivery amounted to a valid pledge of the goods, and the plaintiff thereby acquired a right to hold them as against Abraham and all persons claiming title thereto under him." The principle seems to be the same, according to the view which Mr. Baron Martin takes, which is this: There has been adopted, for the convenience of mankind, a mode of dealing with property the possession of which cannot be immediately delivered, namely, that of dealing with symbols of the property. In the case of goods which are at sea being transmitted from one country to another, you cannot deliver actual possession of them, therefore the bill of lading is considered to be a symbol of the goods, and its delivery to be a delivery of them. When they have arrived at the dock, until they are delivered to some person who has the right to hold them the bill of lading still remains the only symbol that can be dealt with by way of assignment, or mortgage, or otherwise. As soon as delivery is made, or a warrant for delivery has been issued, or an order for delivery accepted (which in law would be equivalent to delivery), then those symbols replace the symbol which before existed. Until that time bills of lading are effective representations of the ownership of the goods, and their force does not become extinguished until possession, or what is equivalent in law to possession, has been taken on the part of the person having a right to demand it.

It appears to me that that is the legal sense of the transaction. The ship-owner contracts that he will deliver the goods on the payment of freight. He discharges his contract when he delivers the goods. But, unless he chooses to waive his rights, he is not bound so to deliver the goods, or to hand them over to the person who is the original consignee to whom he has contracted to make the delivery, until all the conditions on which he contracted to deliver them are fulfilled. One of those conditions is, that the freight should be paid; and until the freight has been paid he is not bound to make the delivery.

Mr. Justice Willes explains what is the effect of these various Acts of Parliament. These Acts of Parliament are not intended to deprive the ship-owner of the right which he has to say that he will not part with the possession of the goods until freight is paid. Accordingly, the local Act first enacted that there should be a power on the part of the ship-owner to relieve himself from the responsibility, which might be extremely inconvenient to all parties, of keeping the goods on board, when either the consignee was not ascertained, or when, if ascertained, there were some laches on his part in demanding the delivery of the goods. In such a case the ship-owner, by depositing them in a warehouse, placed them in such a condition that if their owner could not be ascertained the goods should be considered as if they were still at sea, in the absolute possession of the master to all intents and purposes. But if the owner of the goods could be ascertained, and the only question was the question of freight, still the Act of Parliament provided that the ship-owner should be protected, that he should not be bound to hand over the goods absolutely, but that he should hand them over *sub modo*, with the full right of retaining his lien on the goods themselves, and with the right of preventing them being dealt with or removed until that lien should be satisfied. The legal effect of the proceeding is this, that the proprietor or consignee may require the goods to be landed at a wharf, and to be warehoused in his name, but subject to this condition, that the ship-owner still retains his interest in the cargo until his charge for freight has been defrayed. If he gives notice of that charge prior to any act being done by which the ownership of the goods is changed, prior to the acceptance of an order for delivery, and prior to the issue of a warrant for delivery, then the ship-owner's lien holds and attaches itself to those goods, and the goods cannot be removed; the bills of lading cannot be considered as having been fully spent or exhausted, because there remains an important part of the contract unfulfilled on the part of the consignee, namely, payment of the freight in respect of which the contract was entered into.

That seems to me to be the whole basis of the judgment at which the learned judges arrived in the courts below, and which, as I before stated, was their unanimous conclusion. But against it several objections have been urged. It is said that a frightful amount of fraud may be perpetrated if persons are allowed to deal in this way with bills of lading drawn in sets, if you allow efficacy be given to the first assignment of one of those bills, to the detriment of persons who may take, for value, subsequent assignments of the others. All that we can say is, that such has been the law hitherto, and that the consequences of the supposed evil, whatever they may be, have not been considered to be such as to counterbalance the great advantages and facilities afforded by the transfer of bills of lading. There is no authority or reason for holding that the person who first obtains the assignment of a bill of lading, and has given value for it, shall not acquire the legal ownership of the goods it represents. It seems to be required by the exigencies of mankind. It may be a satisfaction to be told by Mr. Justice Willes (though it is a matter upon which I put no reliance), that other nations concur with us in holding that (whatever inconveniences there may be attending it), the person who gets the first assignment for value is the person to be preferred.

The reasoning of the learned judges in this case establishes clearly these two propositions: First, that the holder of the first assignment for value obtains a priority over those who obtain possession of the other bills. And, secondly (following the reasoning of Mr. Justice Willes), "The wharfinger under these circumstances was, at the lowest, the common agent for the ship-owner and for the consignee or holder of the bill of lading, — agent for the consignee or holder, upon his producing the bill of lading showing that he was entitled to the goods, and upon his paying the freight, to transfer the goods into his name, and to deliver them to him, or give him a warrant for them, — and agent for the ship-owner to retain possession of the goods and to permit no one to exercise any control over them until the claim for freight had been satisfied. During this period, therefore, the bill of lading would not only, according to the usage, and for the satisfaction of the wharfinger that he was delivering to the right person, be a symbol of possession, and practically the key of the warehouse, but it would, so far at least as the ship-owner was concerned, retain its full and complete operation as a bill of lading, there having been no complete delivery of possession of the goods." The other learned judges take the same view; and I apprehend that the correct view in substance is this, — that this being the possession of the wharfinger, the bill of lading remains in force so long as complete delivery and possession has not been given to some person having the right to claim such delivery and possession.

As to the argument founded on the possibility of fraud, I agree very much with one of the learned judges, Mr. Justice Willes, who says that as to any argument upon that subject, "all arguments founded upon the notion that the court is to pronounce a judgment in this case which will protect those who deal with fraudulent people, are altogether beside the facts of this case, and foreign from transactions of this nature." I am afraid that the protection of parties against fraud is a matter of difficulty with which the legislature must cope, as far as it can possibly do so, from time to time, when frauds of a serious character are practised; but the courts of law, which have to administer the law as it exists, cannot alter their course of proceeding because those who ought to do that which is right and just to their neighbors find means of defrauding them in spite of all the protection which the law may have thrown around the innocent holders of property. Judicature has no power to interfere with the course of proceeding in such cases. It must be left to the legislature alone. But, on the other hand, we should consider that our mercantile laws, which are founded on long usage, have been found to work well for the general convenience of those engaged in those large adventures which are familiar to the enterprise of this country, and that although occasional inconvenience may have been caused by the fraudulent behavior of some parties, yet these laws have, upon the whole, been felt to operate beneficially.

The principles which, as I have stated, form the foundation of the judgment in the present case are, that the parting with the symbol of property the possession of which cannot be delivered is the parting with the property itself; and that persons who have not a complete ownership and possession of the property cannot be said to have such a title to that property as to divest the operation of the symbol to give a title to it, until something occurs which brings the symbol and the property itself into contact, — and that for the purpose of so bringing the property and the symbol into contact, there must be a complete concurrence of title in the person who holds the symbol and the person who has the right to demand the property; and until that happens the symbol, as in the present case, has not exhausted its office.

I am, therefore, of opinion that the learned judges have come to the right conclusion, and I have to move your lordships to affirm the two decisions which are complained of in this appeal.

Judgments of Court of Common Pleas and of Court of Exchequer Chamber affirmed, and appeal dismissed with costs.[1]

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SHEPHERD v. HARRISON.

In the House of Lords, April 27, 28, 1871.

[*Reported in Law Reports*, 5 *House of Lords*, 116.]

This was a proceeding in error on a judgment of the Court of Exchequer Chamber, which had confirmed a previous judgment of the Court of Queen's Bench, Law Rep. 4 Q. B. 196–493. The cause was tried before Mr. Justice Mellor, at Manchester, in 1868, and a verdict was taken for the plaintiff, subject to a case.

The plaintiff was a merchant carrying on business at Manchester under the style of John Shepherd & Co. The defendants were the owners of the screw steamer "Olinda," of Liverpool. There had been other dealings between the plaintiff and Paton, Nash, & Co., of Pernambuco, and on those dealings there was a credit of £3,000 in favor of the plaintiff. The first dealing of the plaintiff with Paton, Nash, & Co. in the article of cotton appeared to have taken place in 1865. On that occasion the plaintiff received from George Paton & Co., of Liverpool, who were the agents in this country for Paton, Nash, & Co., of Pernambuco, a letter dated the 3d of May, 1865, in which they said: "Herewith we beg to hand you bill of lading 240 bags cotton, per 'Spray.' We presume our Pernambuco friends have made a mistake in sending it under cover to us. We also enclose draft on your good selves for £2,072 9*s.* 6*d.*, which we will thank you to return with the needful." The bill was returned accepted, and in due time paid. There seemed to have been another order for cotton in 1865, which, on account of the state of the markets, was not executed; but in the course of the correspondence Paton, Nash, & Co. wrote, on the 14th of May, 1866: "You do not mention how we are to reimburse ourselves — whether we are to discount sales, or to draw on you." On the 7th of September, 1867, the plaintiff sent to Paton, Nash, & Co. a letter desiring them to purchase for him 1,000 bales of cotton at a price specially mentioned. Paton & Co., on the 28th of September, wrote back acknowledging the order, and adding: "You do not mention whether part of the order is to go against your funds lying here, but we suppose you intend it as a remittance." To which, on the 25th of October, 1867, the plaintiff answered: "Pray don't make the mistake you did before about our funds in your hands; they never were intended to be applied to cotton purchases, but to wait instructions." Paton, Nash, & Co. proceeded to execute the order, and purchased 750 bales of cotton, sending 339 by the ship "Capella" and 208 by the ship "La Plata." On sending this cotton Paton & Co. despatched a letter, dated the 25th of October, 1867, which ended with these words: "On reading over your order again, we are impressed that you wish us to draw for the amount of invoice, and not to deduct net proceeds in our hands, and we therefore shall value on you on forwarding bills lading." In another letter of the same date they wrote to say that they had sent the cotton, "and beg now to enclose invoices 339 bales per 'Capella,' costing £1,616 8*s.* 8*d.*; 208 bales per 'La Plata,' £883 7*s.* 1*d.* We have drawn upon you as per note at foot for the same, to which we beg your protection." Two drafts were enclosed, which were drawn in favor of George Paton & Co., of Liverpool. The letter ended thus: "The bills lading will be handed over to you by Messrs. George Paton & Co." The invoice accompanying this cotton described it as shipped "per Norwegian brig 'Capella' for Liverpool, on account and risk of Messrs. John Shepherd & Co." There was a similar invoice as to the cotton shipped per "La Plata."

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[1] Lords Chelmsford and Westbury delivered concurring opinions Lord Colonsay also concurred.

The bills of lading, together with the two bills of exchange, were forwarded by Paton, Nash, & Co. to George Paton & Co., and on the 16th of November George Paton & Co. wrote to the plaintiff: "We beg to hand you herewith bills of lading for 339 bales of cotton per 'Capella,' and 208 bales of cotton per 'La Plata,' received this morning from our Pernambuco friends. We also enclose bills on your good selves for £1,616 8*s.* 8*d.* and £883 7*s.* 1*d.*, to which please do the needful, and return to us in course." These bills were accepted, and returned to George Paton & Co. in a letter in which the plaintiff complained that some of the cottons had not been bought according to his instructions, and added: "In case, therefore, of any loss arising from the sale of these, we must claim against you." Some correspondence, not in a friendly tone, occurred between the plaintiff and George Paton & Co. on the subject of these cottons. The remaining 200 bales purchased by Paton, Nash, & Co. were shipped by them on board the "Olinda." On the 12th of November, 1867, Paton, Nash, & Co. wrote a letter to the plaintiff, in which they said: "Enclosed please find invoice and bill lading of 200 bales cotton, shipped per 'Olinda,' S.S., costing £861 2*s.* 7*d.*, which we hope may prove correct and satisfactory. We have advanced the brig 'Capella' £55 6*s.* 6*d.*, as per receipt enclosed, to be deducted from the freight on your cotton, and on which you have 5% commission, and insurance £2 15*s.* 4*d.*, to cover the advance. We have

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therefore drawn upon you for £916 9*s.* 1*d.* in favor of Messrs. George Paton & Co., to which beg your protection." The letter and invoice were forwarded direct to the plaintiff. The bill of lading and the bill of exchange were forwarded to George Paton & Co., who sent them to the plaintiff. The invoice referred to in this letter was "Invoice of 200 bales cotton shipped per 'Olinda,' S.S., for Liverpool, on account and risk of Messrs. John Shepherd & Co." The bill of lading was in the usual form, and was thus indorsed: —

"Pernco., 13 Novr., 1867, per pro
Paton, Nash, & Co.,
A. M. C. Soares,
Geo. Paton & Co."

The "Olinda" arrived at Liverpool on the 5th of December, and on that day George Paton & Co. wrote to the plaintiff: "Our Pernambuco letters to the 12th ult. are just to hand, and we beg to enclose B. lading for 200 bales cotton shipped by Messrs. Paton, Nash, & Co., per 'Olinda,' S.S., on your account. We hand also their draft on your good selves for costs of the cotton, to which we beg your protection (£916 9*s.* 1*d.*)." On the 6th of December, 1867, the plaintiff answered: "Your favor of yesterday is received, with enclosures. On reference to invoices and bills of exchange which we have accepted, we find that they have been drawn in excess of the price mentioned in order; there is also a quantity styled 'Mediums' that we did not order at all. These, with the hostile position you have taken with regard to the 208 bales ex 'La Plata,' stand in the way of our accepting the bill of exchange now enclosed. We shall place the 200 bales ex 'Olinda' in another broker's hands, and soon as we learn we shall inform you their opinion of them." The plaintiff retained the bill of lading, and sent back the bill of exchange unaccepted, whereupon it was protested by George Paton & Co. The plaintiff sent the bill of lading to his brokers, with instructions to pay the freight and obtain the cotton. The brokers went to the defendants and paid the freight, and obtained a delivery order; but the delivery was stopped by the intervention of George Paton & Co., who held the duplicate bill of lading, and who undertook to indemnify the defendants.

The court was to have the same power as a jury to draw any inferences of fact.

The Court of Queen's Bench gave judgment for the defendants, and this judgment was affirmed in the Exchequer Chamber. The plaintiff thereupon brought error.

Sir R. Palmer, Q. C., and *Mr. T. H. Jordan*, for the plaintiff in error.

Mr. Holker, Q. C., and *Mr. Gully*, for the defendants in error, were not called on.

LORD CHELMSFORD. My lords, your lordships, I believe, consider it unnecessary to hear any argument on the part of the defendants. The question for you to determine is, whether the defendants, the owners of the vessel "Olinda," were bound to deliver to the plaintiff 200 bales of cotton which were shipped by Paton, Nash, & Co., from Pernambuco, and invoiced "on account and at the risk" of the plaintiff, and whether they are liable to an action for the non-delivery. The question is one entirely of fact, depending upon the circumstances stated in the special case, and upon inferences which the courts below were at liberty to draw from those facts. [His lordship stated them, and he referred particularly to this letter in which it was said: "On reading over your order again we are impressed that you wish us to draw for the amount of invoice, and not to deduct net proceeds in our hands, and we therefore shall value on you on forwarding bills of lading."]

That, therefore, was the course of dealing which thenceforth was to take place between the parties with regard to consignments made by Paton, Nash, & Co., on the orders of Mr. Shepherd. Accordingly, after the cotton was purchased by Paton, Nash, & Co., parts of it were sent in two vessels called the "Capella" and "La Plata," and the other part in the "Olinda," on which the present question arises.

Now, when the cotton was shipped on board the "Capella" and the "La Plata," bills of lading were sent (and this is a most important circumstance), not to Mr. Shepherd, but to the agents of Paton, Nash, & Co., Messrs. George Paton & Co., of Liverpool, and the letter of the 25th of October announcing that, says: "The bills lading will be handed over to you by Messrs. George Paton & Co." Accordingly, George Paton & Co. sent the bills of lading to the plaintiff, and also enclosed the bills for acceptance in a letter of the 16th of November, in which they say: "We beg to hand you herewith bills of lading for 339 bales cotton, per 'Capella,' and 208 bales cotton, per 'La Plata,' received this morning from our Pernambuco friends. We also enclose bills on your good selves for £1,616 8*s.* 8*d.* and £883 7*s.* 1*d.*, to which please do the needful and return to us in course."

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Did Mr. Shepherd, the plaintiff, then believe that he would not be entitled to receive the cotton upon these bills of lading so sent to him, without his accepting the bills of exchange? Why, what does he say in his letter? He says: "Your favor of the 16th instant is to hand, bringing two bills for acceptance, which, as desired, we now return accepted, but with the reservation as to the mediums and seconds not being bought according to our instructions." And then he makes an apology for not having sent the bills of exchange immediately, for he says: "Your letter did not arrive on Saturday till after offices were closed, say 1 P. M."

It appears to me that this is very important indeed, as showing the nature of the transactions between the parties, to consider what was done with regard to a portion of this order, and that the bills of lading were sent to the agents of Paton, Nash, & Co., and not to the plaintiff, apparently preserving to Paton, Nash, & Co. the *jus disponendi* over these goods, and not passing the actual absolute property in them to the plaintiff.

Then, with regard to the 200 bales of cotton in question, the course of proceeding appears to have been this: They were shipped on board the defendant's vessel, the "Olinda:" and a letter of the 12th of November was written, on which stress has been laid with regard to one passage which it contains: "Enclosed please find invoice and bill of lading of 200 bales cotton shipped per 'Olinda.'" Hence, it is said that there was evidently the intention, originally at all events, to send the bill of lading to the plaintiff, and not to the agents of Paton, Nash, & Co. But I confess it appears to me that the former dealings with regard to the other parcels of cotton sent by the "Capella" and the "La Plata," transmitting the bills of lading upon those occasions to the agents of Paton, Nash, & Co., and not to the plaintiff, very strongly lead me to the conclusion that it was a mistake to say that they intended to enclose the bill of lading. Probably when they came to look at the letter they said: "Oh, this will not do; we don't intend to send the bill of lading to the plaintiff," and therefore they altered the destination of it, by sending it to their agents instead of to the plaintiff.

Then the agents, George Paton & Co., write on the 5th of December to the plaintiff: "Our Pernambuco letters to 12th ult. are just to hand, and we beg to enclose B/ lading for 200 bales cotton shipped by Messrs. Paton, Nash, & Co., per 'Olinda,' S. S., on your account. We hand also their draft on your good selves for costs of the cotton, to which we beg your protection." Now, what must Mr. Shepherd have understood, having regard to previous dealings with respect to the other portions of the cotton? what must he have understood by this letter of George Paton & Co., the agents, but this, that he was not to deal with the bill of lading unless he accepted the bill of exchange which was sent at the same time? I think there can be no doubt whatever that that would be the fair and proper impression made by this letter on his mind, having regard to previous transactions.

In answer to that, he writes to them: "On reference to invoices and bills of exchange which we have accepted, we find that they have been drawn in excess of price mentioned in order; there is also a quality styled 'mediums' that we did not order at all. These, with the hostile position you have taken with regard to the 208 bales ex 'La Plata,' stand in the way of our accepting the bill of exchange now enclosed. We shall place the 200 bales ex 'Olinda' in another broker's hands, and as soon as we learn we shall inform you their opinion of them." Well, he did so. He sent back their bill of exchange unaccepted, and then placed the bill of lading in his own brokers' hands, Messrs. Eason, Barry, & Co.

It has been said that upon that bill of lading, if the plaintiff's agent had acted promptly, he might and would have received, and would have been entitled to receive, the cotton ex the "Olinda." What would have been the consequence of that, it is unnecessary for us to say. Under these circumstances, if it is clear that he was not entitled to use the bill of lading without accepting the bills of exchange, it is possible that an action of trover might have been brought against him had he got possession of the cotton, and that the damages would have been the amount of the bills of exchange which he was bound to accept. But it is unnecessary for us to consider that question. Before any use had been made of the bill of lading George Paton & Co. interfered; they produced their bill of lading, and demanded possession of the goods under an indemnity, and the goods were given up to them.

The question, then, is, whether, under these circumstances, the plaintiff was entitled to the possession of the goods. The question with regard to the property may perhaps be a different question; but the question now is, whether he was entitled to have the possession of the goods on the production of the bill of lading, and whether the defendants are liable to an action of trover for refusing to deliver the cotton to him, and for delivering it to George Paton & Co.

Now that being, as I have already said, a question of fact, and of inference to be derived from the circumstances stated in the special case, we have had the opinion of two courts, — I should say the unanimous opinion, notwithstanding some slight doubt intimated by Baron Cleasby, — of nine judges on the subject, that the plaintiff, under the circumstances, was not entitled to the possession of the cotton.

But it is said on the part of the plaintiff that the inference of fact is only to be drawn with reference to decisions which have been made with regard to documents which pass the property in goods; and we have been referred to cases to show that where goods are shipped on account of and at the risk of a consignee the absolute property in the goods vests in him, subject only to a right on the part of the consignor to stop *in transitu*. Some strong cases have been cited on that subject, and particularly two before Lord Ellenborough (Walley *v.* Montgomery, 3 East, 585, and Coxe *v.* Harden, 4 East, 211, 217). In the case of Coxe *v.* Harden the consignee had obtained possession of the goods, which, Lord Ellenborough said (4 East, 211, 217), removed the difficulty which stood in the way of the consignees, namely, the circumstance of the captain having signed the bills of lading in such terms as did not entitle them to call upon him for a delivery under their bill of lading, which was unindorsed; showing, therefore, that upon a shipment with an invoice on account and at the request of the consignee, the consignor may impose conditions on the delivery of the possession.

Now, that this is always a question of intention appears to me to be decided by the case of Moakes *v.* Nicholson, 19 C. B. (N. S.) 290. In that case coals were sold at Hull, and shipped on board a vessel chartered by the buyer. If that had been a case of delivery of goods to a carrier by land, of course they would have vested in the buyer. The coals were to be paid for in cash. One of three bills of lading making the coals deliverable to Pope, the buyer, or order, was sent to him with an account of the price of the coals. He not having paid the amount, the agent of the seller gave notice to the master of the vessel not to deliver the coals, and he accordingly refused. An action was brought by the person to whom Pope, the buyer, had sold the coals, and had handed the bill of lading. It was held that he was not entitled to recover. Chief Justice Erle said: "The property could not pass out of Josse (the seller) unless there was a sale by him with the intention that the property should pass to the vendee. Now, it was clearly the intention of Josse — and the jury have so found — to retain the property until his agent in London should receive the cash against the bill of lading. If that was the clear intention of Josse the property did not pass."

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My lords, in a book to which my noble and learned friend near me (Lord Cairns) has referred me, and which appears to be very ably written, on the sale of personal property, the authorities on the subject of reservation of the *jus disponendi* are all collected, and the whole matter is summed up clearly and distinctly in the following passage: "The following seem to be the principles established by the foregoing authorities: first, where goods are delivered by the vendor, in pursuance of an order, to a common carrier for delivery to the buyer, the delivery to the carrier passes the property, he being the agent of the vendee to receive it, and the delivery to him being equivalent to a delivery to the vendee; secondly, where goods are delivered on board of a vessel to be carried, and a bill of lading is taken, the delivery by the vendor is not a delivery to the buyer, but to the captain as bailee for delivery to the person indicated by the bill of lading as the one for whom they are to be carried. This principle runs through all the cases and is clearly enunciated by Baron Parke and by Mr. Justice Byles" in two cases to which reference is there made.

Under these circumstances I apprehend your lordships can entertain no doubt whatever that the judges of the Court of Queen's Bench and the judges of the Court of Exchequer Chamber came to a right conclusion upon the facts which were before them, and that the plaintiff was not entitled to recover in this action against the defendants for the non-delivery to him of the cotton in question. I therefore advise your lordships that the judgment of the court below should be affirmed.

Judgment of the Court of Exchequer Chamber affirmed.[1]

GABARRON v. KREEFT.

IN THE EXCHEQUER, JULY 7, 1875.

[*Reported in Law Reports*, 10 *Exchequer*, 274.]

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BRAMWELL, B.[2] It will be convenient in this case briefly to state the facts, as I appreciate them. The defendants bought from one Munoz all the ore of a certain mine in Spain, to be shipped by Munoz f. o. b. at Cartagena, on ships to be chartered by the defendants or by him. The ore was to be paid for by bills against bills of lading, or on the execution of a charter, and on a certificate that there was enough ore in stock to load the vessel chartered. On being so paid for, the ore was to be the property of the defendants. Various vessels had been loaded, and others chartered, and various payments made up to March, 1872, when the "Trowbridge," one of the chartered ships, arrived at Cartagena. The payments that had been made at that time exceeded in amount the price of all the ore shipped and to be shipped in all the vessels chartered and not loaded; so that had Munoz shipped ore on the "Trowbridge," he would have been entitled to no payment from the defendants in respect of it. He had ore which he could and ought to have so shipped, taking bills of lading to the order of the defendants. Instead of doing this, he, on the 8th of April, and before any ore was put on board the "Trowbridge," picked a quarrel with the defendants, telegraphed to them that he would not load the "Trowbridge" on their account, and though they telegraphed to him threatening him if he did not, he loaded the "Trowbridge" and took bills of lading making the shipment to be by one Sabadie, and the cargo deliverable to Sabadie's order. It is agreed he had at the time of shipment no intention to ship for the defendants. In giving these bills of lading the captain was clearly justified, as the charter said he was to sign bills of lading as presented. Sabadie was a sham; the ore was the ore of Munoz. Munoz indorsed Sabadie's name on the bill of lading, and then his own, and then pledged it to the plaintiffs. The question is, whether the plaintiffs or defendants are entitled to the cargo.

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[1] Lords WESTBURY, COLONSAY, and CAIRNS delivered concurring opinions.

[2] On a feigned issue to try title, a verdict had been entered for the defendant, and pursuant to leave reserved a rule *nisi* had been obtained to show cause why the verdict should not be set aside and entered for the plaintiffs on the ground that the property in the ore passed to them or that the defendants were estopped from disputing that it so passed.

If the cargo ever belonged to the defendants, it is certain that Munoz could confer no title unless by estoppel or otherwise, as hereafter mentioned. This is clear on principle, and is shown by Ogle *v.* Atkinson, 5 Taunt. 759. Did, then, the ore ever belong to the defendants? Certainly not, till it was paid for. For the agreement was not a sale of specific property, but an agreement to sell all the ore to be produced. Did it become the property of the defendants on being paid for? The contract says it shall. But it seems to me impossible that it can be so. There is nothing to distinguish the ore paid for from that not paid for, certainly there is no evidence that the ore put on the "Trowbridge" was specially ear-marked as the subject of the cargo for it or any other ship. No certificate in relation to it was given as provided by the contract. It is impossible to suppose that if this ore had been stolen while in the possession of Munoz, though after it was paid for, the loss would have been the defendants', or that the defendants would not have had a right to reject this ore and object to its being loaded, or that Munoz might not have loaded other ore. These considerations seem to show that no property passed in this ore before it was put on board the ship. Did that cause the property to pass? Now, it is clear that Munoz had no right to put any part of that ore on the ship except for the purpose of its being delivered to the defendants. On the other hand, it is equally clear to me, that had he said to the captain when loading, "I load this on my own account, and not on the

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defendants'," and the captain had taken it on board, the loading, together with the other facts, would not have passed the property. But it does not appear that he said anything till he presented the bill of lading, and then he showed that he had not loaded for the defendants, but for his own purposes. If the property had passed on taking the bill of lading made out as it is, the loading was, in my opinion, nugatory. The captain knew no better, and was justified in giving the bill of lading as he did, but his doing so did not take the property out of the defendants, if in them, any more than it would if the ore had been bought and paid for by the defendants, stored in their yards, and shipped by Munoz as a mere agent. Ogle *v.* Atkinson, 5 Taunt. 759. The question, then, is reduced to this, did the property pass on actual shipment, the shipper having no right to ship except to pass the property, and having no right to retain possession for any lien for the price or otherwise, but taking, when he does take it, a bill of lading, deliverable otherwise than to the defendants, to whom it ought to have been made deliverable.

If this matter were *res integra,* there would be strong ground for contending it did. It would be impossible to suppose that Munoz could be heard to say, "I was doing what was right if shipping as your property, wrong if shipping as mine, but it is the latter I did." If Munoz could not say this, neither, it is argued, could any one claiming title under him.

It is true that Munoz had told the defendants that he would not ship on their account, but they had equally told him he should, and should ship on no other, and he shipped. Suppose goods not specific were sold to be delivered by the seller into the buyer's cart when sent for, and the seller said, "I shall not put those goods in your cart unless you pay more than the agreed price," and the buyer said, "You shall, and I shall send my cart," and did, and the goods were put in it by the seller, it is clear that the seller could get no more than the agreed price. I know that different considerations may arise as to a cargo, but the question as between Munoz and the defendants is the same.

But the matter is not *res integra*, though there is no case precisely in point. Ellershaw *v.* Magniac, 6 Ex. 570 *n.*, certainly is not. There the shipper had shipped a different cargo to what he had agreed to ship; the captain taking it on board knew that. He was bound to tell the shipper to take it out or to give him bills of lading deliverable to him. I am aware that a cargo of linseed was to be shipped, and that some linseed was shipped. But the plaintiff had a right to reject a part cargo. The case may be tested thus. If a bill of lading of the linseed had been given deliverable to the plaintiff, he might have refused to receive it. Still that case shows that a shipper rightfully shipping for a buyer, can nevertheless get a bill of lading deliverable to himself.

201 Neither is Turner *v.* Trustees of the Liverpool Docks, 6 Ex. 543; 20 L. J. (Ex.) 393, in point. For there the shippers had a right of lien on the goods till they were paid for in the agreed manner. But that case also shows that goods may be put by the seller on the buyer's ship with

nothing, as appears, said at the time, and that nevertheless the seller may get a bill of lading deliverable to himself. It does not appear in that case that the shippers at the time of shipment said anything about the form of the bill of lading to be given, or reserved to themselves any right as to it. 255 2

Then there is the case of Falke *v.* Fletcher, 18 C. B. (N. S.) 400; 34 L. J. (C. P.) 146, in which Willes, J. (p. 409), uses expressions which go to show that a shipper may ship saying nothing, and then demand a bill of lading in exchange for the mate's receipt in such form as he pleases. Wait *v.* Baker, 2 Ex. 1, is also not in point, because there 197 the vendor had a right of lien. But Parke, B., said: "The delivery of the goods on board the ship was not a delivery of them to the defendant, but a delivery to the captain to be carried under a bill of lading, and that bill of lading indicated the person for whom they were to be carried." He said the same thing in Van Casteel *v.* Booker, 2 Ex. 691; 18 L. J. (Ex.) 9. In Moakes *v.* Nicholson, 19 C. B. (N. S.) 290; 34 L. J. 215 (C. P.) 273, it was held that retaining the bill of lading, though made out in the buyer's name, prevented the passing of the property. There, however, the vendor had a lien. Mr. Benjamin, on Sales (p. 306), thus sums up the result: "Where goods are delivered on board of a Rl vessel to be carried, and a bill of lading is taken, the delivery by the vendor is not a delivery to the buyer, but to the captain as bailee for delivery to the person indicated by the bill of lading, as the one for whom they are to be carried." The cases seem to me to show that Rl the act of shipment is not completed till the bill of lading is given; that if what is shipped is the shipper's property till shipped on account of the shipowner or charterer, it remains uncertain on whose account it is shipped, and is not shipped on the latter's account till the bill of lading is given deliverable to him.

It seems to me, therefore, that in this case the property never passed to the defendants, and the plaintiffs are entitled to recover. I feel bound by the authorities, which perhaps establish a more convenient state of law than would exist if bills of lading might be got deliverable to one person while the property was in another.

As to the question of estoppel, viz., that the defendants, having authorized the signing of bills of lading as presented, have authorized an act by which Munoz has been able to deceive the plaintiffs, I am of opinion that would not avail the plaintiffs if the property in the ore had passed to the defendants. The defendants no more enabled the commission of a fraud than they would have done if the ore had been their property, never that of Munoz, in their stores, and Munoz only an agent for shipment, and the charter in the present form. What the defendants have done is, supposing the property is theirs, to put it in the possession of Munoz, and so make him appear the owner. But if I hand my watch to a man to keep for me, though I in a sense enable him to appear to be the owner, yet if he sells or pledges it, I do not lose my property.

I think judgment should be for the plaintiffs.[1]

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[1] CLEASBY, B., and KELLY, C. B., delivered concurring opinions.

One of two holders of B of L. who first gives notice prevails.
distinguishable from Barber v. Meyerstein, p. 216; but looks contra to me.
B. M. says, as bet. two assignees of B of L, first in time prevails.
This case is diff. ~~As bet.~~ This is the shipper or warehouseman, & he can del. without liability to the first transferee of a valid appearing B of L.

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GLYN, MILLS, CURRIE, & CO. *v.* THE EAST AND WEST INDIA DOCK CO.

IN THE HOUSE OF LORDS, AUGUST 1, 1882.

[*Reported in 7 Appeal Cases*, 591.]

APPEAL from the judgment of the Court of Appeal (6 Q. B. D. 475)[1] reversing a judgment of Field, J. (who tried the case without a jury), in favor of the appellants (5 Q. B. D. 129). The facts which are set out in the judgments of Field, J., and Brett, L. J., are shortly as follows: —

Sugar was shipped in Jamaica and consigned to Cottam, Mortan, & Co., merchants in London. On April 16, 1878, the master signed a set of three bills of lading marked respectively "First," "Second," and "Third," making the sugar deliverable to Cottam & Co. or their assigns, freight payable in London. Each bill contained the clause, "In witness whereof the master or purser of the said ship hath affirmed to three bills of lading, all of this tenor and date, the one of which bills being accomplished, the others to stand void." During the voyage Cottam & Co. on the 15th of May, 1878, indorsed in blank the bill marked "First" to the appellants, London bankers, in consideration of a loan. The ship arrived at London on the 27th of May, and on the 28th the master landed the sugar and deposited it with the respondents in their docks, lodging with them a copy of his manifest in a printed form supplied by the respondents. In the manifest the names of Cottam & Co. appeared as consignees and as entering the goods. At the foot was a printed clause: "I declare the above to be a true copy of the manifest of the cargo of the above ship, and hereby authorize the East and West India Dock Company to deliver the same to the consignees as above or to the holders of the bills of lading." This was signed by the master, the words "the consignees as above or to" being first struck out. On the 29th the master lodged with the respondents a written notice "pursuant to 25 & 26 Vict. c. 63 s. 68, &c." to detain the sugar till payment of the freight. On the 31st Cottam & Co. brought the bill marked "Second," not indorsed, to the respondents, who entered Cottam & Co in their books as proprietors of the sugar.

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[1] BRAMWELL and BAGGALLAY, LL. J., were of opinion that the judgment of FIELD, J., should be reversed. BRETT, L. J., delivered an elaborate dissenting opinion.

On the 7th of June, the freight having been paid by Cottam & Co., the stop for freight was removed. In July the respondents, *bona fide* and without notice or knowledge of any claim by the appellants, delivered the sugar to Williams & Co., who held delivery orders signed by Cottam & Co. Cottam & Co. having gone into liquidation in August the appellants demanded the sugar from the respondents, producing the bill of lading marked "First." The respondents not being able to deliver, the appellants brought this action against them claiming damages for the value of the sugar.

Sir F. Herschell, S. G., and *Benjamin*, Q. C. (*Barnes* with them), for the appellants.

Sir H. Giffard, Q. C., and *Cohen*, Q. C. (*Pollard* with them), for the respondents.

LORD BLACKBURN. My lords, this is one of the cases in which difficulty arises from the mercantile usage of making out a bill of lading in parts.

There is since the decision of Lickbarrow *v.* Mason, 1 Sm. L. C. 8th ed. p. 753, now nearly one hundred years ago, no doubt that, before there was any statute affecting the matter, the bill of lading was a transferable document of title, at least to the extent, as was said by Lord Hatherley in Barber *v.* Meyerstein, Law Rep. 4 H. L. 326, that, "when the vessel is at sea and the cargo has not yet arrived, the parting with the bill of lading is parting with that which is the symbol of property, and which for the purpose of conveying a right and interest in the property is the property itself." And the very object of making the bill of lading in parts would be baffled unless the delivery of one part of the bill of lading, duly assigned, had the same effect as the delivery of all the parts would have had. And the consequence of making a document of title in parts is, that it is possible that one part may come into the hands of one person who *bona fide* gave value for it under the belief that he thereby acquired an interest in the goods, either as purchaser, mortgagee, or pawnee, and another part may come into the hands of another person who, with equal *bona fides*, gave value for it under the belief that he thereby acquired a similar interest. This cannot well happen, unless there is a fraud on the part of those who pass the two parts to different persons such as would in most cases bring them within the grasp of the criminal law, and from the nature of the transaction such a fraud must speedily be detected; the cases, therefore, in which it occurs are not very frequent. Nevertheless, it does at times occur, and there are cases in our courts, where the rights of the two holders have had to be considered. The last of those was Barber *v.* Meyerstein, Law Rep. 4 H. L. 317, in this House; and so far as that decision extends, the law must be taken to be settled.

I have never been able to learn why merchants and shipowners continue the practice of making out a bill of lading in parts. I should have thought that, at least since the introduction of quick and regu lar communication by steamers, and still more since the establishment of the electric telegraph, every purpose would be answered by making one bill of lading only which should be the sole document of title, and taking as many copies, certified by the master to be true copies, as it is thought convenient; those copies would suffice for every legitimate purpose for which the other parts of the bill can now be applied, but could not be used for the purpose of pretending to be holder of a bill of lading already parted with. However, whether because there is some practical benefit of which I am not aware, or because, as I suspect, merchants dislike to depart from an old custom for fear that the novelty may produce some unforeseen effect, bills of lading are still made out in parts, and probably will continue to be so made out. So long as this practice continues, it is of vast importance not to unsettle the principles which have been already settled; and when a new case has to be decided it is desirable to be very cautious as to what principles are applied.

The facts in the present case bear in many respects a close resemblance to those in Barber *v.* Meyerstein, Law Rep. 4 H. L. 317, but they are not quite the same; and the question, on the solution of which in my opinion the decision in the present case ought to depend, did not arise in Barber *v.* Meyerstein, Law Rep. 4 H. L. 317, though Lord Westbury did in that case mention it when he says (Law Rep. 4 H. L. 336): "There can be no doubt therefore that the first person who for value gets the transfer of a bill of lading, though it be only one of a set of three bills, acquires the property; and all subsequent dealings with the other two bills must in law be subordinate to that first one, and for this reason, because the property is in the person who first gets a transfer of the bill of lading. It might possibly happen that the shipowner having no notice of the first dealing with the bill of lading, may, on the second bill being presented by another party, be justified in delivering the goods to that party; but although that may be a discharge to the shipowner, it will in no respect affect the legal ownership of the goods." That point did not arise, and Lord Westbury did not express any opinion on it. He only mentions it so as to show that it was not decided either way.

In the present case Cottam & Co., on the 15th of May, 1878, applied in writing to Glyn & Co., bankers in London, for an advance, on the security of certain bills of lading. From the terms of the application it is plain that the bankers were to have the property, with a power of sale, in the goods represented by the bills of lading, so far as was necessary to secure their advance, and that, subject thereto, Cottam & Co. were to remain owners of all the rest of the interest in the goods and might do, as owners, everything consistent with the property thus given to the bankers. I do not think it necessary to express any opinion on a question much discussed by Brett, L. J., I mean whether the property which the bankers were to have was the whole legal property in the goods, Cottam & Co.'s interest being equitable only, or whether the bankers were only to have a special property as pawnees, Cottam & Co. having the legal general property. Either way the bankers had a legal property, and at law the right to the possession, subject to the shipowners' lien, and were entitled to maintain an action against any one who, without justification or legal excuse, deprived them of that right.

Cottam & Co. delivered to the bankers, as part of their security, a bill of lading for twenty hogsheads of sugar by the "Mary Jones," shipped by Elliot in Jamaica, deliverable to Cottam & Co. or to their assigns, indorsed in blank by Cottam & Co. This bill of lading bore on the face of it, distinctly printed, the word "First," and at the end had the usual clause "In witness whereof the master of the ship hath affirmed to three bills of lading, all of this tenor and date, the one of which bills being accomplished, the others to stand void." There could be no doubt therefore that the bankers had distinct notice that there were two other parts of the bill of lading. It appears in Barber *v.* Meyerstein, Law Rep. 4 H. L. 317, that in a similar transaction the Chartered Mercantile Bank, before making a similar advance to Abraham, had insisted on having all three parts of the bill of lading delivered to them, and so no doubt might Glyn & Co. have done here; but I infer that Abraham, who soon after was guilty of a very gross fraud, was not a person who could ask any reliance to be placed on his honesty; and that where the person depositing the bill of lading is of good repute, a banker would rather run the risk, in most such cases nominal, of the depositor having committed a fraud, than the risk of offending a good customer by making inquiries which might be construed as implying that they thought him capable of committing a gross fraud. However this be, it appears that Glyn & Co. made no inquiry, and were content to take the one part. And as in fact neither of the other parts had been transferred, the security which Glyn & Co. had was not impeached by such a prior transfer. And as the "Mary Jones" was then at sea, the question mainly discussed in Barber *v.* Meyerstein, Law Rep. 4 H. L. 317, does not arise in this case.

The "Mary Jones" arrived on the 27th of May, and the next day the master reported her at the Customs, and the goods were there, for Customs purposes, entered by Cottam & Co. as owners. All this was quite right, and did not require the production of any bill of lading; it could and ought to have been done as well if the other parts of the bill of lading had been delivered to Glyn & Co., or had remained locked up in the desk of the shipper Elliot in Jamaica.

The master appears to have been in a hurry to get his vessel empty, and to have resolved to avail himself of the provisions of the Merchant Shipping Act, 1862, sects. 66 to 78. He had not, in strictness, any right to do so till default had been made in making entry, which never was the case at all, or till default had been made in taking delivery within seventy-two hours after the report of the ship, which would not in this case be till the 31st of May. But the master, apparently being in a hurry, on the 28th of May, prepared and signed a notice to the East and West India Docks to "detain all the undermentioned goods which shall be landed in your docks, now on board the ship 'Mary Jones' from Jamaica, whereof I am master, until the freight due thereon shall be duly paid or satisfied, in proof of which you will be pleased to receive the directions of James Shepherd & Co. The whole cargo as per bills of lading." This stop was lodged with the dock company on the 29th of May.

The dock company, it appears, were in the habit of requiring the master to sign an authority at the foot of a copy of the manifest. And in this case the copy manifest was signed and lodged on the 28th of May. It is not necessary to inquire what would have happened if, before the seventy-two hours had expired, a duly authorized person had tendered the freight and demanded delivery, for no such thing occurred. And I think, as soon as the seventy-two hours had elapsed, the dock company held the goods under the provisions of the Act, just as much as if they had not been landed till then. The counsel for the respondents wished your lordships to draw the inference of fact that all this must have been done, not under the provisions of the Act, but by virtue of some agreement to which Cottam & Co. were a party. I do not see any evidence of this; and looking at the manner in which the admissions were made, so as to apply not only to the "Mary Jones" but to two other ships mentioned in the 6th and 11th paragraphs of the statement of defence, I should, if necessary, draw the inference that it was not the fact.

Then on the 31st of May, on which the seventy-two hours had expired, Cottam & Co. brought down and showed to the dock company a bill of lading with the word "second" distinctly printed on the face of it, and in every other respect precisely similar to the bill at that time in the hands of Glyn & Co. It was not indorsed. The clerk of the dock company entered in the books of the company that Cottam & Co. were the proprietors of the goods, and marked the bill of lading with his initials and the date, so as to show that he had seen it, and returned it to Cottam & Co. It was proved, what I think would have been inferred without proof, that after this the dock company would, according to their ordinary practice, have delivered the goods when the stop for freight was removed to the order of Cottam & Co., unless, in the mean time, they had got notice that another bill of lading was, as the witness says, out.

It appeared in Barber *v.* Meyerstein, Law Rep. 4 H. L. 317, that in the case of Abraham, whose honesty they seem to have distrusted, the Chartered Mercantile Bank had lodged a stop; and so might Glyn & Co. have done in the present case. They did not do so. And the stop for freight having been removed the dock company, though not till the month of July, delivered the goods to the order of Cottam & Co., not having then either notice or knowledge of the fact that one part of the bill of lading had been indorsed to Glyn & Co., but having from the form of the bill itself notice that there were two other bills of lading either of which Cottam & Co., if dishonest enough, might have indorsed and delivered for value to some other party.

The real question, I think, is, whether the dock company were under such circumstances justified in or rather excused for delivering to Cottam & Co.'s order, though if they had had notice or knowledge of the previous transfer of the bill of lading to Glyn & Co. it would have been a misdelivery, for which they would have been responsible. I do not think the dock company held the goods by virtue of any contract. They held them under the statute subject to a duty imposed by the statute, to deliver them to the person to whom the shipowner was bound to deliver them. And, as I think, they were justified, or rather excused, by anything which would have justified or excused the master in so delivering them. So that, I think, the very point which has to be decided is that raised by Lord Westbury, namely, what will excuse or justify the master in delivering.

The case of Barber *v.* Meyerstein, Law Rep. 4 H. L. 317, settles that the mere fact that there were parts of the bills in the hands of the mortgagor or pledgor does not form a justification or excuse for an innocent purchaser from the mortgagor or pledgor, whichever he was, taking the goods. If it could be proved that the other parts of the bills of lading were left in the hands of the mortgagor or pledgor, in order that he might seem to be the owner, though he was not, a purchaser from the person in whose hands they were thus left might either at common law or under the Factors' Acts have a good title; but there is not in this case, any more than there was in Barber *v.* Meyerstein, any evidence to raise such a question.

But the master is not in the position of a purchaser from the holder, or person supposed to be the holder, of a bill of lading. He is a person who has entered into a contract with the shipper to carry the goods, and to deliver them to the persons named in the bill of lading — in this case Cottam & Co. — or their assigns, that is, assigns of the bill of lading, not assigns of the goods. And I quite assent to what was said in the argument that this means to Cottam & Co., if they have not assigned the bill of lading, or to the assign if they have. If there were only one part of the bill of lading, the obligation of the master under such a contract would be clear, he would fulfil the contract if he delivered to Cottam & Co. on their producing the bill of lading unindorsed; he would also fulfil his contract if he delivered the goods to any one producing the bill of lading with a genuine indorsement by Cottam & Co. He would not fulfil his contract if he delivered them to any one else, though if the person to whom he delivered was really entitled to the possession of the goods, no one might be entitled to recover damages from him for that breach of contract. But at the request of the shipper, and in conformity with ancient mercantile usage, the master has affirmed to three bills of lading all of the same tenor and date, the one of which bills being accomplished the others to stand void.

In Fearon *v.* Bowers, 1 Sm. L. C. 782, decided in 1753, Lee, C. J., is reported to have ruled "that it appeared by the evidence that according to the usage of trade the captain was not concerned to examine who had the best right on the different bills of lading. All he had to do was to deliver the goods upon one of the bills of lading, which was done. The jury were therefore directed by the Chief Justice to find a verdict for the defendant." Lord Tenterden says (I quote from the 5th edition of Abbott on Shipping, the last published in his lifetime, part 3, chap. ix., sect. 24), "But perhaps this rule might upon further consideration be held to put too much power into the master's hands." It is singular enough that one hundred and twenty-nine years should have elapsed without its having been necessary for any court to say whether this rule was good law. It was suggested on the argument with great probability that, especially after the caution given immediately after the passage I have read (part 3, chap. ix., sect. 25), masters have declined to incur the responsibility of deciding between two persons claiming under different parts of the bill of lading, so that the case has not arisen. If this rule were the law, it would follow *a fortiori* that if the master was entitled to choose between two conflicting claims, of both of which he had notice, and deliver to either holder, he must be justified in delivering to the only one of which he had notice. So that I think it is necessary to consider whether it is law, and I do not think it can be law, for the reason given by Lord Tenterden; it puts too much power in the master's hands. Where he has notice or probably even knowledge of the other indorsement, I think he must deliver, at his peril, to the rightful holder or interplead.

But where the person who produces a bill of lading is one who — either as being the person named in the bill of lading which is not indorsed, or as actually holding an indorsed bill — would be entitled to demand delivery under the contract, unless one of the other parts had been previously indorsed for value to some one else, and the master has no notice or knowledge of anything except that there are other parts of the bill of lading, and that therefore it is possible that one of them may have been previously indorsed, I think the master cannot be bound, at his peril, to ask for the other parts.

It is not merely that, as Bramwell, L. J., says (6 Q. B. D. 492) "it is the undoubted practice to deliver without inquiry to any one who produces a bill of lading," i. e. when no other is brought forward, and that the evidence given in Fearon *v.* Bowers, 1 Sm. L. C. 8th ed. 782, must have proved that much, though it seems also to have proved more; but that, as it seems to me, unless this was the practice, the business of a shipowner could not be carried on, unless bills of lading were made in only one part. I cannot say on this anything in addition to what Baggallay, L. J., says (6 Q. B. D. pp. 502, 503), and I quite assent to his reasoning there; I think also that the only reasonable construction to be put upon the clause at the end of the bill of lading is that the shipowner stipulates that he shall not be liable on this contract if he *bona fide*, and without notice or knowledge of anything to make it wrong, delivers to a person producing one part of the bill of lading, designating him — either as being the person named in the bill if it has not been indorsed, or if there be a genuine indorsement as being assign — as the person to whom the goods are to be delivered. In that case, as against the shipowner, the other bills are to stand void. Even without that clause I should say that the case falls within the principle laid down as long ago as the reign of James I. in Watts *v.* Ognell, Cro. Jac. 192. That depends, says Willes, J., in De Nicholls *v.* Saunders, Law Rep. 5 C. P. 594, "upon a rule of general jurisprudence, not confined to choses in action, though it seems to have been lost sight of in some recent cases, viz., that if a person enters into a contract, and without notice of any assignment fulfils it to the person with whom he made the contract, he is discharged from his obligation." The equity of this is obvious. It was acted upon in Townsend *v.* Inglis, Holt, N. P. 278, where goods lodged in the docks by Reed & Co. were by them sold to Townsend and a delivery order was given by Reed & Co. to Townsend. Townsend paid for the goods to Reed & Co.'s brokers, who misappropriated the money. Then Reed & Co. countermanded the order and finally removed the goods from the docks before the dock company had any notice either of the sale to Townsend or of the delivery order given to him. Townsend brought trover against Reed & Co. and the dock company. Gibbs, C. J., a very great commercial lawyer, left to the jury the question as to whether Townsend was, on the evidence as to previous dealings, justified in paying the broker, which the jury found he was, and the plaintiff had a verdict against Reed & Co., but he directed a verdict for the dock company, saying, "Though the skins were the property of the plaintiffs from the completion of the bargain, the company had made no transfer, and had no notice of their possessory title when they delivered the skins to Reed & Co." And in Knowles *v.* Horsfall, 5 B. & Ald. 139, Abbott, C. J., treats this as indisputable. Goods, part of which were in a warehouse, had been sold by Dixon to the plaintiff. Abbott, C. J., says, as to the parcel in the warehouse, "If the plaintiff had given notice of the sale to the warehouse keeper, the latter would not have been justified in delivering them to any other order than that of the plaintiff, but not having received any such notice, the warehouse keeper would have been justified in delivering them to the order of Dixon, who placed them there." I know of no case in which this principle has been departed from intentionally, and though it is very likely that it may have been sometimes lost sight of, I do not know to what cases Willes, J., alludes.

The sum involved in this case is not large, but the amounts advanced by those who lend money on the security of bills of lading, and the value of the goods for which warehouse keepers and wharfingers become responsible, are enormous. Which is the more important trade of the two I do not know, but the decision of this case must have an effect on both, and it is therefore of great importance, and requires careful consideration. And that being so, I have felt some diffidence in differing from the two learned judges who had below come to a different result. Mr. Justice Field seems (5 Q. B. D. 135) to have taken a view of the facts as to the way in which the goods came into the hands of the dock company different from that which I have taken, and consequently to have thought that the very important question suggested by Lord Westbury did not arise. Lord Justice Brett thinks (6 Q. B. D. 488) that the master cannot be excused as against the first assignee of one part of the bill, who has the legal right to the property, for delivering under any circumstances to one who produces another bill of lading bearing a genuine indorsement, unless he would be excused in all circumstances; in other words unless Fearon *v.* Bowers, 1 Sm. L. C. 8th ed. 782, is good law to its full extent. In this I cannot agree. I think, as I have already said, that where the master has notice that there has been an assignment of another part of the bill of lading, the master must interplead or deliver to the one who he thinks has the better right, at his peril if he is wrong. And I think it probably would be the same if he had knowledge that there had been such an assignment, though no one had given notice of it or as yet claimed under it. At all events, he would not be safe, in such a case, in delivering without further inquiry. But I think that when the master has not notice or knowledge of anything but that there are other parts of the bill of lading, one of which it is possible may have been assigned, he is justified or excused in delivering according to his contract to the person appearing to be the assign of the bill of lading which is produced to him.

And I further think that a warehouseman taking the custody of the goods under the provisions of the Merchant Shipping Act, 1862, s. 66, &c., is under an obligation cast upon him by the statute to deliver the goods to the same person to whom the shipowner was by his contract bound to deliver them, and is justified or excused by the same things as would justify or excuse the master. And I find, as a fact, that this was the position of the respondents here. And, on this *ratio decidendi*, I think that the appeal should be dismissed, with costs.

Judgment appealed from affirmed, and appeal dismissed with costs.[1]

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[1] Lords SELBORNE, CAIRNS, O'HAGAN, WATSON, and FITZGERALD delivered concurring opinions. Lord CAIRNS, at the end of his opinion, said: "It is said that this will cause inconvenience to those who advance money upon bills of lading. I do not think that it need do so in the least. There are, at all events, three courses open to them, either of which they may take. The mercantile world may, if they think right, alter the practice of giving bills of lading in more parts than one. That would be one course which might be taken. But even supposing that the bill of lading is in more parts than one, all that any person who advances money upon a bill of lading will have to do, if he sees, as he will see, on the face of the bill of lading, that it has been signed in more parts than one, will be to require that all the parts are brought in, that is to say, that all the title deeds are brought in. I know that that is the practice with regard to other title deeds, and it strikes me with some surprise that any one would advance money upon a bill of lading without taking that course of requiring the delivery up of all the parts. If the person advancing the money does not choose to do that, another course which he may take is, to be vigilant and on the alert and to take

a pledge of B. of L. does not
transfer the ownership, o
a property.
∴ the pledgee is not
liable as an
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Consignee by

SEWELL *v.* BURDICK.

IN THE HOUSE OF LORDS, DECEMBER 5, 1884.

[*Reported in* 10 *Appeal Cases,* 74.]

APPEAL by the defendants from an order of the Court of Appeal (13 Q. B. D. 159) reversing a decision of Field, J. The facts are fully set out in the judgment of Field, J., 10 Q. B. D. 363. Briefly they were as follows: —

In September, 1880, Nercessiantz shipped machinery on the respondent's ship to be carried from London to Poti in the Black Sea, under bills of lading whereby the goods were made deliverable to the shipper or assigns, freight, primage, and disbursements to be paid at destination, in default the owners or agents to have an absolute lien on the goods and liberty to sell by auction and retain freight and all charges. The bills of lading, indorsed in blank, were, in November, 1880, deposited by Nercessiantz with the appellants, bankers in Manchester, as security for a loan of £300 advanced by them to Nercessiantz. The ship meanwhile had arrived at Poti in September, and the goods were landed and warehoused at the Russian custom-house in October. Nercessiantz disappeared, and after a year the goods, in accordance with Russian law, were sold to pay custom-house duty and charges, and realized no more than enough for that purpose. Meanwhile the appellants had indorsed the bills of lading to their agents at Tiflis, with instructions to protect their interests, and had informed the shipowners that if the goods were sold to pay freight, &c., the appellants claimed all the proceeds over and above the amount due to the shipowners for freight, &c., but the appellants never claimed delivery of the goods. The respondent having brought an action for £174 8*s.* 9*d.* for freight and charges against the appellants as indorsees of the bills of lading, Field, J., who tried the case without a jury, gave judgment for the defendants. 10 Q. B. D. 363. The Court of Appeal (Brett, M. R., and Baggallay, L. J., Bowen, L. J., dissenting) set aside this judgment and gave judgment for the plaintiff for the amount claimed. 13 Q. B. D. 159. The defendants appealed.

Sir F. Herschell, S. G. (*Danckwerts* with him), for the appellants.

C. Hall, Q. C., and *Edwyn Jones*, for the respondent.

LORD BLACKBURN. My Lords, the judgment of Field, J., was re-

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care that he is on the spot at the first arrival of the ship in the dock. If those who advance money on bills of lading do not adopt one or other of those courses, it appears to me that if they suffer, they suffer in consequence of their own act."

In Sanders *v.* McLean, 11 Q. B. D. 327, the Court of Appeal decided that where by a contract of sale payment was to be made "in exchange for bills of lading," the purchaser was bound to pay when a duly indorsed bill of lading was tendered to him, although the bill of lading was drawn in triplicate, and all the parts were not tendered or accounted for.

versed by the order now under appeal. The case was tried before him without a jury, and I think it is necessary to see what he had to determine. There was no question between vendor and vendee, nor of stoppage *in transitu*, raised, for there was neither a vendor nor a stoppage. The law and decisions as to stoppage *in transitu* might be relevant in construing the Statute 18 & 19 Vict. c. 111, but did not otherwise affect the rights of the parties.

It will be seen by reference to the statement of claim and of defence that it was not suggested that the defendants were, at the time the goods were shipped, in any way interested in the goods; nor that they were, either as undisclosed principals or otherwise, parties to the contract in the bill of lading until it was delivered to them, after the ship had sailed and the goods were in the hands of the shipowners to be carried under the bill of lading and were not yet delivered, with an indorsement in blank by Nerecessiantz, the consignee named in the bill of lading.

I do not think that, either at the trial or on the argument, it was at all disputed that at common law the remedy of the shipowner under a bill of lading was by enforcing his lien upon the goods, or by bringing an action on the contract against any one who, at the time when the goods were shipped, was a party to the bill of lading, either as being on the face of it a contracting party, or as being an undisclosed principal of such a party. In either of these cases he might be sued as having been from the beginning a party to the contract.

Some attempts had been made to say that the contract in a bill of lading might, under some circumstances at least, be transferred to an assignee in a manner analogous to that in which the contract in a bill of exchange was transferred by the indorsement of the bill of exchange; but I think since the decision in Thompson *v.* Dominy, 14 M. & W. 403, in 1845, it has been undisputed law that under no circumstances could any one not a party to the contract from the beginning sue on it in his own name. Any action on the contract at common law must be brought in the name of an original contractor, and no action could be brought on the contract against one who was not liable to be sued as an original contractor.

But ten years later the 18 & 19 Vict. c. 111, was passed. The preamble states this as one of the objects which the legislature had in view. "Whereas by the custom of merchants a bill of lading being transferable by indorsement the property in the goods may thereby pass to the indorsee" (which I think for a long time before the 18 & 19 Vict., A.D. 1855, was undisputed), "but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner" (this, it is to my mind clear, refers to Thompson *v.* Dominy, *supra*), "and it is expedient that such rights should pass with the property."

The mode in which the legislature carry out the object thus expressed in the preamble is by sect. 1: "Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself."

The case made on the statement of claim was that "the" property had passed upon or by reason of the indorsement to the defendants. Not that they were before that a party to the contract in the bill of lading, but that by virtue of the Act 18 & 19 Vict. when the property passed they became subject to the same liabilities as if the contract contained in the bill of lading had been made with themselves.

It is not disputed that the delivery of the bill of lading to the defendants with the indorsement of the consignee on it in blank was an indorsement, nor that whatever interest then passed to them still remained in them. What was in issue was whether upon or by reason of that indorsement "the" property passed.

The first and most important question to be decided in this case is, what is the true construction of 18 & 19 Vict. c. 111? Does "the property" in the goods there mean any legal property in the goods: so as to be satisfied by proof that a legal property passed accompanied by a right of possession so as to entitle the transferee to maintain trover, though it was intended by the parties, and was as between them, to be by way of security only, the transferor retaining a right of redemption either by way of a common law retention of the general property, though the pledgee had a right to the possession and a property as pledgee, a right exceeding a lien: or the whole property at law having passed by way of mortgage the transferor retaining an equity of redemption, which in 1855 was an equitable right, enforceable only in a Court of Equity?

I think that all the judges below were of opinion that if the right reserved was the general right to the property at law, what was transferred being only a pledge (conveying, no doubt, a right of property and an immediate right to the possession, so that the transferee would be entitled to bring an action at law against any one who wrongfully interfered with his right), though "*a*" property, and "a" property against the indorser, passed "upon and by reason of the indorsement," yet *the* property did not pass. And I agree with them. I do not at all proceed on the ground that this being an indorsement in blank followed by a delivery of the bill of lading so indorsed, had any different effect from what would have been the effect if it had been an indorsement to the appellants by name.

The case of The Freedom, Law Rep. 3 P. C. 594, was cited, and I think there are expressions used in the judgment delivered in that case by Sir Joseph Napier which indicate that the Judicial Committee were not of that opinion. It is said (page 599), "The plaintiffs were consignees for sale; but as part of the transaction a bill of exchange was drawn by the consignors for nearly the full value of the goods, the bills of lading were indorsed by them and forwarded to the plaintiffs, by whom the draft of the consignors was accepted and paid in due course." If that was the transaction (and whether it was so or not, the Judicial Committee proceeded on the assumption that such was the transaction), the plaintiffs in The Freedom were in exactly the position of Church, in the case of Newsom *v.* Thornton, 6 East, 17, the case to which I shall have to refer afterwards. Church had the bill of lading indorsed to him as a factor, or consignee for sale, and had therefore a right to hold the goods as against the indorser as a security for all his advances, and he had authority at common law to sell the goods, and before the arrival of the ship to transfer the bill of lading in furtherance of a sale, but he had no authority to pledge either the goods or the bill of lading. It is true that by the Factors' Acts the plaintiffs in The Freedom would have had a power, which Church had not, to pledge the bill of lading, but as they did not exercise that power it could make no difference.

The judgment then proceeds: "The legal title to the property in the goods specified in the bills of lading was thus transferred to and vested in the plaintiffs; the right of suing upon the contract in the bills of lading was transferred to them by force of the Statute 18 & 19 Vict. c. 111." The judgment then proceeds to show, I think correctly, that the *dictum* of Martin, B., reported in Fox *v.* Nott, 6 H. & N. 637, was not necessary for the decision in Fox *v.* Nott, and goes on: "Their Lordships are satisfied that it was intended by this Act that the right of suing upon the contract under a bill of lading should follow the property in the goods therein specified; that is to say, the legal title to the goods as against the indorser." It certainly seems to me that their Lordships thought that "the" property passed within the meaning of 18 & 19 Vict. c. 111, if any legal right to hold as against the indorser passed.

The statute which their Lordships had to construe was the 24 Vict. c. 10, s. 6, which is in these terms: "The High Court of Admiralty shall have jurisdiction over any claim by the owner" (*i. e.*, of the goods) "or consignee or assignee of any bill of lading of any goods carried into any port in England or Wales in any ship, for damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales." It is not necessary to put a construction on 24 Vict. c. 10, s. 6.

I think that there are very good reasons for contending that a person who has possession of an indorsed bill of lading without any right at all to hold it against the indorser, without being owner of any interest in the goods, is not an "assignee" within the meaning of this enactment, and consequently that what I understand to be the actual decision of Dr. Lushington in The St. Cloud, Brow. & Lush. 4, that such a person could not sue under the Admiralty Act, may have been right enough. It is not necessary to decide that. But I agree with what was said in

The Nepoter, Law Rep. 2 A. & E. 376, that it is contrary to all rules of construction to interpolate any reference to the Bill of Lading Act into the Admiralty Act. I think, therefore, that the actual point decided in The Freedom, *supra*, might be quite right, for the plaintiff in that action had *a* property, and a very substantial property, in the goods, as against the indorsers, and every one else, and was in every sense an assignee of the bill of lading. The opinion expressed on the construction of the 18 & 19 Vict. c. 111, that in that Act the property meant a legal title as against the indorser, was perhaps unnecessary, and, I think, not sound.

The words used in the statute are not such as *prima facie* to express such an intention. No one, in ordinary language, would say that when goods are pawned, or money is raised by mortgage on an estate, the property, either in the goods or land, passes to the pledgee or mortgagee, and I cannot think that the object of the enactment was to enact that no security for a loan should be taken on the transfer of bills of lading unless the lender incurred all the liabilities of his borrower on the contract. That would greatly, and I think unnecessarily, hamper the business of advancing money on such securities which the legislature has, by the Factors' Acts, shown it thinks ought rather to be encouraged.

It is not uncommon to reduce into writing the agreement between the banker and his customers as to the terms on which the bills of lading deposited by them as securities are to be held. Such was the case in Glyn *v.* East and West India Dock Company, 5 Q. B. D. 129; 6 Q. B. D. 475; 7 App. Cas. 591, as to which I shall have more to say hereafter.

When there is such a writing, it is, in the absence of fraud, conclusive as between the parties as to what they intended. And I do not in the least question that such a writing may be so expressed as to show that between the parties the transfer was a mortgage, though of goods, in the manner with which every one is familiar with regard to lands. The equity of redemption in such a case was an equitable estate only, and in 1855 enforceable in equity, not at law.

Where there is neither a symbolical delivery by a transfer of a bill of lading, nor an actual delivery of the goods themselves, there may be (though there seldom is) a substantial difference in the rights of the lender according as the transaction is of the one kind or the other.

In Howes *v.* Ball, 7 B. & C. 481, Ball sold and delivered a coach to John Howes (since deceased) under an agreement in writing, in which there was this clause, "And further I, John Howes, do agree that Thomas Ball do have and hold a claim upon the coach until the debt be duly paid." John Howes died without having paid the debt. Ball, after his death, seized the coach, for which seizure the action was brought by the executor. Had that agreement amounted to a mortgage by John Howes to Ball, I take it there could have been no doubt that the mortgagee would have had as much right against the executor of John Howes as he would have had against John Howes himself. But it was held that it did not amount to a mortgage, but only to an agreement that Ball should have a right of hypothec, and, there having been no delivery by Howes to Ball, the decision was that though so long as John Howes lived and held the property in the coach Ball might have justified the seizure, as against him, he could not justify a seizure as against the representatives.

In Flory *v.* Denny, 7 Ex. 581, where the agreement was "as an additional security for a loan to assign all the debtor's right and interest in a chattel," it was held to be a mortgage, and to operate so as to transfer the property, without any delivery, as a bargain and sale out and out of the goods would, though an agreement to create a pledge would, according to Howes *v.* Ball, *supra*, have conveyed no property of any kind in the goods without a delivery.

But where the goods are at sea, and there is a transfer of the bill of lading, there is a delivery of possession, symbolical, it is true, but all that can be given. The question whether there was a mortgage or only a common law pledge, or hypothec, it being accompanied by delivery, might affect the question what was the court in which those rights were to be enforced, but does not affect the substance of the rights. The borrower, if ready and willing to pay the money, might in the one case be able to bring an action at law against the lender who refused to allow him to redeem, and in the other have to sue in equity, but as it would equally be a pledge his rights would be the same in substance. I am therefore strongly inclined to hold that even if this was a mortgage there would not have been a transfer of "the" property within the meaning of 18 & 19 Vict. c. 111. This is contrary to the opinions not only of Brett, M. R., and Baggallay, L. J., but of Field, J., also.

Bowen, L. J., who agreed with Field, J., in thinking that this was not a mortgage but only a pledge, did not express any opinion as to what would have been the law if it had been a mortgage. I believe all the noble and learned lords who heard the argument are agreed with him in thinking that in this case it was only a pledge. I do not therefore intend to express a final decision that an assignee of a bill of lading by way of mortgage is not as such liable to be sued under 18 & 19 Vict. c. 111; but only to guard against its being supposed that even if Brett, M. R., and Baggallay, L. J., were right in holding this a mortgage, I, as at present advised, should agree in their conclusion that the defendants could be sued.

I now proceed to consider the question on which the Court of Appeal were divided in opinion, but the majority made the order now appealed against. The question is stated by Brett, M. R., to be, "Does the indorsement of a bill of lading as a security for an advance, by a necessary implication which cannot be disproved, pass the legal property in the goods named in the bill of lading to the indorsee with an equity in the indorser, the borrower, to redeem the bill of lading by payment, or to receive the balance, if any, on a sale?" 13 Q. B. D. 161.

Field, J., had held, and Bowen, L. J., agreed with him, that it might so operate, if so intended by the parties at the time, but did not so operate if it was intended to be no more than a pledge as distinguished from a mortgage.

I do not understand that any one of the judges below disputed that if it was a question of intention depending on the evidence, the finding of Field, J., was right; but the majority in the Court of Appeal proceeded on the principles laid down by Brett, L. J., in Glyn *v.* East and West India Dock Company, *supra.* In that case the terms on which the bill of lading was delivered to Glyn & Co. were reduced to writing, and the question, therefore, whether it was intended to deliver it by way of pledge only, or by way of a mortgage, depended on the construction of that writing. Whether Brett, L. J., thought that on the construction of the written instrument it was intended to be a mortgage I do not know; I do not think he proceeded on that ground. He said it was a mortgage, and that the effect of the statute 18 & 19 Vict. c. 111, was to transfer the right to sue and the liability to be sued to Glyn & Co.

Lord Bramwell, then Bramwell, L. J., was of an opposite opinion on both points. He thought that Glyn & Co. had a special property and a right of possession, and no more.

In the House of Lords I said, "I do not think it necessary to express any opinion on a question much discussed by Brett, L. J., — I mean whether the property which the bankers were to have was the whole legal property in the goods, Cottam & Co.'s interest being equitable only, or whether the bankers were only to have a special property as pawnees, Cottam & Co. having the legal general property. Either way the bankers had a legal property, and at law the right to the possession, subject to the shipowner's lien, and were entitled to maintain an action against any one who, without justification or legal excuse, deprived them of that right." 7 App. Cas. 591, 606. All the noble and learned lords agreed in this. I think, therefore, the decision of this House is a strong authority in support of the position which I have before advanced, that the rights of a mortgagee having taken a bill of lading, and the rights of a pawnee having taken a bill of lading, are in substance the same.

I did not think it necessary to point out that the question which the House in Glyn *v.* East and West India Dock Company, *supra.* had to decide, and did decide, would have been just the same if 18 & 19 Vict. c. 111, had never been passed or had been repealed, and consequently that it was unnecessary to express any opinion on the construction of that Act, but it obviously was so.

Before proceeding further I wish to point out what, in my opinion, is a great misapprehension as to the effect of the decision of this House in Lickbarrow *v.* Mason, 6 East, 20, n., and as to the weight to be given to the opinion of Buller, J., delivered in this House and reported in a note to 6 East.

I have already said that in this case there is no sale, no vendor, and no vendee, and no stoppage *in transitu*, so that this misapprehension, as I think it is, is not so material as it might be in some other cases.

A demurrer on evidence, as is pointed out by Eyre, C. J., in delivering the unanimous opinion of the judges in Gibson *v.* Hunter, 2 H. Bl. 205, 206, not Gibson *v.* Minet, as is by mistake said in the note in 6 East, though not familiar in practice, was a proceeding known to the law. He explains it, and states his very confident expectations (which have been justified by the result) that no demurrer on evidence would again be brought before the House.

It may be well to point out the dates. The demurrer to evidence in Lickbarrow *v.* Mason, 5 T. R. 683, was in 1787. The only case of a demurrer on evidence in what were then recent times, was Cocksedge *v.* Fanshawe, 1 Doug. 118, 134, on which judgment had been given in this House in 1783. Neither in the King's Bench nor in the Exchequer Chamber was any question raised in Lickbarrow *v.* Mason as to the mode in which the questions discussed were raised. In 1790 the writ of error from the decision of the Exchequer Chamber was brought before the House of Lords. The law peers at that time were Lord Thurlow, Lord Loughborough, and Lord Kenyon. When it was argued does not appear, but it was argued, and the same question as had been asked of the judges in Cocksedge *v.* Fanshawe was asked of the judges. Six judges (including all the survivors of those who had joined in Lord Loughborough's judgment in the Exchequer Chamber) answered in favor of the respondent. The three judges who had given judgment in the King's Bench answered in favor of the appellant. This House delayed giving its opinion till 1793. In the meantime, in 1791, there was a demurrer to evidence in Gibson *v.* Hunter, *supra*, which was brought before this House. The case in this House is reported, 2 H. Bl. 187. On the 7th of February, 1793, this House gave judgment, awarding a *venire de novo*. One week afterwards, on the 14th of February, 1793, this House delivered judgment in the long pending case of Lickbarrow *v.* Mason, awarding in that case also a *venire de novo*. Lord Loughborough was himself at that time Lord Chancellor.

I should have thought, if anything was clear, it was that this House did not decide anything, except that on that demurrer to the evidence no judgment could be given; certainly the last conclusion that I should draw is that stated by Field, J., that the House in which Lord Loughborough was Chancellor decided "presumably" on the opinion delivered by Buller, J., against the judgment of Lord Loughborough, which six judges to three had thought right. Neither can I at all agree in the opinion expressed by Field, J., that the opinion of Buller, J., has always been taken as the law, and been adopted and followed as the law up to the present day. It never was published till 1805 in a note to 6 East, 20. I have for many years been of opinion, and still remain of opinion, that much of what Buller, J., expresses in that opinion as to stoppage *in transitu* was peculiar to himself, and was never adopted by any other judge, and is not law at the present day. But it is not necessary to pursue the subject further, as I agree with Bowen, L. J., that neither the statement of the custom of merchants in the special verdict in Lickbarrow *v.* Mason, *supra*, nor the opinion of Buller, J., justifies the inference that the indorsement of a bill of lading for a valuable consideration must pass the entire legal property, whatever was the intention of the parties.

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In Lickbarrow *v.* Mason, *supra*, Turing was an unpaid vendor to Freeman. He had indorsed the bill of lading to Freeman, and had not therefore any right, except that of stopping the goods whilst *in transitu* if Freeman became insolvent without having paid for the goods, and that right he had, though the indorsed bill of lading had been sent on to the vendee, so long as that bill of lading remained in the vendee's hands. But before any such stoppage Freeman, for valuable consideration, indorsed the bill of lading to Lickbarrow, who, whether as mortgagee or pledgee, had a legal property accompanied by a right of possession. The point which I understand to have been decided in Lickbarrow *v.* Mason was, that on the transfer of the bill of lading to Lickbarrow the goods ceased to be *in transitu*, the shipowner from that time no longer holding them as a middleman to carry the goods from the unpaid vendor, Turing, to Freeman his vendee, but holding them as agent for Lickbarrow. It was held, first in *Re* Westzinthus, 5 B. & Ad. 817, and then in Spalding *v.* Ruding, 6 Beav. 381, that where the *transitus* was thus put an end to by what was in reality only a pledge, the stoppage might be made available in equity so far as the rights of the pledgee did not extend. I thought, and still think, that the reason why the stoppage could not be made available at law was because the shipowner no longer held the goods as a middleman, as the transferee of the bill of lading for valuable consideration and *bona fide* so as to give him a security whether by way of mortgage or by way of pledge, had a legal property in the goods which he could enforce as against the shipowner. Such being my view of the law, whether it was right or wrong, I expressed myself accordingly in Kemp *v.* Falk, 7 App. Cas. 573, so as to show that I thought so; but there was nothing in that case to call for a decision on the point now before this House.

In Newsom *v.* Thornton, 6 East, 40, Lord Ellenborough says: "I should be very sorry if anything fell from the court which weakened the authority of Lickbarrow *v.* Mason, *supra*, as to the right of a vendee to pass the property of goods *in transitu* by indorsement of the bill of lading to a *bona fide* holder for a valuable consideration and without notice. For as to Wright *v.* Campbell, 4 Burr. 2047, though that was the case of an indorsement of a factor, it was an outright assignment of the property for value. Scott, the indorsee, was to sell the goods and indemnify himself out of the produce the amount of the debt for which he had made himself answerable. The factor, at least, purported to make a sale of the goods transferred by the bill of lading, and not a pledge. Now this was a direct pledge of the bill of lading, and not intended by the parties as a sale. A bill of lading, indeed, shall pass the property upon a *bona fide* indorsement and delivery where it is intended so to operate, in the same manner as a direct delivery of the goods themselves would do if so intended. But it cannot operate further."

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Lawrence, J., at page 43, says, speaking of Lickbarrow *v.* Mason, *supra*, "All that that case seems to have decided is, that where the property in the goods passed to a vendee, subject only to be devested by the vendor's right to stop them while *in transitu*, such right must be exercised, if at all, before the vendee has parted with the property to another for a valuable consideration and *bona fide*, and by indorsement of the bill of lading given him a right to recover them." And Le Blanc, J., says that what they then determine "will not break in at all on the doctrine of Lickbarrow *v.* Mason that the indorsement of a bill of lading upon the sale of the goods will pass the property to a *bona fide* indorsee, the property being intended to pass by such indorsement."

In Glyn *v.* East and West India Dock Co., 6 Q. B. D. 480, Brett, L. J., says (speaking of an opinion of Willes, J.), "To say that an indorsement of a bill of lading for an advance is only a pledge, seems to me to be inconsistent with what has always been considered to be the result of Lickbarrow *v.* Mason, *supra*, namely, that such an indorsement passes the legal property," by which I understand him to mean the whole legal property. But neither in that case nor in the case now at bar does he refer to any authority to that effect. Expressions used by judges have been cited which, I think, only show that they did not carefully consider their language, where no question of the kind before us was under discussion. And, as far as I know, there is no decision subsequent to Lickbarrow *v.* Mason which proceeds on such a ground, whilst Newsom *v.* Thornton, 6 East, 17, proceeds expressly on the ground that the indorsement of a bill of lading, when intended to be a pledge only, is not valid if made by one who has no authority to make a pledge. I do not know that I am justified in saying that it is a decision that, if it was made by one who had authority to make a pledge, it would be good as such, though I think that appears to have been Lord Ellenborough's opinion, and I do not think any authority was cited on the argument at the bar to show that such is not the law. No case was cited at the bar, nor am I aware of any in which it has been held that a transfer of the bill of lading for value necessarily, whatever might be the intention, passed the whole legal property. The Master of the Rolls says: "If the general understanding of merchants had not been in accordance with the verdict of the jury in Lickbarrow *v.* Mason, 1 Sm. L. C. 753, 8th ed., accepted in its largest sense, there would, one would think, have been cases in the books raising the question." 13 Q. B. D. 162. With submission to the Master of the Rolls, I think no weight can be given to this absence of authority until it is shown that there have been cases in which it became material to consider whether an indorsement intended to be and operating as a pledge at law had a less effect than an indorsement operating against the intention as a mortgage. I have already given my reasons for thinking that in substance the rights would be the same. Without, therefore, deciding the question whether a mortgage would render the mortgagee liable under 18 & 19 Vict. c. 111, I decide that, mainly for the reasons given by Bowen, L. J., this transfer did not operate as a mortgage. *Order appealed from reversed.*[1]

[1] Lords SELBORNE, BRAMWELL, and FITZGERALD delivered concurring opinions.

COMMERCIAL BANK *v.* ARMSBY COMPANY.

SUPREME COURT OF GEORGIA, APRIL 4–MAY 13, 1904.

[*Reported in* 120 *Georgia*, 74.]

CANDLER, J. The J. K. Armsby Company, an Illinois corporation, shipped to Walton & Carr, their brokers, in Augusta, a quantity of salmon for distribution to different parties to whom the goods had been sold. Walton & Carr were merely agents of the Armsby Company, and had no right or title to the salmon. The goods were shipped from a point in Oregon, by parties from whom they had been ordered by the Armsby Company, on a through bill of lading to Augusta, and were consigned to the order of the consignor, with directions to notify Walton & Carr. The Armsby Company sent Walton & Carr a check for the amount of the freight, which was paid, and it also mailed them the original bill of lading, which was indorsed in blank. Carr, a member of the firm of Walton & Carr, took the bill of lading to the Commercial Bank of Augusta, and hypothecated it for a loan of money. Shortly thereafter Walton & Carr failed, and the bank converted the salmon for the payment of its debt; whereupon the Armsby Company brought against it the present suit, which was an action of trover. The case was tried before the judge of the city court of Richmond county, without a jury. The judge found in favor of the plaintiff. The defendant excepted.

"Where an owner has given to another such evidence of the right of selling his goods, as, according to the custom of trade or the common understanding of the world, usually accompanies the authority of disposal, or has given the external indicia of the right of disposing of his property, a sale to an innocent purchaser divests the true owner's title." Civil Code, § 3539. The sole question for our determination, then, is, does a bill of lading of the character of the one involved in this suit constitute such an external indicium of the right of disposing of the property for which it was issued as to bring the case within the operation of the rule laid down in the code section cited? As a general rule, the transferee of a bill of lading can obtain 1.
no better title to the goods which it covers than that which was in the person by whom it was transferred. Indeed, it is a self-evident proposition that no man can convey that which he does not possess. 2
But the true owner of property may, by placing it in the power of another to defraud innocent purchasers by an apparently valid transfer of the property, cut himself off from claiming it, and thereby divest the title from himself. In 4 Am. & Eng. Enc. L. (2d ed.) 551, it is said that an important exception to the general rule which has already been stated "arises in the case of the transfer of a bill of lad-

ing to a *bona fide* purchaser for value by a consignee to whom the goods are, by the terms of the instrument, made deliverable, or to whom the consignor and original owner of the goods has indorsed and delivered the bill. It seems to be established that in this case the transfer defeats the vendor's right of stoppage *in transitu*, and passes the title to the goods to the *bona fide* transferee." See also 6 Cyc. 424; 1 Mechemon Sales, § 166; Pollard *v.* Reardon, 65 Fed. 848. While a bill of lading is not in the full sense a negotiable instrument, it is treated by universal commercial usage as a symbol of the goods for which it is issued; and consequently it is in a measure negotiable. In Georgia, it may be pledged as security for debt (Civil Code, § 2956), and a *bona fide* assignee for value is protected in his title against the owner's right of stoppage *in transitu* (Civil Code, § 3553). In American Nat. Bank *v.* Georgia R. Co., 96 Ga. 665, the status of bills of lading under our law is discussed with considerable fulness; and while the decision in that case is not directly in point on the question involved in the case at bar, the reasoning of Mr. Chief Justice Simmons has an important bearing thereon. The following language from the opinion of Mr. Justice Miller in the case of McNeal *v.* Hill, Woolw. (U. S. C. C.) 96, is there quoted with approval: "As civilization has advanced and commerce extended, new and artificial modes of doing business have superseded the exchanges by barter and otherwise which prevail while society is in its earlier and simpler stages. The invention of the bill of exchange is a familiar illustration of this fact. A more modern, but still not recent invention of like character, for the transfer, without the cumbersome and often impossible operations of actual delivery of articles of personal property, is the indorsement or assignment of bills of lading and warehouse receipts. Instruments of this kind are *sui generis.* From long use and trade they have come to have among commercial men a well-understood meaning, and the indorsement or assignment of them as absolutely transfers the general property of the goods and chattels therein named as would a bill of sale."

In this case there was no dispute as to the general custom of trade in regard to bills of lading of the character of the one negotiated by Carr with the Commercial Bank. It was the daily practice of banks in Augusta and elsewhere to advance money on such security, for possession of the bill of lading was regarded as *prima facie* evidence of the title of the holder to the goods of which the bill was the symbol. Ordinarily bills of lading of this kind are attached to drafts for the purchase-price of the goods, and can only be obtained by payment of the draft. Carr's possession of the bill of lading was, therefore, *prima facie* evidence that he had paid a draft drawn by the consignor and was entitled to the property. The departure of the Armsby Company from this custom placed it in the power of Carr to commit a fraud on the bank — an opportunity of which he seems to have promptly availed himself. Applying the well-known rule that where one of two innocent persons must suffer from the wrong of another the burden should be borne by him who placed it in the power of the wrong-doer to perpetrate the fraud, we fail to see how it can be held that the plaintiff can recover. The Georgia cases cited by counsel for the defendant in error do not, in our opinion, conflict with what is here laid down. The case of Tison *v.* Howard, 57 Ga. 410, which is more nearly in point than any of the other cases cited, is easily distinguishable from the case at bar. There the owner of the goods received from the transportation company duplicate bills of lading, both of which he indorsed in blank, sending the original to his factor and depositing the duplicate in a bank for safe keeping and for no other purpose. The bailee bank indorsed the duplicate bill of lading and secured from the factor an amount of money in excess of the value of the goods. The court held, in effect, that a bill of lading is not, in the full sense, a negotiable instrument; and that, the deposit of the bill with the bank being purely a bailment for safe keeping, the virtual theft of it by the banker did not deprive the true owner of the goods of his title. In the case now under consideration no such state of facts is made to appear. The Armsby Company forwarded to Walton & Carr a bill of lading the possession of which, under the universal custom of business, gave a *prima facie* right to the disposal of the goods for which it was issued. The purpose for which the instrument was confided to Walton & Carr does not definitely appear from the record; but there is nothing to indicate that it was merely intrusted to them for safe keeping. There was nothing to put the bank on notice that title to the property was in any one other than the holder of the bill of lading. A fraud was committed by Carr, by means of which he obtained from the bank a large sum of money. To say nothing of the provisions of the Civil Code, § 3539, the plainest principles of equity require that the Armsby Company, which made the commission of the fraud possible, and not the bank, should bear the loss.

Judgment reversed. All the Justices concur, except Lamar, J., disqualified.[1]

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[1] Munroe *v.* Philadelphia Warehouse Co., 75 Fed. Rep. 545, *acc.* See also Pollard *v.* Reardon, 65 Fed Rep. 848 (C. C. A.); National Bank of Bristol *v.* Baltimore & Ohio R. Co., 59 At. Rep. 134 (Md.). Compare recent expressions in The Carlos F. Roses, 177 U. S. 655, 665; Washburn Crosby Co. *v.* Boston & Albany R. Co., 180 Mass. 252, 257; Neimeyer Lumber Co. *v.* Burlington & Missouri R. Co., 54 Neb. 321, and cases cited.

WARD *v.* TAYLOR.

SUPREME COURT OF ILLINOIS, SEPTEMBER TERM, 1870.

[*Reported in* 56 *Illinois,* 494.]

MR. JUSTICE SHELDON delivered the opinion of the court: —

This was an action of assumpsit, brought by Taylor against Ward, to recover the price of a threshing-machine.

The declaration was for goods sold and delivered.

The question which we shall consider is, whether, upon the facts in this case, an action lies for goods sold and delivered.

In order to maintain the count for goods sold and delivered, it is essential that the goods should have been delivered to the defendant or his agent, or to a third person at his request, or that something equivalent to a delivery should have occurred.

It is claimed that the delivery of the machine to the railroad company, at Canton, for transportation to the defendant, was a delivery to him.

While it is the rule, that the delivery of goods bought, to a carrier, to be conveyed to the vendee, is a complete delivery to the latter, and vests the property in the goods in him, yet the delivery to a carrier is incomplete to charge the vendee for the price of the goods, if lost, unless the vendor, in so delivering them, exercises due care and diligence, so as to provide the consignee with a remedy over against the carrier. Chitty on Contracts, 440; Buckman *v.* Levi, 3 Camp. 414; Clarke *v.* Hutchings, 14 East, 475.

Taylor consigned this machine, not to Ward, but to himself, to the care of Ward. Whether the delay in carrying the machine to its place of destination was occasioned by the loss of time between the manufactory at Canton and Cincinnati, or between Cincinnati and Metropolis, Ward was cut off from any remedy against the carrier. The contract for safe carriage is between the carrier and consignee, and the latter has the legal right of action.

In Evans *v.* Martell, 1 Ld. Raym. 271, it was held *per totam curiam:* "If goods, by bill of lading, are consigned to A, A is the owner and must bring the action against the master of the ship, if they are lost.

"But, if the bill be special, to be delivered to A to the use of B, B ought to bring the action. But if the bill be general to A, and the invoice only shows that they are upon the account of B, A ought always to bring the action, for the property is in him, and B has only a trust."

This question cannot be determined by the relations between Ward and Taylor merely. The carrier is a third party, and in case of an action, has the right to insist that the party alone entitled should sue. Ward could maintain no action against the carrier; Taylor could.

Had the machine been lost, the delivery to the railroad company would have been incomplete, under the authorities cited, to charge Ward for the price of it. And, although the machine was not lost, that should not change the effect of the act of delivery to the carrier, as to whether it amounted to a delivery to Ward.

It is further urged, that the machine coming into the possession of J. F. Mills & Co., at Cincinnati, the agents of Ward, that amounted to a delivery to Ward.

But it came to them only in pursuance of the shipment, *en route* to Metropolis, "*via* Cincinnati, care of J. F. Mills & Co.," as helpers-on of the forwarding of the machine to its destination to Taylor, and no greater effect, as regards delivery, is to be given to their reception of it for that purpose, than to the receiving of it by the railroad company.

There was no actual delivery of the machine to Ward at Metropolis, nor was it stored or left there for him; but on the failure to pay the freight and charges, the boat carried away the machine, and delivered it at St. Louis to Koenig & Co., agents of C. Aultman & Co., and correspondents of Taylor, who assumed to pay the freight and charges for Taylor.

He has never parted with the machine, and is not entitled absolutely to the price. The evidence shows no more than a breach of contract in refusing to receive the machine, and we are of opinion that the delivery to the railway company did not constitute a complete delivery to Ward, so as to charge him for the price of the machine; because, being consigned to Taylor himself, it was not put into such a course of conveyance as that in case of a loss, Ward might have had his indemnity against the carrier.[1]

In Turner *v.* Trustees, etc., 6 Eng. L. & Eq. R. 507, the consignment being to the consignors or order, it was held, notwithstanding the goods were placed on the ship of the vendee, that there was no delivery as such to him, because the vendors had purposely restrained the effect of delivery on board the vessel, still reserving to themselves the *jus disponendi*.

As Taylor intentionally reserved to himself the rightful power of disposition of the machine in question, as against Ward, he cannot, because he was not called on to exercise it, be permitted to deny his possession of that right which he expressly reserved, and would have asserted, had occasion required.

We think the common count for goods sold and delivered is not maintainable in this case, and that a recovery can only be had under a special count upon the contract, for not accepting the machine, or, may be, a count for goods bargained and sold.

This being a sufficient ground upon which to reverse the judgment, it is unnecessary to consider the various errors assigned.

The judgment of the court below is reversed and the cause remanded.

Judgment reversed.

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[1] The Prussia, 100 Fed. Rep 484.

PETERS v. ELLIOTT.

SUPREME COURT OF ILLINOIS, SEPTEMBER TERM, 1875.

[*Reported in* 78 *Illinois*, 321.]

APPEAL from the Circuit Court of Mercer County; the Hon. GEORGE W. PLEASANTS, Judge, presiding.

This was a suit in replevin, brought by Peters, Fuhlhage, & Co., to recover the possession of 200 barrels of flour.

The flour had been levied upon and taken out of the hands of the Chicago, Burlington, and Quincy Railroad Company by a constable, as the property of Cannon & Van Liew, under four several writs of attachment issued against them. The defendants in the suit are, the constable, in whose possession under the levy the flour was, and the plaintiffs in the attachment suits. The controversy was as to the property in the flour at the time of the levy of the writs of attachment, whether it was in Cannon & Van Liew, or in the plaintiffs in this suit, Peters, Fuhlhage, & Co.

The evidence consisted of a shipping-receipt, a draft, and a written stipulation of facts, as follows: —

Chicago, Burlington, and Quincy Railroad Line.

No. 236. VIOLA, ILL., *April* 30, 1874.

Received from Cannon & Van Liew, as consignors, the articles marked and weighed, as follows:

ARTICLES.	MARKS AND NUMBERS.	WEIGHT.
200 bbls. Flour,		
Shipped in cars,	Nos. 716 and 810.	
(More or less).		

To be billed to

PETERS, FUHLHAGE, & CO.,

(Original.) East St. Louis, Ill.

* * *

This receipt is not transferable.

A. O. WATERMAN,
Freight Agent.

(1033.)

$1,000. ALEDO, ILL., *April* 30*th*, 1874.

At sight, pay to the order of McKinney, Gilmore, & Co. one thousand dollars, and charge the same to account of

CANNON & VAN LIEW.

To Peters, Fuhlhage, & Co.,
St. Louis, Mo.

INDORSEMENT.

Pay *Valley Nat. Bank*, St. Louis, Mo.
McKINNEY, GILMORE, & Co.
E. E. MOSES, Teller.

Stipulation as follows: —

"It is admitted by the defendants that the plaintiffs paid to the Valley National Bank of St. Louis, Mo., $1,000, on the 2d day of May, A. D. 1874, on the above draft, and that to said draft was attached the said shipping-receipt signed by the agent of the Chicago, Burlington, and Quincy Railroad Company, at Viola, Ill.

"It is further admitted, that the said draft was mailed to the said Valley National Bank of Missouri, on the 30th day April, A. D. 1874, by McKinney, Gilmore, & Co., and reached said bank with the shipping-receipt attached in the ordinary way, and that said plaintiffs paid said draft in good faith, and had not, at the time they paid the same, any knowledge of the existence of any attachment suit, or of any levy on said flour, by virtue of any process of law.

"It is further stipulated, that Cannon & Van Liew had not, at the time of the shipment of said flour to the plaintiffs, nor at the time it was levied on by said attachments, sold or contracted to sell said flour to said plaintiffs, but that said flour was simply consigned to said plaintiffs, as commission merchants, to sell and account for the proceeds to said Cannon & Van Liew.

"It is further stipulated, that said draft was drawn on the morning of April 30th, 1874, and delivered to McKinney, Gilmore, & Co. before 12 o'clock in the forenoon of said day, with said shipping-receipt for the flour in controversy, by Cannon & Van Liew, who then said: 'You hold said flour for your security.' That McKinney, Gilmore, & Co. held a note against said Cannon & Van Liew for $600, which the said draft and receipt were to secure, and which was afterwards, when the $1,000 were collected, surrendered to said Cannon & Van Liew, with the remainder of $400 placed to their credit, and paid out on their order.

"It is further admitted, that the said McKinney, Gilmore, & Co. placed said draft and shipping-receipt in the post-office in Aledo, by 3 o'clock in the afternoon of said day, directed to the National Valley Bank of St. Louis, for collection.

"It is further admitted, that the several attachment suits offered in evidence by the defendants were not commenced until 2 o'clock in the afternoon of the said day, and the property was not levied upon until after that time."

It was admitted that the four writs of attachment in favor of the defendants, against Cannon & Van Liew, were issued and levied upon the flour on the 30th day of April, 1874, and that judgments were rendered afterward in the suits, against Cannon & Van Liew, in favor of the several plaintiffs.

Messrs. *Bassett* and *Wharton*, for the appellants.

Messrs. *Pepper* and *Wilson*, for the appellees.

MR. JUSTICE SHELDON delivered the opinion of the court: —

It is admitted by the counsel for the appellees, that, ordinarily, a sale, mortgage, or pledge of property in the course of transportation, may be legally made, and the title passed by the delivery of the shipping-bill. But it is contended that the rule, being received in its full force, does not, under the circumstances of this case, aid the claim of right to this property which is here asserted on the part of the plaintiffs.

It is first claimed that no right to the flour could pass by the delivery of the shipping-receipt, because of the provision in it, that it was not transferable.

It is enough to say, that, whatever the reason of this provision, it must have been, for some purpose, in the interest of the railroad company. As the company intended and undertook to carry and deliver the flour to the consignees, the delivery of the shipping-receipt to them, or for their benefit, was only to the strengthening of their right to have the delivery of the flour made to them, and it is not perceived how plaintiffs', the consignees, assertion of right to the property, through a delivery of the receipt, should interfere with any interest of the railroad company, or any object of this provision in the shipping-receipt. We do not conceive that it has any significance in its bearing upon the rights of the parties in this suit.

It is then objected that there was no valid sale or pledge to McKinney, Gilmore, & Co., or to the plaintiffs, of the flour prior to the levy of the attachments, because the former parted with nothing for the draft; that they neither surrendered up the note for $600, upon which the drawers were indebted to them, nor paid to the drawers the excess of $400 above the note, until after the draft was collected and the money remitted to them from St. Louis; that they merely forwarded the draft for collection; that it was a voluntary pledge to them. The pledge of the property by delivery of the shipping-receipt, if made to secure a pre-existing debt, would be as valid as if made for new advances.

There was an acknowleged indebtedness of $600 to McKinney, Gilmore, & Co., which the draft and shipping-receipt were to secure. This would form a sufficient consideration for a pledge of the property to them, if it were to be regarded as one to them alone.

The excess of the amount of the draft which they received above their indebtedness, the $400, might have been garnisheed in the hands of McKinney, Gilmore, & Co. by these attaching creditors, but the latter could not take the flour from the former. By the delivery of the draft and shipping-receipt to McKinney, Gilmore, & Co., Cannon & Van Liew were divested of the title to the flour, so far as was necessary to protect the payment of the draft; their interest then was in the surplus only, and their attaching creditors acquired no greater interest than they possessed. Schweizer *v.* Tracy, 76 Ill. 345.

But it is insisted that, whatever the rights of McKinney, Gilmore, & Co. may have been, as the plaintiffs did not pay the draft until some days after the levy of the attachments, they could have acquired no right to the property until at that time, and that it must have been acquired from McKinney, Gilmore, & Co., but that the latter, at that time, could not transfer any right to the property, because it was in the adverse possession of the officer, under the attachments; that their claim to the property was then but a right of action for the property, which, under the law, cannot be sold or assigned, and various authorities are cited to that point.

We do not consider that the state of facts in this case brings the claim of the plaintiffs within the range of the objection taken, or of the authorities cited.

The simultaneous acts, of the shipment of the flour, drawing the draft and the delivery of the same, together with the railroad receipt for the flour to the payees of the draft, McKinney, Gilmore, & Co., expressed the intention of the drawers, that the drawees should pay the amount of the draft and reimburse themselves for the payment, out of the flour. It was a request to the drawees, these plaintiffs, to pay the draft, and an intended transfer of the flour as a security to protect them in the acceptance and payment of the draft. At the time, Cannon & Van Liew were the absolute owners of the flour, and had the full power of disposition of it. Their intention and purpose should have effect, unless there be some rule of law which forbids. There is none such, but, on the contrary, the law sustains and gives effect to transactions of this character.

It is well settled, that, where a party consigns goods to another, and thereupon draws upon the consignee for funds, accompanying the draft with the delivery of the bill of lading, or shipping-receipt, as collateral security for its payment, the acceptance and payment, by the consignee, of the draft accompanied with the bill of lading or shipping-receipt, vests in him a special property in the goods, sufficient to maintain replevin against an officer who, after such delivery, attaches them upon a writ against the general owner.

The bill of lading, or shipping-receipt, in such case, is a symbol of the goods, and the delivery thereof, with the intention to transfer the property in the goods, is a symbolical delivery of the goods. Michigan Central Railroad Company *v.* Phillips et al., 60 Ill. 190; Haille *v.* Smith, 1 Bos. & Pull. 563; Holbrook *v.* Wight, 24 Wend. 169; Grosvenor *v.* Phillips, 2 Hill, 147; The Bank of Rochester *v.* Jones, 4 Comst. 497; Gibson *v.* Stevens, 8 How. 384; Allen *v.* Williams, 12 Pick. 297; National Bank of Cairo *v.* Crocker, 111 Mass. 163; First National Bank *v.* Dearborn, 115 id. 219.

The delivery of the shipping-receipt took place before the levy of the attachments, but, as payment was not made of the draft until some days after such levy, it is supposed by appellants' counsel that the plaintiffs' title had its origin at the time of such payment, and so must yield to the prior levy of the attachments. But the interest acquired by the plaintiffs in the flour dates back to the time of the delivery of the draft and shipping-receipt to McKinney, Gilmore, & Co. The delivery to the latter is to be regarded as one made to them for the use of the plaintiffs, vesting the property in the latter provisionally, — that is, in case of their acceptance and payment of the draft. The plaintiffs, from the time of that delivery, had a *lien* upon the flour for the advance they should make, with possession in themselves, for the constructive possession of McKinney, Gilmore, & Co. is to be regarded as theirs. And, as respects the right of the plaintiffs, we do not conceive it makes any difference that McKinney, Gilmore, & Co. paid nothing for the draft; that they received it to pay a debt of $600 to themselves, and to pay over the balance of $400 to Cannon & Van Liew; or whether there was any consideration whatever between Cannon & Van Liew and the payees of the draft.

The draft came to the plaintiffs with the shipping-receipt attached to it. They paid it in entire good faith, with no notice of the attachments or their levy. They were entitled to make the payment on the credit of the flour, and to hold the flour which the shipping-receipt represented, for their security in making the payment. It would be, in effect, as if, at the time of making the draft, a mortgage of the flour had been given to the drawees to secure them in the payment they should make of the draft. A mortgage may be made to secure future advances, and will be effective to that end, at least when the future advances are made in good faith, without notice of any intervening adverse right.

Our conclusion, then, is, that the plaintiffs had at least the interest of a *lien* upon this flour to secure the advance they made upon the draft, which is to be regarded as acquired at the time of the delivery of the draft and shipping-receipt to McKinney, Gilmore, & Co.; and that these attaching creditors had no right afterward to levy upon and take the property out of the hands of McKinney, Gilmore, & Co., in whose constructive possession it was for the plaintiffs, before their claim upon the property was discharged.

The judgment must be reversed. *Judgment reversed.*

MAHAR WIGTON *v.* EDWIN BOWLEY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, NOVEMBER 5, 1880–JANUARY 17, 1881.

[*Reported in* 130 *Massachusetts*, 252.]

TORT for the conversion of 112 barrels of flour. Answer, a general denial. The case was submitted to the Superior Court, and after judgment for the defendants, to this court, on appeal, upon agreed facts, in substance as follows: —

The plaintiffs are proprietors of flouring-mills in Hart, Michigan; and, on October 18, 1878, they received from Henry Fenno, who was then doing business in Boston, a letter asking for the price per car-load of their flour delivered on board the cars. On October 28, the plaintiffs sent to Fenno the figures requested; and, on October 31, Fenno ordered of the plaintiffs a car-load of the flour at the price named, authorized them to draw on him for the amount at ten days' sight, and referred them to persons with whom he had dealt. The plaintiffs, having obtained satisfactory information from the persons indicated as to Fenno's pecuniary standing, on November 13, 1878, loaded a car with the flour ordered, directed and consigned to Fenno at Boston; and, at the same time, they drew on Fenno as directed. The draft and the bill of lading for the flour, in which Fenno was named as consignee, were sent to a bank in Boston, with the instruction to deliver the bill of lading to Fenno, if the draft was accepted. The draft was never accepted, and the bill of lading was never delivered. There is no evidence to show that it was ever presented to Fenno for acceptance.

On December 5, 1878, Fenno executed to the defendants an order on the freight agent of the Boston and Albany Railroad Company to deliver to the defendants the flour in question; and the defendants paid the full purchase price of the flour to Fenno. The defendants presented the order to the freight agent of said company, and he delivered the flour to them, according to the usage of that and other railroad corporations, without exacting the production of the bill of lading. On December 9, 1878, the bill of lading and the draft were returned to the plaintiffs by the bank. The flour so delivered to the defendants is the same flour which the plaintiffs had consigned to Fenno. The plaintiffs have never received anything in payment or part payment thereof. Fenno failed immediately after he executed the order to the defendants, and his testimony cannot be procured by either party.

If, upon the above facts and such inferences as a jury would be authorized to draw, the plaintiffs were entitled to recover, judgment was to be entered for them for $518.56, and interest from the date of the writ; otherwise, judgment for the defendants.

F. W. Griffin and *S. T. Harris*, for the plaintiffs.

H. Carter, for the defendants.

COLT, J. Upon the agreed facts, the court below was justified in finding that the property in the flour was transferred to Fenno, the purchaser, when it was delivered for transportation to the railroad company in Michigan.

It appears that Fenno, having obtained from the plaintiffs the price asked for their flour delivered on board the cars, ordered a car-load at the price named, and authorized the plaintiffs to draw on him for the amount at ten days' sight, at the same time giving references to other parties as to his pecuniary standing. The plaintiffs took time to satisfy themselves as to his responsibility, and then delivered the flour on board the cars, directed to Fenno at Boston, and consigned to him. The receipt given by the railroad, sometimes called the shipping-receipt or bill of lading, was taken in his name. These facts sufficiently show that the plaintiffs did not intend to retain their hold on the property, after it was taken by the carrier, as security for the payment of the price.

In the sale of specific chattels, an unconditional delivery to the buyer or his agent, or to a common carrier consigned to him, whether a bill of lading is taken or not, is sufficient to pass the title, if there is nothing to control the effect of it. If the bill of lading or written evidence of the delivery to a carrier be taken in the name of the consignee, or be transferred to him by indorsement, the strongest proof is afforded of the intention to transfer the property to the vendee. Merchants' National Bank *v.* Bangs, 102 Mass. 291. If the vendor intends to retain the right to dispose of the goods while they are in course of transportation, he must manifest that intention at the time of their delivery to the carrier. It is not the secret purpose, but the intention as disclosed by the vendor's acts and declarations at the time, which governs. Foster *v.* Ropes, 111 Mass. 10; Upton *v.* Sturbridge Mills, 111 Mass. 446. Where there is conflicting evidence as to intention, the question is for the jury. It cannot be disposed of as matter of law, unless the evidence will justify a finding but one way. National Bank of Cairo *v.* Crocker, 111 Mass. 163; National Bank of Chicago *v.* Bailey, 115 Mass. 228; Alderman *v.* Eastern Railroad, 115 Mass. 233.

In the case at bar, the fact that the shipping-receipt was not delivered to Fenno, but was sent with the draft to a bank in Boston, is not conclusive evidence, as against the rights of the consignee, that the plaintiffs intended not to part with the title. It was no part of the contract of sale. It was given in the name of Fenno, and could not be transferred by the plaintiffs so as to change title in the property without his indorsement. What passed between the plaintiffs and the bank in Boston, not communicated to Fenno, cannot affect his rights.

It is not shown that the acceptance or payment of the draft was a condition precedent to a change of title; and the finding of the court below cannot be disturbed. *Judgment affirmed.*

DOWS *v.* PERRIN.

NEW YORK COURT OF APPEALS, DECEMBER, 1857.

[*Reported in* 16 *N. Y.* 325.]

APPEAL from the Superior Court of New York City. The action was brought to recover the possession of about five thousand bushels of corn. On the trial, before Mr. Justice Oakley, it was proved that Dows & Carey, commission merchants of New York City, had agreed with I. F. Mack, of Rochester, to advance thirty-eight cents per bushel upon corn which he should consign to them, upon his delivering to their agent at Rochester shipping-bills therefor; that Mack delivered to their agent, on the 8th of August, 1848, bills purporting the shipment of the corn in question, at Buffalo, by two canal-boats, to the care of Dows & Carey, New York, for account of I. F. Mack. The bills were signed "Niles & Wheeler, per E. H. Walker." E. H. Walker was a clerk in the office of Niles & Wheeler, who were forwarders at Buffalo, acting agents of a line in which they and the defendant Caleb were interested as partners, and were also engaged in the purchase and sale of grain on their own account. Upon the delivery of these bills to their agent, the plaintiffs accepted and subsequently paid drafts drawn upon them by Mack for the amount of the stipulated advances. The defendants offered to prove as follows: the corn originally belonged to Niles & Wheeler, who owned and had it in their actual possession, at Buffalo, on the 8th of August, 1848. On that day they agreed with one James O. Bloss to give him the refusal, or right to purchase the corn, at forty-four cents a bushel, until Friday, the 11th of August; that the corn should be shipped on the boats of Niles & Wheeler, as their property, and should become Bloss' property if paid for within the stipulated time, but not otherwise. It was shipped accordingly on two boats, and the boats left Buffalo on the 9th and 10th of August, with regular bills of lading, signed by their captains and Niles & Wheeler, respectively, consigning the corn to M. M. Caleb & Co., of New York, a forwarding firm of which Niles & Wheeler were members. The defendant Perrin was master of one of the boats, and Caleb, the other defendant, was one of the firm of M. M. Caleb & Co. Bloss obtained the instruments, upon the production of which the plaintiffs made their advances, by falsely representing to Walker, the clerk of Niles & Weeeler, that he had bought the corn of the latter; and, as soon as they were obtained, he transmitted them to Mack, at Rochester, who delivered them to the plaintiffs' agent, procured the advances upon them, and immediately absconded, being then insolvent. On the eleventh day of August, the last day Bloss had to pay for the corn, he informed Niles & Wheeler that he could not pay for it; that he had been acting for Mack, and had no interest in the corn, and that he had obtained the shipping-bills from Walker, their clerk. This was the first information they had of the transaction with Walker, and they immediately took steps to notify the plaintiffs by telegraph and to guard their own rights. This evidence was excluded by the court, under exceptions by the defendants.

It was proved by the defendants that Walker, the clerk from whom Bloss obtained the shipping-bills, had in fact no authority to give them. He had never signed shipping-papers of a like character, nor any the effect of which was to transfer or authorize the transfer of the property of Niles & Wheeler. He had signed papers where Niles & Wheeler had received freight which came down Lake Erie, and which they shipped, by boats other than their own, to places along the canal, to enable the captains or owners of the boats to comply with the statute in relation to clearances on the canal, but never when the property was destined to New York, except when it was sent to the partners, M. M. Caleb & Co. The papers he had signed were always delivered to the captains, with a view to their obtaining clearances, and he signed those in question under the belief that they were to be used for the same purpose. These did not purport to be regular bills of lading, being on a single paper and relating to four distinct boats and shipments, and not being signed by the captains or masters of any of them. There was no evidence, on the part of the plaintiffs, as to Walker's authority, except that in a single instance he had signed a shipping-bill, for property which Niles & Wheeler received from the West, and shipped, by the boats of other forwarders, to a point on the canal between Buffalo and Albany. The cause was finally submitted to the jury, under instructions that the only question was as to Walker's authority to bind Niles & Wheeler by the so-called bills of lading, upon which Mack procured the advances from the plaintiff. Exceptions were duly taken to the decisions and charge of the judge; and the jury gave a verdict for the plaintiffs, on which judgment was rendered, and was afterwards, on appeal, affirmed by the Superior Court at general term. The plaintiff Carey died after verdict, and the cause was continued in the name of his survivor, Dows. The defendants appealed to this court.

Nicholas Hill, for the appellants.

C. Van Santvoord, for the respondent.

DENIO, C. J. Assuming that Walker had power to sign the bill of lading on behalf of Niles & Wheeler, and giving to that paper as a commercial instrument the effect which I have attributed to it, was it negotiable in such a sense as to confer upon a *bona fide* transferee a title not affected by the fraud committed in obtaining it? Mack clearly could claim nothing under it. Taking the offer of proof in connection with what was in fact proved, it was obtained by Bloss representing to the clerk, in the absence of his employers, that those employers had sold to him, Bloss, the corn in question, when in fact no such transaction had taken place. On the strength of that representation the clerk made out and signed the bill of lading in question on behalf of Niles

& Wheeler, operating, as I have shown, to transfer the corn to Mack, the nominee of Bloss. Bloss acted in that business on behalf of Mack, in whose favor the instrument ran, under some arrangement which is not disclosed. Mack does not stand in the position of an innocent holder. He is a party to the very instrument affected by the fraud, and can claim nothing under it against Niles & Wheeler, or the defendants who hold the title which they had. But Mack transferred the paper to the plaintiffs, who, I assume, advanced money upon it in good faith and without notice. If the paper was negotiable, with the same effect as a bill of exchange, or promissory note payable to bearer, the plaintiffs have a title unaffected by the fraud of Mack; otherwise they have not. I think that the courts have gone no further upon this subject than to hold that the *bona fide* indorsee of a bill of lading, for value, is not liable to have the property which it represents stopped *in transitu* by his consignor on account of the non-payment of the purchase price. The right of stoppage *in transitu* obtains when the sale was in all respects valid, where there was no condition attached to the delivery to the carrier, and where the title and the right of possession are transferred to the purchaser upon the execution of the instrument of sale. The right to arrest goods so sold while in the hands of the carrier, when the sale was on credit and the purchaser has failed, is one conferred by law independently of any contract between the parties, and it assumes the entire validity of the contract of sale. The right is peculiar in its character, and bears no analogy to the power to treat as void a transaction invalid on account of fraud. The right of stoppage *in transitu* is cut off by the transfer of the bill of lading to a *bona fide* purchaser, but it by no means follows that the holder of such a bill, void on account of fraud, can confer a better title than he had himself, and I am of opinion that he cannot do so. The quality of transferability which pertains to a bill of lading was largely discussed in the noted case of Lickbarrow *v.* Mason, on the several occasions when that case came before the English courts. None of the judges affirmed that it was negotiable in the same sense as a bill of exchange; but that position must be established in its fullest extent in order to hold that these plaintiffs obtained a good title by their transaction with Mack. Lickbarrow *v.* Mason should, I think, be considered as establishing the precise point which arose in the case, and nothing more. To that extent it has ever since been followed, and is no doubt settled law. 2 Durn. & E. 63; 1 H. Bl. 367; 2 id. 211; 5 Durn. & E. 367, 683. The subsequent cases down to a certain period have been collected and examined by the American editor of Smith's Leading Cases. His conclusion I understand to be, that a bill of lading is not negotiable in a commercial sense, and that, in the absence of a right of property in the consignee, and of a power to sell, he cannot by any indorsement of the bill of lading confer a title to the goods as against the true owner. Vol. 1, p. 543, Phil. ed. of 1844. Mack certainly had no right of property in the corn. His pretended purchase, effected through

Bloss, was utterly void on account of fraud. Niles & Wheeler could have taken it from him if he had obtained the actual possession, and could have maintained trespass, or replevin in the *cepit*, for any act of ownership which he might have exercised in respect to it. Carey *v.* Hotailing, and Olmsted *v.* Same, 1 Hill, 311, 317. If the bill of lading had been made out by Niles & Wheeler, and had been stolen from their desk, where it had been awaiting the payment of Bloss, he would have obtained as good a title to it as he did by procuring it by the use of the means which he adopted, and this of course would have been no title which he, or any one claiming under him, could have asserted. Brower *v.* Peabody, 3 Kern. 126. A question similar in principle lately came before the Queen's Bench in Gurney *v.* Behrend, 3 Ellis & Bl. 622. In that case the plaintiffs were the *bona fide* holders of a bill of lading which had come into the hands of one Pries, from whom the plaintiffs immediately obtained it as security for an advance of money. The defendant claimed under the original owner and shipper of the goods, who contended that the parties who delivered the bill to Pries had appropriated it in fraud of their, the shippers', rights. Bills of exchange had been drawn on London for the purchase price of the goods, and the shipper contended that the bill of lading was not to have been delivered until the bills of exchange were accepted. They were refused acceptance, and the drawers became bankrupt, but the bill of lading was delivered over and was then put in circulation, and came to the plaintiffs *bona fide.* Lord Campbell, delivering the judgment of the court, said: "A bill of lading is not, like a bill of exchange or promissory note, a negotiable instrument which passes by mere delivery to a *bona fide* transferee for a valuable consideration, without regard to the title of the parties who make the transfer. Although the shipper may have indorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority. If it be stolen from him or transferred without his authority, a subsequent *bona fide* transferee cannot make title under it against the shipper of the goods. A bill of lading only represents the goods, and in this instance the transfer of the symbol does not operate more than a transfer of what is represented." He added, that if the delivery to Pries was a misappropriation of the bill of lading, the shippers would have a right to stop the goods *in transitu.* The case was decided upon another ground, namely, that no condition had been annexed to the delivery of the bill of lading to Pries. It is true, it cannot be claimed that what was said by the venerable Chief Justice is strictly authority; but as the opinion was delivered after an adjournment, and seems to have been prepared with care, and no dissent from other members of the court was expressed, it is entitled to great weight, and will, no doubt, be followed in the English courts. That it was intended to be a precedent for future cases is further evident from what was added by the Chief Justice in conclusion: "No decision or doctrine," he said, "was cited in the argument which at all conflicts with the view we have taken of this case, and we conceive that it is in entire conformity with various decisions relied upon by the plaintiffs." Lickbarrow *v.* Mason had been pressed upon the attention of the court by the plaintiffs' counsel, and the Chief Justice further added, that he approved of the decision in that case, and of the doctrine that when a bill of lading is put into circulation by the authority of the owner of the goods (the shipper or consignee), a *bona fide* transferee of an absolute title is freed from the equitable right of the unpaid vendor to stoppage *in transitu.* The same view of the effect of a bill of lading was taken by members of this court in recent cases, where however the precise point was not in judgment. 3 Kern. 628, per Comstock, J.; Farmers and Mechanics' Bank *v.* Butchers and Drovers' Bank, 16 N. Y. 140, by Selden, J. Without dwelling upon the point, I am clearly of the opinion that when a bill of lading is obtained by fraud from the owner of the goods, a *bona fide* indorsee or transferee has no better title than the indorser had. I think, therefore, that the Superior Court fell into an error upon this part of the case.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

Comstock, J., did not sit in the case; all the other judges concurring. *Judgment reversed and new trial ordered.*[1]

SHAW *v.* RAILROAD COMPANY.

Supreme Court of the United States, October Term, 1879.

[*Reported in* 101 *United States*, 557.]

Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This is an action of replevin brought by the Merchants' National Bank of St. Louis, Missouri, against Shaw & Esrey, of Philadelphia, Pennsylvania, to recover possession of certain cotton, marked "W D I." One hundred and forty-one bales thereof having been taken possession of by the marshal were returned to the defendants upon their entering into the proper bond. On Nov. 11, 1874, Norvell & Co., of St. Louis, sold to the bank their draft for $11,947.43 on M. Kuhn & Brother, of Philadelphia, and, as collateral security for the payment thereof, indorsed in blank and delivered to the bank an original bill of lading for one hundred and seventy bales of cotton that day shipped to the last-named city. The duplicate bill of lading was on the same day forwarded to Kuhn & Brother by Norvell & Co. The Merchants' Bank forwarded the draft, with the bill of lading thereto attached, to the Bank of North America. On November 14, the last-named bank sent the draft — the original bill of lading still being attached thereto — to Kuhn & Brother by its messenger for acceptance. The messenger presented the draft and bill to one of the members of that firm, who accepted the former, but, without being detected, substituted the duplicate for the original bill of lading.

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[1] A portion of the opinion (holding that there was not sufficient evidence to be submitted to the jury that Walker had power to bind Niles & Wheeler) is omitted.

On the day upon which this transaction occurred, Kuhn & Brother indorsed the original bill of lading to Miller & Brother, and received thereon an advance of $8,500. Within a few days afterwards, the cotton, or rather that portion of it which is in controversy, was, through the agency of a broker, sold by sample, with the approval of Kuhn & Brother, to the defendants, who were manufacturers at Chester, Pennsylvania. The bill of lading having been deposited on the same day with the North Pennsylvania Railroad Company, at whose depot the cotton was expected to arrive, it was on its arrival delivered to the defendants.

The fact that the Bank of North America held the duplicate instead of the original bill of lading was discovered for the first time on the 9th of December, by the president of the plaintiff, who had gone to Philadelphia in consequence of the failure of Kuhn & Brother and the protest of the draft.

The defendants below contended that the bill of lading was negotiable in the ordinary sense of that word; that Miller & Brother had purchased it for value in the usual course of business, and that they thereby had acquired a valid title to the cotton, which was not impaired by proof that Kuhn & Brother had fraudulently got possession of the bill; but the court left it to the jury to determine, —

1st, Whether there was any negligence of the plaintiff or its agents in parting with possession of the bill of lading.

2d, Whether Miller & Brother knew any fact or facts from which they had reason to believe that the bill of lading was held to secure payment of an outstanding draft.

The jury having found the first question in the negative and the second in the affirmative, further found "the value of the goods eloigned" to be $7,015.97, assessed the plaintiff's damages at that sum with costs, for which amount the court entered a judgment. Shaw & Esrey thereupon sued out this writ of error.

The remaining facts are stated in the opinion of the court.

Mr. James E. Gowen, for the plaintiffs in error.

Mr. Robert N. Willson and *Mr. George Junkin*, contra.

MR. JUSTICE STRONG delivered the opinion of the court.

The defendants below, now plaintiffs in error, bought the cotton from Miller & Brother by sample, through a cotton-broker. No bill of lading or other written evidence of title in their vendors was exhibited to them. Hence, they can have no other or better title than their vendors had.

The inquiry, therefore, is, what title had Miller & Brother as against the bank, which confessedly was the owner, and which is still the owner, unless it has lost its ownership by the fraudulent act of Kuhn & Brother. The cotton was represented by the bill of lading given to Norvell & Co., at St. Louis, and by them indorsed to the bank, to secure the payment of an accompanying discounted time-draft. That indorsement vested in the bank the title to the cotton, as well as to the contract. While it there continued, and during the transit of the cotton from St. Louis to Philadelphia, the indorsed bill of lading was stolen by one of the firm of Kuhn & Brother, and by them indorsed over to Miller & Brother, for an advance of $8,500. The jury has found, however, that there was no negligence of the bank, or of its agents, in parting with possession of the bill of lading, and that Miller & Brother knew facts from which they had reason to believe it was held to secure the payment of an outstanding draft; in other words, that Kuhn & Brother were not the lawful owners of it, and had no right to dispose of it.

It is therefore to be determined whether Miller & Brother, by taking the bill of lading from Kuhn & Brother under these circumstances, acquired thereby a good title to the cotton as against the bank.

In considering this question, it does not appear to us necessary to inquire whether the effect of the bill of lading in the hands of Miller & Brother is to be determined by the law of Missouri, where the bill was given, or by the law of Pennsylvania, where the cotton was delivered. The statutes of both States enact that bills of lading shall be negotiable by indorsement and delivery. The statute of Pennsylvania declares simply, they "shall be negotiable and may be transferred by indorsement and delivery;" while that of Missouri enacts that "they shall be negotiable by written indorsement thereon and delivery, *in the same manner* as bills of exchange and promissory notes." There is no material difference between these provisions. Both statutes prescribe the manner of negotiation; *i. e.*, by indorsement and delivery. Neither undertakes to define the effect of such a transfer.[1]

We must, therefore, look outside of the statutes to learn what they mean by declaring such instruments negotiable. What is negotiability? It is a technical term derived from the usage of merchants and bankers, in transferring, primarily, bills of exchange and, afterwards, promissory notes. At common law no contract was assignable, so as to give to an assignee a right to enforce it by suit in his own name. To this rule bills of exchange and promissory notes, payable to order or bearer, have been admitted exceptions, made such by the adoption of the law merchant. They may be transferred by indorsement and delivery, and such a transfer is called negotiation. It is a mercantile business transaction, and the capability of being thus transferred, so as to give to the indorsee a right to sue on the contract in his own name, is what constitutes negotiability. The term "negotiable" expresses, at least primarily, this mode and effect of a transfer.

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[1] Similar statutes have been passed in California, Maryland, Washington, and perhaps other States. In Tiedman *v.* Knox, 53 Md. 612, it was held that under the Maryland statute a bill of lading is negotiable to the same extent and with the same effect as a bill of exchange. Such legislation is very common in regard to warehouse receipts (see Stimson's Am. Stat. Law, vol. i. § 4372), and generally literal effect seems to be given to it. See Greenbaum *v.* Megibben, 10 Bush, 419 (cf. First Nat. Bank *v.* Boyce, 78 Ky. 41, 55; Western Bank *v.* Marion County Distilling Co., 89 Ky 91); State *v.* Loomis, 27 Minn. 521; Price *v.* Wisconsin Ins. Co., 43 Wis. 267, 281.

In regard to bills and notes, certain other consequences generally, though not always, follow. Such as a liability of the indorser, if demand be duly made of the acceptor or maker, and seasonable notice of his default be given. So if the indorsement be made for value to a *bona fide* holder, before the maturity of the bill or note, in due course of business, the maker or acceptor cannot set up against the indorsee any defence which might have been set up against the payee, had the bill or note remained in his hands.

So, also, if a note or bill of exchange be indorsed in blank, if payable to order, or if it be payable to bearer, and therefore negotiable by delivery alone, and then be lost or stolen, a *bona fide* purchaser for value paid acquires title to it, even as against the true owner. This is an exception from the ordinary rule respecting personal property. But none of these consequences are necessary attendants or constituents of negotiability or negotiation. That may exist without them. A bill or note past due is negotiable, if it be payable to order, or bearer, but its indorsement or delivery does not cut off the defences of the maker or acceptor against it, nor create such a contract as results from an indorsement before maturity, and it does not give to the purchaser of a lost or stolen bill the rights of the real owner.

It does not necessarily follow, therefore, that because a statute has made bills of lading negotiable by indorsement and delivery, all these consequences of an indorsement and delivery of bills and notes before maturity ensue or are intended to result from such negotiation.

Bills of exchange and promissory notes are exceptional in their character. They are representatives of money, circulating in the commercial world as evidence of money, "of which any person in lawful possession may avail himself to pay debts or make purchases or make remittances of money from one country to another, or to remote places in the same country. Hence, as said by Story, J., it has become a general rule of the commercial world to hold bills of exchange, as in some sort, sacred instrument in favor of *bona fide* holders for a valuable consideration without notice." Without such a holding they could not perform their peculiar functions. It is for this reason it is held that if a bill or note, indorsed in blank or payable to bearer, be lost or stolen, and be purchased from the finder or thief, without any knowledge of want of ownership in the vendor, the *bona fide* purchaser may hold it against the true owner. He may hold it though he took it negligently, and when there were suspicious circumstances attending the transfer. Nothing short of actual or constructive notice that the instrument is not the property of the person who offers to sell it, — that is, nothing short of *mala fides* will defeat his right. The rule is the same as that which protects the *bona fide* indorser of a bill or note purchased for value from the true owner. The purchaser is not bound to look beyond the instrument. Goodman v. Harvey, 4 Ad. & E. 870; Goodman v. Simonds, 20 How. 343; Murray v. Lardner, 2 Wall. 110; Matthews v. Poythress, 4 Ga. 287. The rule was first applied to the case of a lost bank-note (Miller v. Race, 1 Burr. 452), and put upon the ground that the interests of trade, the usual course of business, and the fact that bank-notes pass from hand to hand as coin, require it. It was subsequently held applicable to merchants' drafts, and in Peacock v. Rhodes, 2 Doug. 633, to bills and notes, as coming within the same reason.

The reason can have no application to the case of a lost or stolen bill of lading. The function of that instrument is entirely different from that of a bill or note. It is not a representative of money, used for transmission of money, or for the payment of debts or for purchases. It does not pass from hand to hand as bank-notes or coin. It is a contract for the performance of a certain duty. True, it is a symbol of ownership of the goods covered by it, — a representative of those goods. But if the goods themselves be lost or stolen, no sale of them by the finder or thief, though to a *bona fide* purchaser for value, will divest the ownership of the person who lost them, or from whom they were stolen. Why, then, should the sale of the symbol or mere representative of the goods have such an effect? It may be that the true owner by his negligence or carelessness may have put it in the power of a finder or thief to occupy ostensibly the position of a true owner, and his carelessness may estop him from asserting his right against a purchaser who has been misled to his hurt by that carelessness. But the present is no such case. It is established by the verdict of the jury that the bank did not lose its possession of the bill of lading negligently. There is no estoppel, therefore, against the bank's right.

Bills of lading are regarded as so much cotton, grain, iron, or other articles of merchandise. The merchandise is very often sold or pledged by the transfer of the bills which cover it. They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose and performing different functions. It cannot be, therefore, that the statute which made them negotiable by indorsement and delivery, or negotiable *in the same manner* as bills of exchange and promissory notes are negotiable, intended to change totally their character, put them *in all respects* on the footing of instruments which are the representatives of money, and charge the negotiation of them with all the consequences which usually attend or follow the negotiation of bills and notes. Some of these consequences would be very strange, if not impossible. Such as the liability of indorsers, the duty of demand *ad diem*, notice of non-delivery by the carrier, &c., or the loss of the owner's property by the fraudulent assignment of a thief. If these were intended, surely the statute would have said something more than merely make them negotiable by indorsement. No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express. Especially is so great an innovation as would be placing bills of lading on the same footing in all respects with bills of exchange not to be inferred from words that can be fully satisfied without it. The law has most carefully protected the ownership of personal property, other than money, against misappropriation by others than the owner, even when it is out of his possession. This protection would be largely withdrawn if the misappropriation of its symbol or representative could avail to defeat the ownership, even when the person who claims under a misappropriation had reason to believe that the person from whom he took the property had no right to it.

We think, therefore, that the rule asserted in Goodman *v.* Harvey, Goodman *v.* Simonds, Murray *v.* Lardner, *supra*, and in Phelan *v.* Moss, 67 Pa. St. 59, is not applicable to a stolen bill of lading. At least the purchaser of such a bill, with reason to believe that his vendor was not the owner of the bill, or that it was held to secure the payment of an outstanding draft, is not a *bona fide* purchaser, and he is not entitled to hold the merchandise covered by the bill against its true owner. In the present case there was more than mere negligence on the part of Miller & Brother, more than mere reason for suspicion. There was reason to believe Kuhn & Brother had no right to negotiate the bill. This falls very little, if any, short of knowledge. It may fairly be assumed that one who has reason to believe a fact exists, knows it exists. Certainly, if he be a reasonable being.

Judgment affirmed.[1]

pp. p. 1084 - 1109
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THOMAS EMERY'S SONS *v.* IRVING NATIONAL BANK.

SUPREME COURT OF OHIO, DECEMBER TERM, 1874.

[*Reported in* 25 *Ohio State*, 360.]

ERROR to the Superior Court of Cincinnati.

Thomas Emery's Sons, plaintiffs in error, a firm doing business in Cincinnati, Ohio, had, before the dates hereinafter named, transacted business with one Mirrielees, a produce broker in the city of New York, which resulted in leaving a balance due from Mirrielees to the plaintiffs in error. This was the nature of the transaction: Upon the order of Emery's Sons, Mirrielees purchased goods in New York, on his own account, and shipped the goods to them at Cincinnati, by a common carrier, with which Emery's Sons had special arrangements for freight, upon an agreement that Emery's Sons would pay him the cost of the goods at New York and one per cent commission added. It was usual for Mirrielees, upon making shipment of goods, to take from the carrier a bill of lading, and to draw upon them for the price of the goods and his commission, and at the same time to obtain a discount of the drafts, with bills of lading attached, from the Irving National Bank, at New York. These drafts had uniformly been honored by the drawees upon presentation by the bank.

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[1] A portion of the opinion immaterial to the principal point is omitted.

On the 24th of March, 1869, Mirrielees shipped three casks of stearine to Emery's Sons, by the Atlantic Time Line, and took from the carrier a receipt or bill of lading, the material part of which reads as follows: "New York, 24th March, 1869. Received from G. M. Mirrielees the following packages (contents and value unknown), in apparent good order, and marked as in the margin. (3) Three casks stearine. For Thos. Emery's Sons." In the margin was written "Cin., O." Thereupon, Mirrielees drew his bill of exchange as follows: —

$299\frac{21}{100}$ NEW YORK, March 24, 1869.

On demand, pay to the order of myself, two hundred and ninety-nine $\frac{21}{100}$ dollars, value received, and charge the same to account of 3 casks stearine.

To Messrs. Thos. Emery's Sons, Cincinnati.

G. M. MIRRIELEES.

And, having indorsed the same, on the same day, delivered it, with the bill of lading, to the defendant in error, who paid therefor full value. At the same time Mirrielees sent to Emery's Sons a letter, as follows: —

NEW YORK, March 24, 1869.

Messrs. Thomas Emery's Sons, Cincinnati:

GENTLEMEN, — Herewith please find invoices 3 casks of stearine, amounting to $299.21, for which I have valued this day.

Yours truly, G. M. MIRRIELEES.

On the 26th of the same month Mirrielees shipped as per the following bill of lading:

☞ No liability assumed for miscarriage or wrong delivery of goods that are marked with initials, numbers, or that are imperfectly marked.

Weights and Classifications subject to correction.

Cincinnati, O.

Thos. Emery's Sons.

New York, 26th March, 1869

Received from G. M. MIRRIELEES

The following PACKAGES (*contents and value unknown*), *in apparent good order, and marked as in the margin.*

(6) *Six Hhds. Stearine.*

(4) *Four Hhds. Stearine.*

On account of which he drew as follows: —

$1,098 $\frac{42}{100}$ NEW YORK, March 26, 1869.

On demand, pay to the order of myself, ten hundred and ninety-eight $\frac{42}{100}$ dollars, value received, and charge the same to account of 10 casks stearine.

To Messrs. Thos. Emery's Sons, Cincinnati, Ohio.

G. M. MIRRIELEES.

And having also sold and delivered this draft, with bill of lading attached, to the defendant in error, he wrote to Emery's Sons: —

NEW YORK, March 26, 1869

Messrs. Thomas Emery's Sons, Cincinnati:

GENTLEMEN, — Herewith please find invoice of 10 hhds. stearine, amounting to $1,098.42, for which I have valued on you to-day.

Yours truly,

G. M. MIRRIELEES.

Irving National Bank forwarded these respective drafts, with bills of lading attached, for collection, on the 26th and 27th of same month; but upon presentation to the plaintiffs in error, payment was refused.

After these bills of lading had been thus transferred to Irving National Bank, Emery's Sons received and sold both shipments of stearine, and refused to account to the bank for the proceeds or price.

The original action was brought in the Superior Court of Cincinnati, by the bank, to recover the amount of the proceeds of sales. The defendants, by way of defence, insisted that they might rightfully retain the money, and apply it on the indebtedness of Mirrielees to them.

On the trial, at special term, the court rendered judgment in favor of the defendants. The plaintiff moved for a new trial, which motion was overruled, and a bill of exceptions, embodying all the testimony, was taken. On error the court at general term reversed the judgment rendered at special term, and remanded the case to special term with instructions to the court to proceed to render a judgment in favor of the plaintiff. Thereupon, the court at special term, without granting a new trial, proceeded to render judgment in favor of the plaintiff.

This proceeding is prosecuted to reverse the judgment of reversal rendered by the court at general term, and the judgment subsequently rendered at special term, in favor of the plaintiff below.

King, Thompson, & Avery, for plaintiffs in error.

Joshua H. Bates and *Clement Bates*, for defendant in error.

MCILVAINE, C. J. Where goods are delivered by a vendor to a common carrier, consigned to the vendee, the question, whether the title thereby passes from the vendor to the vendee, depends upon the intention of the vendor, which intention is to be gathered from all the circumstances of the transaction.

If the goods be shipped in pursuance of the purchaser's order and at his risk, or if it otherwise appear to be the intention of the shipper to part with the title, the carrier becomes the agent of the consignee, and the delivery to him is equivalent to a delivery to the purchaser. If the vendor, however, in making the consignment and delivering the goods to the carrier, does not intend to part with his title to and control over them, the carrier must be regarded as the agent of the consignor and not of the consignee.

In all such transactions, the bill of lading is an important item of proof as to the intention, but it is not necessarily conclusive of the question. If the bill of lading shows that the consignment was made for the benefit of the consignor or his order, it is very strong proof of his intention to reserve the *jus disponendi*. And on the other hand, if the bill of lading shows that the shipment is made for the benefit of the consignee, it is almost decisive of the consignor's intention to part with the ownership of the property. If the bill of lading does not disclose the person for whose benefit the consignment is made, it is of less weight on the question of the shipper's intention. We have no doubt, however, that if the bill of lading shows a consignment by vendor to vendee, and no other circumstance appears as to the intention, it will be taken as *prima facie* evidence of an unconditional delivery to the vendee.

As between the consignor and consignee, the bill of lading cannot be regarded as a contract in writing, but merely as an admission or declaration on the part of the consignor as to his purpose, at the time, in making the shipment, and such admission is subject to be rebutted by other circumstances connected with the transaction.

By the rules of commercial. law, bills of lading are regarded as symbols of the property therein described, and the delivery of such bill by one having an interest in or a right to control the property, is equivalent to a delivery of the property itself. A consignor who has reserved the *jus disponendi*, may effectuate a sale or pledge of the property consigned, by delivery of the bill of sale to the purchaser or pledgee, as completely as if the property were, in fact, delivered. If such transfer of the bill of lading be made after the property has passed into the actual possession of the consignee, the transferee of the bill takes it subject to any right or lien which the consignee may have acquired by reason of his possession. But if the bill of lading be transferred by way of sale or pledge to a third person, before the property comes into the possession of the consignee, the consignee takes the property subject to any right which the transferee of the bill may have acquired by the symbolic delivery of the property to him.

The principle on which the title to goods may be transferred by a transfer of the bill of lading, is wholly distinct from that on which the right of stoppage *in transitu* rests. The right to stop goods in transit exists only where the vendor has consigned them to the buyer under circumstances which vest the title in the buyer. The transfer of goods by delivering the bill of lading, can be made only in cases where the vendor has not parted with the title.

In the case before us, it must be assumed that the court below, at general term, found from the evidence, that Mirrielees did not intend, by delivering the stearine to the carrier, to vest the title in Emery's Sons absolutely as purchasers, but only on condition that they would accept and pay the bill of exchange drawn on account thereof. It is true that this intention was not expressed on the face of the bills of lading, but it fully appears from other facts and circumstances. The letter of Mirrielees, of the date of each shipment, containing the invoice of the goods, and informing the consignees that the invoice had been valued (drawn against) that day; the drawing of the bills of exchange on account of the invoices and for their full value; the indorsement of the bills of exchange with bills of lading attached, and their delivery to Irving National Bank on discount, all on the day of shipment, clearly show the intention of Mirrielees at the time of shipment, to reserve the *jus disponendi.* And this conclusion is much strengthened by the further fact that previous transactions between the same parties had been conducted in the same way, without objection.

Upon this theory of the case, we are of opinion that Irving National Bank, by discounting the bills of exchange with the bills of lading attached, became vested of the property consigned to Emery's Sons, as a security for the payment of the drafts, as fully and completely as if the stearine itself had been delivered into its actual possession, and was entitled to demand from the consignees an account of the proceeds of sales or the price of the goods.

It is claimed, however, that these bills of lading were not transferable by delivery merely, for the reason that they were not made so negotiable by their terms. Bills of lading are not, and cannot be made, by any form of words, negotiable in the sense that commercial paper payable to bearer, or order, or assigns is negotiable. If such words of negotiability be contained in them, they only indicate the intention of the shipper as to the person for whose use the consignment is made. If the goods be deliverable, by the terms of the bill, to the consignee or his order, there can be no doubt that the person to whom the bill may be transferred by the consignor would be charged with notice of the rights of the consignee, and on the other hand, if the bill be made to the use of the consignor or his order or his assigns, the consignee would be charged with notice of the rights of those to whom the bill may have been transferred. But in either case, the question is open to inquiry as to what such rights may be, and can be determined only by inquiry into the real nature and character of the transaction.

A bill of lading, being symbolical of the property described in it, like the property it represents, may be transferred by delivery merely, and this is so without regard to the presence or absence of words of negotiability on its face. It is unlike commercial paper, however, in this — the assignee cannot acquire a better title to the property thus symbolically delivered, than his assignor had at the time of assignment.

It is also claimed that these bills of lading were not transferred to the bank until after the consignees had obtained possession of the goods, and a right had thereby accrued to them to hold the goods, or the price thereof, for the satisfaction of the claims due them from their consignor. This claim is based on the theory that the possession of the carrier was the possession of the consignees, and has already been answered. We do not understand it to be claimed that the goods were, in fact, delivered to the consignees by the carrier, before the transfer to the bank of the bills of lading. But if it were so claimed, we could not disturb the finding of the court below on that question. From the weight of the testimony, we think the bills of lading had been transferred to the bank before the goods arrived at the place of their destination.

On petition in error by the plaintiff below, the Superior Court, sitting in general term, reversed the judgment rendered at special term in favor of the defendants, and remanded the cause to special term with instructions to the judge there sitting to render judgment for the plaintiff, which was done accordingly. In this we think there was error. The only question before the general term was as to the alleged error of the court at special term in overruling the motion of the plaintiff for a new trial. When that error was found by the reviewing court the judgment below was properly reversed, and the only judgment which should have been rendered after reversal, was to grant a new trial as moved for at special term. The plaintiff not being entitled to judgment on the pleading, and there being no agreed statement of facts, or a special finding of facts by the court to which the case had been submitted on the evidence, it was not a case for final judgment. The order made at the general term, that the judgment be rendered at special term, will therefore be reversed. The judgment afterward entered in favor of the plaintiff is also reversed, and the cause remanded to the court below with instructions to grant the plaintiff below his motion for a new trial, and that it proceed to final judgment in the cause according to law. *Judgment reversed.*

WELCH, WHITE, REX, and GILMORE, JJ., concurred.

JOHN M. FORBES *v.* BOSTON & LOWELL RAILROAD COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH 15, 16 — JUNE 29, 1882.

[*Reported in* 133 *Massachusetts*, 154.]

MORTON, C. J. The first case is an action of tort, containing a count for the conversion of a quantity of corn and a count for the conversion of a quantity of wheat. As different considerations apply to the two counts, they must be treated separately.

On or about October 20, 1879, Gallup, Clark, and Company, grain-dealers in Chicago, in response to an order from Foster and Company, forwarded to Boston fifty carloads of corn, by the National Despatch Fast Freight Line, which is an association of several railroad companies, whose roads make a continuous line from Chicago to Boston, the defendant's road being a part of the line. Upon the shipping of the corn, an inland bill of lading was issued, by which it was consigned to the order of Gallup, Clark, and Company, at Boston. Gallup, Clark, and Company drew a draft upon Foster and Company for the price of the corn, attached to it the bill of lading, and forwarded both to the Tremont National Bank of Boston. On Oct. 24, 1879, Foster and Company paid to the bank the amount of the draft, and the draft and bill of lading were delivered to them. Immediately upon obtaining the draft and bill of lading, Foster and Company indorsed them to the plaintiffs, as security for an advance then made by the plaintiffs to the full amount of the draft, and they have held them ever since. The corn mentioned in the bill of lading was received and transported by the defendant, arriving in Boston on Oct. 30, 1879. It remained in its cars until Dec. 12, 1879, when by the orders of Foster and Company it was shipped on board a vessel for Cork, and exported to Ireland. Foster and Company did not produce and present to the defendant the bill of lading, but represented that it was in their possession.

Upon these facts, it is too clear to admit of any doubt, that, by the transfer of the draft and bill of lading by Foster and Company to the plaintiffs, the title and property in the corn passed to them. The bill of lading, though not strictly a negotiable instrument like a bill of exchange, was the representative of the property itself; it was the means by which the property was put under the power and control of the plaintiffs, and the delivery of it was for most purposes equivalent to an actual delivery of the property itself.

The transaction between Foster and Company and the plaintiffs was not in form or in effect a mortgage, so that, as contended by the defendant, it must be recorded in order to have validity; it was a transfer and delivery of the property. The clear intent of the parties was that the property in the corn should pass to the plaintiffs as security for the advance made by them. Whether they took an absolute title with a liability to account for the proceeds, or a title as pledgees, is not material, as all the authorities show that they took either a general or a special property in the corn, which entitles them to recover of any one who wrongfully converts it. De Wolf *v.* Gardner, 12 Cush. 19; Cairo National Bank *v.* Crocker, 111 Mass. 163; Green Bay National Bank *v.* Dearborn, 115 Mass. 219; Chicago National Bank *v.* Bayley, 115 Mass. 228; Hathaway *v.* Haynes, 124 Mass. 311; Gibson *v.* Stevens, 8 How. 384; Dows *v.* National Exchange Bank, 91 U. S. 618. Numerous other cases might be cited. The delivery of the bill of lading was in law the delivery of the property itself, and it was not necessary that the plaintiffs should take immediate possession of it upon its arrival, or that they should give notice to the carrier or warehouseman who held the property. Farmers & Mechanics' National Bank *v.* Logan, 74 N. Y. 568; The Thames, 14 Wall. 98; Meyerstein *v.* Barber, L. R. 2 C. P. 38, 661, and L. R. 4 H. L. 317. It is true that the plaintiffs might by their subsequent laches defeat their right to assert their title. If they permitted the property to remain under the control of their assignors, and held them out to the world as having the right to deal with the property, they might be estopped from setting up their title. But the authorities are decisive to the point that, by the transfer from Foster and Company, they took a title as purchasers of the corn which entitles them to maintain this action, unless they have lost the right by their laches, upon proving a conversion by the defendant.

The next question is whether there was a conversion by the defendant. It is settled that any mis-delivery of property by a carrier or warehouseman to a person unauthorized by the owner or person to whom the carrier or warehouseman is bound by his contract to deliver it, is of itself a conversion, which renders the bailee liable in an action of tort in the nature of trover, without regard to the question of his due care or negligence. Hall *v.* Boston & Worcester Railroad, 14 Allen, 439. By the bill of lading, and by the way-bill which was sent to the defendant in the place of a duplicate bill of lading, the corn was to be delivered to the order of Gallup, Clark, and Company. The defendant contracted to deliver it to such person as Gallup, Clark, and Company should order, and could not without violating its contract deliver it to any other person. By delivering it to Foster and Company, therefore, the defendant became liable for a conversion, unless it shows some valid excuse. Newcomb *v.* Boston & Lowell Railroad, 115 Mass. 230; Alderman *v.* Eastern Railroad, 115 Mass. 233. The record before us does not show any laches or any act of the plaintiffs which can excuse or justify this mis-delivery. They did not hold Foster and Company out to the world or to the defendant as one entitled to control the property. Indeed, it is admitted that the defendant did not know, until long after the delivery, that the plaintiffs had any connection with the property, or with

Foster and Company. The plaintiffs did nothing to mislead the defendant. They had the right to rely upon the facts that they held the bill of lading, and that, according to the ordinary course of business, the goods could not be obtained except upon its production. The defendant saw fit to deliver them to Foster and Company without requiring them to produce the bill of lading, relying upon their representation that they were the holders of it. It took the risk of their truthfulness, and cannot now shift that risk upon the plaintiffs, who have done nothing to mislead or deceive the defendant. We are, for these reasons, of opinion that the defendant is liable for the value of the corn described in the first count of the declaration.

In the case of the wheat, there are some facts proved at the trial which lead us to a different result. By the bills of lading and the way-bills, the wheat was consigned to John H. Foster and Company at Boston. The fact that they did not contain the words "or order," or other equivalent words, so as to make them upon the face *quasi* negotiable, is not important. The bill of lading was yet the representative of the wheat, and its transfer and delivery to the plaintiffs vested in them the title to the property, as against the consignees and their creditors. But the presiding justice of the Superior Court who heard the case has found as a fact, "that it was the custom of the railroads terminating in Boston to deliver to the consignee goods 'billed straight' as it is termed, that is, billed to a particular person, not to order, when they were satisfied of the identity of the consignee, without requiring the production of the bills of lading, and to rely upon the way-bills to determine the consignee and the form of the consignment."

Under this finding, we must assume that the custom existed, and that the plaintiffs knew or ought to have known of it. It materially affects the relations and rights of the parties. Although it does not affect the question of the title of the plaintiffs as against Foster and Company, it qualifies the duties of the defendant as to the delivery of the wheat. It justified the defendant in delivering it to Foster and Company, the consignees, at least at any time before notice that the property had been transferred. Under it, there was no laches in not calling for the bill of lading; and, in thus delivering, there was no violation of any of the terms of its contract, express or implied. Such delivery therefore was not a mis-delivery which would amount to a conversion and render the defendant liable to the plaintiffs. We are therefore of opinion that the defendant is not liable for the value of the wheat sued for.[1]

Judgments accordingly.[2]

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[1] Litchfield Bank *v.* Elliott, 83 Minn. 469; Conley *v.* Canadian Pac. Ry. Co., 32 Ont. 258, *acc.*

Compare Walters *v.* Western R. Co., 63 Fed. Rep. 391; Bass *v.* Glover, 63 Ga. 745; Hopkins *v.* Cowen, 90 Md. 152; Wright & Colton Co. *v.* Warren, 177 Mass. 283; Midland Bank *v.* Missouri, &c. R. Co., 62 Mo. App. 531; Union Pac. R. Co. *v.* Johnson, 45 Neb. 57; First Bank *v.* Northern R., 58 N. H. 203; Colgate *v.* Pennsylvania Co., 102 N. Y. 120; Dwyer *v.* Gulf, &c. Ry. Co, 69 Tex. 707.

It is expressly provided in the bills of lading ordinarily in use in this country that unless the bill runs to "order" delivery may be made to the consignee without production of the bill.

[2] A portion of the opinion is omitted.

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THE ANCHOR MILL COMPANY, Appellant, *v.* THE BURLINGTON, CEDAR RAPIDS & NORTHERN RAILWAY COMPANY, Defendant, and THE SIOUX FALLS NATIONAL BANK, Intervener.

Supreme Court of Iowa, May 18, 1897.

[*Reported in* 102 *Iowa*, 262.]

Prior to September 1, 1894, the plaintiff, The Anchor Mill Company of Cedar Rapids, Iowa, had contracted with the Lacey Grain Company of Sioux Falls, South Dakota, for the purchase of four thousand bushels of wheat, which the latter company began to ship about September 1, and on that day wrote to the plaintiff, "As cars of wheat are liable to arrive there ahead of draft, we inclose you an order on the agent to deliver you grain billed to us without presentation of bill of lading." The following order was inclosed: "Sioux Falls, So. Dak., September 1, 1894. Agent B., C. R. & N. Ry., Cedar Rapids, Iowa — Dear Sir: Please deliver all grain billed to us at Cedar Rapids, Iowa, to the Anchor Mill Co., without presentation of bill of lading. Yours truly, The Lacey Grain Co.," which the plaintiff delivered to the railroad agent, who placed it on file, and thereafter delivered, in accordance with it, the shipments of wheat made prior to the one in controversy. The carload involved in this action arrived at Cedar Rapids and was delivered to the plaintiff on a side track on October 5. On October 10, the defendant received notice from the Sioux Falls National Bank that it held the bill of lading and claimed the wheat. The defendant then removed the car back to its yards, whereupon the plaintiff began this action. The wheat had been shipped to the Lacey Grain Company, consignee, October 2, 1894. The bill of lading was in the usual form, and on the back was indorsed: "Deliver to Anchor Mill Co. The Lacey Grain Company." On October 6 the Sioux Falls National Bank bought a draft of the Lacey Grain Company, receiving the bill of lading as security. The bank filed an intervening petition, claiming the wheat, and the trial court directed a verdict finding the petitioner entitled to the possession of the property, and judgment was rendered on this verdict. The plaintiff appealed.

Rothrock & Grimm, for appellant.

J. C. Leonard and *S. K. Tracy*, for appellee railroad company.

Preston, Wheeler & Moffitt, for appellee intervener.

Ladd, J.[1] It is insisted by appellee that the wheat could only be delivered by transfer of the bill of lading. Garden Grove Bank *v.* Humeston & S. Railway Co., 67 Iowa, 533 (25 N. W. Rep. 761), is relied on. That the bill of lading represents the property while being transported, and its assignment operates as a symbolical delivery thereof, cannot be doubted. Weyand *v.* Railway Co., 75 Iowa, 579 (39 N. W. Rep. 899); Ayres Weatherwax & Reed Co. *v.* Dorsey Produce Co., 101 Iowa, 141 (70 N. W. Rep. 111). The bill of lading, however, is not a negotiable instrument, and its transfer carries with it only such interest in the property as the assignor might transfer by actual delivery. Certainly, the assignment of the bill of lading is not more effective in transferring title than manual change of possession. The intervener obtained no better title to the wheat than the Lacey Grain Company had when it parted with the bill of lading. Haas *v.* Railroad Co., 81 Ga. 792 (7 S. E. Rep. 629); Tison *v.* Howard, 57 Ga. 410; Shaw *v.* Railroad Co., 101 U. S. 557. Prior to that time the railroad company had fully performed its duties as common carrier by delivering the wheat to the plaintiff in pursuance of the order of the consignee and the indorsement on the back of such bill. The title to the wheat had passed to the plaintiff, who had already paid for it. The bill of lading had served the purposes of its existence, and was no longer a thing of value. Such a rule only requires that the purchaser of a bill of lading know the title to the property of the person from whom he buys. This is the general rule, and we know of no reason for making an exception in favor of one claiming possession by constructive instead of actual delivery of property. It follows that the district court erred in directing a verdict in favor of the intervener, and its judgment must be *Reversed.*[1]

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[1] A portion of the opinion in which it was held that the wheat had been delivered to the plaintiff is omitted. The statement of facts also is somewhat abbreviated.

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[1] See also National Commercial Bank *v.* Lackawanna Transportation Co., 59 N. Y. App. Div. 270; 172 N. Y. 596; Mairs *v.* Baltimore & Ohio R. Co., 73 N. Y. App. Div. 265.

JOSEPH B. MOORS *v.* FERDINAND A. WYMAN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, NOVEMBER 16, 17, 1887 — JANUARY 9, 1888.

[*Reported in* 146 *Massachusetts*, 60.]

HOLMES, J. This is a bill in equity brought by a creditor of the Boston firm of F. Shaw & Brothers, consisting of Fayette Shaw and Brackley Shaw, against that firm; against another firm in Vanceboro, Maine, of the same name, consisting of the above-named Shaws and Thaxter Shaw; and against Ferdinand A. Wyman, to whom both firms have made voluntary assignments for the benefit of creditors. As the objections to the jurisdiction are now waived, and as the assets in controversy have been converted into money, and a large part of the plaintiff's claim has been paid since the filing of the bill, leaving only certain items of the account in dispute, such only of the facts need be stated as are necessary in order to settle these disputed items.

The plaintiff, Moors, made advances to the Boston firm in several ways. 1st. Under what is called the loan account agreement, by indorsing their notes, &c., in Boston, taking as security bills of parcels of specified hides, which the Vanceboro firm were tanning for the Boston firm, and which were delivered by the Boston firm to and held by Thaxter Shaw as agent for the plaintiff with the consent of the Vanceboro firm. The Vanceboro firm agreed that the cost to Moors for tanning should not exceed four cents per pound, and in fact all charges for tanning were paid by the Boston firm to the Vanceboro firm. By the Boston firm's agreement, Moors had power in case of default, or if in his opinion the collateral did not afford a margin of twenty-five per cent above the amount unpaid, to sell at public or private sale without notice; and it was further agreed that all collateral security held by Moors for the Boston firm's account, whether under that contract or otherwise, might be taken and applied as general security for all existing or subsequent indebtedness. This account has been paid off in great part, since the filing of the bill.

2d. The plaintiff issued to the Boston firm letters of credit on Morton, Rose, & Co., of London, under which the firm bought hides, taking bills of lading to the plaintiff's order by agreement, the plaintiff having a lien on the goods, bills of lading, and policies of insurance, with authority to take possession and dispose of them at his discretion for his security or reimbursement. Before the defendant's failure the practice was for the plaintiff to indorse the bill of lading to the Boston firm, they signing a contract by which they received the hides as his agents, and agreed as such agents to send the hides to specified tanneries of theirs in Maine or New York, and to deliver to the plaintiff upon demand the identical leather into which the hides should be manufactured, the plaintiff not to be chargeable with any expense thereon. The intention of the agreement was stated to be to protect and preserve unimpaired the plaintiff's lien. After the failure the plaintiff took possession of the hides as they arrived, and sold them through reputable brokers for fair prices. The plaintiff has paid Morton, Rose, & Co. the whole amount due them.

3d. The plaintiff obtained letters of credit for the Boston firm drawn upon the Bank of Montreal by the agents of the bank, the Boston firm giving the bank an agreement similar to that with Moors, last mentioned, with authority to the agents to take possession of the goods and dispose of the same at discretion, and to charge all expenses, including commissions, for sale and guaranty. Upon the arrival of the hides the agents of the bank indorsed the bills of lading to Moors, who before the failure indorsed them to the Boston firm under the same form of agreement as stated with regard to bills of lading under the Morton, Rose, & Co. credit. The hides arriving after the failure were sold by him in like manner as before stated. The plaintiff has paid the bank the whole amount due to it.

It is argued for the Shaws that Moors received the indorsed bills of lading as agent of the Bank of Montreal, and that, however this may be, he has lost his rights in all hides received by him under any bills of lading before the failure, and turned over to the Boston firm as Moors's agents. But upon the record before us we must take it that Moors received the hides, as the master's report implies that he did, on his own behalf. The agents of the bank looked to him for payment, and they have been paid. The bank had a title, whether absolute or qualified does not matter. See De Wolf *v.* Gardner, 12 Cush. 19; Forbes *v.* Boston & Lowell Railroad, 133 Mass. 154, 156; Moors *v.* Kidder, 106 N. Y. 32. Moors got this title by indorsement, and had a similar title originally under the Morton, Rose, & Co. bills of lading. His indorsements of the bills of lading to the Boston firm as his agents did not release this title. It was not a conveyance in form, and being made only for the purpose of enabling him to get the goods from the carriers, it was not a conveyance in substance or effect. See Moors *v.* Kidder, *supra;* Pratt *v.* Parkman, 24 Pick. 42, 47; Low *v.* De Wolf, 8 Pick. 101, 107.

Neither did Moors lose his rights by giving the custody of the hides to the Shaws. They expressly agreed to hold as Moors's agents, and the general rule is perfectly well settled that the custody of a servant or of a mere agent to hold is the possession of the master or principal. The only difficulties that have arisen have been due to the failure to distinguish accurately between such servants or agents and bailees who hold in their own name; Hallgarten *v.* Oldham, 135 Mass. 1, 9; or, in the case of pledges, between a delivery to the pledgor for his own purposes and intrusting him with the custody on behalf of the pledgee. Kellogg *v.* Tompson, 142 Mass. 76, 79. It might be argued that policy requires an exception to be made in favor of a *bona fide* purchaser for value from the general owner having the seeming possession of the goods, as against a person whose security depended upon possession, and who had made the owner his custodian. But the Massachusetts cases tend to show that there is no such exception in the absence of fraud. Kellogg *v.* Tompson, and Moors *v.* Kidder, *supra;* Thacher *v.* Moors, 134 Mass. 156, 165. At all events, there is nothing in this case to warrant our making one, even assuming that all parties before us are not concluded by the express agreement of the Shaws that the plaintiff's rights should remain. There is nothing in Wyman's position, as to proceeds in his hands, to diminish the rights which Moors had as against the Shaws, nor do his counsel argue that there is, so far as the question of possession is concerned.

Decree accordingly.[1]

FARMERS', ETC. BANK *v.* LOGAN.

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NEW YORK COURT OF APPEALS, MAY TERM, 1878.

[*Reported in* 74 *New York,* 568.]

FOLGER, J. This is an action brought by the plaintiff to recover of the defendants the value of a canal-boat load of wheat, alleged to be the property of the plaintiff and to have been taken by the defendants and converted to their own use.

The plaintiff recovered judgment against all of the defendants. The defendants, Logan and Preston, have appealed, and they contest the recovery. They did, in fact, take the wheat and ship it abroad for their own purposes and benefit. They bought it from the defendant, Brown, at the produce exchange in New York City, and paid for it, all in the usual course of business of that mart. They did not see, nor seek for, any evidence of the title of Brown, or of his right to sell; nor was there any, save that the wheat was in his actual custody, by virtue of a special deposit of it with him in trust, and that he had, and exhibited, samples of it on change.

The wheat was first owned by one Perot, at Buffalo, N. Y. It was in an elevator there. Sears and Daw were commission merchants at that place. They acted, in the purchase of wheat for him, as correspondents and agents there of the defendant Brown, who resided and did business in New York City. At this time they had an order from him to buy two boat-loads of wheat. To fill that order, they negotiated with Perot for the wheat in the elevator, and bought it for Brown. But they bought of Perot on their own credit, and they paid him for it with money obtained by them, as will appear further on. They took a bill of sale from Perot, which ran in their own name, to themselves. Perot knew not Brown in the transaction. The money, with which the wheat was paid for to Perot, was got by them in this way. After the wheat was spouted from the elevator into a canal-boat, owned and navigated by persons not connected with the defendant Brown, the master of it made a bill of lading, stating the shipment of the wheat to be by them, as agents and forwarders, to New York, on account and order of the plaintiff, with a direction appended to notify Brown at that place. They then drew their own draft on Brown, to the official order of the plaintiff's cashier. That draft and the bill of lading, with a certificate of insurance of the wheat, were given to the plaintiff, which, with notice of all the facts at that time existing, on the strength and security of those papers discounted the draft for Sears & Daw, and gave the avails thereof to them. They deposited the money thus obtained, to their own credit, in The White's Bank, and paid Perot for the wheat by their own check to him thereon. The bill of lading and other papers were retained by the plaintiff. The draft was indorsed by it to its correspondent bank in New York City. The bill of lading and certificate of insurance were pinned to the draft. There was stamped upon the draft a direction to the correspondent bank to deliver the bill of lading and certificate to Brown, on his acceptance of the draft. There was stamped on the bill of lading a statement addressed to Brown, in purport that the wheat and the insurance of it were pledged to the plaintiff, as security for the payment of the draft; and that the wheat was put into his custody, in trust, for that purpose, not to be diverted to any other use, until the draft was paid; and that upon his accepting and paying the draft, the claim of the plaintiff would cease. The papers were sent to the correspondent bank, in New York City, with instructions in conformity with the matter stamped upon the papers. The draft was presented to Brown, and was accepted by him. The bill of lading was delivered to and kept by him. After that, the wheat reached New York City; but before the maturity of the draft, Brown procured samples of it, made the sale of it, and with money got from Logan & Preston by an advance on the price, paid the freight and other charges of the carrier. Logan & Preston received the wheat from the carrier, and sent it abroad.

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[1] A portion of the opinion is omitted.

These facts are sufficient to make application of what we conceive to be the law controlling the case.

There lies at the base of the matter an elementary principle of the common law well known and often stated, but which may be profitably repeated here, from a high source, as the foundation of our discussion. A purchaser of chattels takes them, as a general rule, subject to whatever may turn out to be infirmities in the title. A purchaser in market *overt* is an exception. But if not bought there, though the purchase be *bona fide*, the title got may not prevail against the owner. Again: where the owner has parted with the chattel to another, on a *de facto* contract, a purchaser from that other *bona fide* will obtain an indefeasible title. By a *de facto* contract is meant one which has purported to pass the property from the owner to another. See Cundy *v.* Lindsay, L. R. 3 Appeal Cases, 459.

In the case in hand, there was not a purchase by the appellants in market *overt*, for such place and effect of sale is not recognized in this State. Wheelwright *v.* Depeyster, 1 J. R. 471–480; Mowrey *v.* Walsh, 8 Cow. 238. The title set up by the appellants cannot prevail then, unless they purchased in good faith from the real owner, or from one to whom the real owner had parted with the goods on a *de facto* contract. The difference between the parties arises, when the question is put, to whom did Perot, the acknowledged real owner at first, part with it thereby — to Brown, or to Sears & Daw? The appellants claim that the contract of sale from Perot was to Brown; that he became the owner, that the wheat was indeed pledged to the plaintiff, but that Brown was the general owner and the pledgor; that when the plaintiff, being but a pledgee, put the possession of it in Brown, it lost its lien, as against a *bona fide* purchaser from him. So that the important inquiry is, who did, upon all the facts of the case, become the owner of the wheat, by the transaction with Perot? It is conceded to be the vital point in the case of the appellants, that Brown, from whom they purchased, had a title of his own in the goods, which, subject to the lien of the plaintiff, he could transfer, and that the voluntary surrender of the possession to him by the plaintiff enabled him to make an effectual transfer of it, free from that lien.

It will not have escaped an observation of our recital of facts, that Brown furnished no money nor any credit for the purchase from Perot. It was bought by Sears & Daw of him, on their credit, on his trust in them that they would pay for it. Nor was the draft discounted by the plaintiff on the credit of Brown. The bill of lading and the insurance upon the wheat were the security upon which the plaintiff rested. Sears & Daw remained liable until the draft was paid or they were discharged by some act of the plaintiff. Nor did Brown, when he ordered the purchase of the wheat, expect to furnish the money to pay the seller of it. He expected, and Sears & Daw expected, that the money would be got in the way in which it was got. Nor was there any act of Perot, or of Sears & Daw, in dealing with the wheat, which, of itself, passed the title to it to Brown. The Mechanics' and Traders' Bank of Buffalo *v.* The Farmers' and Mechanics' National Bank of Buffalo, 60 N. Y. 40. The bill of the sale from Perot was to Sears & Daw. The bill of lading from the carrier was not to Brown, it was to Sears & Daw, to the account and order of the plaintiff. The shipment is stated, indeed, to be by them as agents and forwarders. That phrase does not, of itself, point to Brown as the principal or consignee; and when understood, in knowledge of all the facts, does not declare or suggest his ownership of the wheat. In sooth, all the paper evidence, up to the time that the bill of lading went into the keeping of the plaintiff, gives no sign of ownership in Brown; but, on the contrary, does show ownership in Sears & Daw transferred to no one, save it be the plaintiff. And the facts given by the oral testimony show the purpose to bar Brown from the right to control or dispose of the wheat, until he paid the draft.

The case of Turner *v.* The Trustees of the Liverpool Docks, 6 Exch. [Welsby, Hurl. & Gordon], 543, is pertinent. Merchants in Liverpool sent orders to merchants in Charleston, to ship cotton on account of the former, in their vessel, for her voyage to Liverpool. They in Charleston bought cotton, and shipped it in that vessel. They took a bill of lading "to order or to our assigns," and indorsed it "deliver the within to The Bank of Liverpool or order." They drew drafts on the merchants in Liverpool, and delivered the bill of lading to a bank in Charleston, and, on security of it, sold the drafts to the bank, and used the avails to pay for the cotton, or to reimburse themselves for advances therefor. They in Liverpool did not pay the bills. When the cotton reached that port, the question arose, to whom did the cotton belong? It was held that the property in it did not vest absolutely in them in Liverpool, notwithstanding the delivery of it on board their ship to their servant, the master; but that they in Charleston, by the terms of the bill of lading, had reserved to themselves a *jus disponendi* of the cotton, and that they had not divested themselves of their property in or possession of the goods; and that having bought the cotton with their own funds on their own credit, they retained their property in it until payment was made for it by the men in Liverpool. See in acc. The Frances, 9 Cranch, 183. There are facts in the case cited (6 Exch. *supra*) not stated by us which make it a stronger case for the principals in Liverpool than the one in hand is for Brown. It was decided in the Exchequer Chamber, after elaborate argument and full consideration. It has been since recognized and approved as sound and authoritative. See Mirabita *v.* Imp. Ottoman Bank, L. R. 3 Exch. Div. 164. The conclusion reached in it satisfies our judgment; the principle declared in it is sound, and applicable to and decisive of the point we are now considering.

When commercial correspondents, on the order of a principal, make a purchase of property ultimately for him, but on their own credit, or with funds furnished or raised by them, and such course is contemplated when the order is given, they may retain the title in themselves, until they are reimbursed. One of the means by which this may be done, is by taking the bill of sale in their own names, and when the property is shipped, by taking from the carrier a bill of lading in such terms as to show that they retain the power of control and disposition of it. This results necessarily from the nature of the transaction. It is not, at once, an irrevocable appropriation of the property to the principal. It rests, for all of its efficiency and prospect of performance, upon the intention to withhold and the withholding the right to the property, so that that right may be used to procure the money with which to pay. It contemplates no title in the principal, until he has reimbursed to his correspondents the price paid by them, or to the person with whom they have dealt, the money obtained from him, with which to pay that price. From the start, the idea formed and nursed is, that the property shall be the means of getting the money with which to pay for it, and that the title shall not pass to him who is to be the ultimate owner, until he has repaid the money thus got.

Although such correspondents act as agents, and are set in motion by the principal who orders the purchase, yet their rights as against him, in the property, are more like those of a vendor against a vendee, in a sale not wholly performed, where delivery and payment have not been made, and where delivery is dependent upon payment. And so in the case cited from 6 Exch., *supra*, such cases of vendor and vendee are looked to as authority, and *e converso*, that case is relied upon in Law Rep. 3 Ex. D., *supra*, which was such a case of vendor and vendee. The rule laid down is, that the property remains in the shipper; or that he has a *jus disponendi*, a property or power which enables him to confer a title on a pledgee or vendee, though in breach of his contract with his first vendee; and that, whichever it is, the result must be the same. *Id.* If the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, and does so not as agent or on behalf of the purchaser, but on his own behalf, he thereby reserves to himself a power of disposing of the property, and consequently there is no final appropriation, and the property does not, on shipment, pass to the purchaser. *Id.* So, if the vendor deals with or claims to retain the bill of lading in order to secure the contract price, as when he sends it forward with a draft attached, and with directions that it is not to be delivered to the purchaser until payment of the draft, the appropriation is not absolute, and until payment or tender of the price, is conditional only, and until then the property of the goods does not pass to the purchaser, *Id.*; and to this Turner *v.* Trustees, *supra*, is cited. We see no principle which distinguishes the case of a vendor and vendee, in this respect, from that of a correspondent or agent, buying for another, yet paying the price from his own means, or from moneys by agreement raised upon the property, or upon his own credit, and holding the property as security, until the principal has made reimbursement. Such is the purpose of the parties. There is no intent that the property shall be appropriated until payment is made. And unless third parties are unavoidably misled to their harm, they have no cause to complain of a purpose so reasonable and productive of so good results.

We think that the adjudications, on this side of the water, are to the same end. There have been repeated adjudications in this court, whereby the legal effect of a bill of lading has been determined, when it contained some special clause or notation, or had upon it an indorsement which pointed out a particular person, as the one on whose account the property named in it was to be carried and delivered. Bank of Rochester *v.* Jones, 4 N. Y. 497; Dows *v.* Perrin, 16 *id.* 325; Mechanics' and Traders' Bank *v.* Farmers' and Mechanics' Bank, 60 *id.* 40; First National Bank of Toledo *v.* Shaw, 61 *id.* 283; s. c. on second appeal, 69 *id.* 624; Marine Bank of Buffalo *v.* Fiske, 71 *id.* 353; Bank of Commerce *v.* Bissell, 72 *id.* 615. The bill of lading of goods, thus affected, *prima facie* confers upon the person in whose favor it is issued, or to whom it is transferred, the legal title to them. 4 N. Y., *supra*

That result is, though the transaction is not intended to give the permanent ownership, but to furnish a security for advances of money or discount of commercial paper, made upon the faith of it. Third persons, dealing with property thus shipped, though acting in good faith, in the regular course of business, and paying value, are affected by the terms of the bill of lading, are bound to look into it, and are chargeable with a constructive notice of the contents of it. In the case in hand, had the appellants asked for the bill of lading, and looked into it, they would have seen that the property described in it was in the possession of Brown, with a special and restricted right over it, and that they could not deal with it safely, until there had been a compliance with the condition attached to that possession. City Bank *v.* R. W. and O. R. R. Co., 44 N. Y. 136. And as they were chargeable with a constructive notice of the contents of it, there is the same legal result as if they had looked into it. *Id.*

We do not understand that the learned counsel for the appellants takes a position which he will admit is hostile to these adjudications. He seeks to distinguish the case at bar from those cited. He admits, as we understand him, that had this case stood alone upon the bill of lading, the defendants would have been properly cast in judgment. But he insists that Brown was the general owner of the wheat; that the plaintiff voluntarily put it into his possession; that being in his possession with its consent, he being general owner of it, the appellants were no longer bound to look into the bill of lading, and had not constructive notice of its contents. There is a subsidiary position, that the plaintiff, having only a special property in the wheat, as a pledgee, could not commit it to the possession of Brown, as he was the general owner and pledgor of it, without losing that special property to a *bona fide* purchaser from him.

It is seen, at once, that the important thing, in this contention, is that Brown was the general owner of the wheat; for on the existence of that depend both the propositions put forth. We think that we have shown that the idea of a general ownership in him is not consistent with the facts of this case, nor with the rules of law declared in like or analogous cases. To be sure, by his order to Sears & Daw to purchase the wheat for him, he set on foot a course of action, which, if carried out to the end, in the manner proposed and intended by all the parties to it, would have vested in him the general and unqualified ownership. But he never had the power over the wheat of a general owner. There was never a time that he had such dominion of it, as that he had the right to enjoy or do with it as he pleased, even to spoiling or destroying it; or that he had that right in it, by which it belonged to him in particular, to the exclusion of all others. To constitute ownership, in the sense of that phrase as here used, there must be, at some time, a right as ample and unrestricted as that. When that right once exists, he who has it is a general owner. He may then burthen or limit that right, or subject it to rights created by him in others, and cease not to be the general owner. But he has not become the general owner, though he may have an interest in the property, until he has a right as great as that stated above.

We are asked, would not the profit have been Brown's, had the wheat advanced in value, and the loss his, had it declined, or if it had been destroyed by fire? To which the ready answer is, whatever had chanced to it, it would not have been his, as between him and Sears & Daw and the plaintiff, until he complied with the conditions on which it was bought for him, that is to say, had accepted and paid the draft. As soon as he paid the draft, it would have been his, with whatever enhancement of value. Had it lessened in value, or been burned up, he would still have been liable to Sears & Daw, for the price of their services and for their expenses, and to the plaintiff, first, on his promise to accept the draft, and after acceptance, on that obligation to pay it. This position is noticed in Mirabita *v.* Imp. Ottoman Bank, *supra;* and while holding that the shipper may retain a power over the goods, it is declared that the vendee has an interest in them, that they are at his risk, and that the loss or benefit to them is his. This particular matter is treated of in Haille *v.* Smith, 1 Bos. & Puller, 563. There, property was shipped by the owners of it, and the bill of lading indorsed in blank, and the invoice were sent to a mercantile house, under a previous agreement that it should receive and hold and sell the property, and apply the avails for the benefit of a banking-house, to which the owners and consignors of the property were or were likely to be indebted. The point was there made that the risk was upon the consignors, up to the time of a sale, and that they had an insurable interest, and that they had a right to detain. The court held, that the bill of lading operated as a change of the property; that by reason of the agreement, from the moment that the goods were set apart for the particular purpose of securing the banking-house, there was a change of property; but as it was a change of property for the purpose only of applying the proceeds by way of indemnity, the circumstances of the risk, and of the profit and loss, referred to the trust with which the property was charged, and were accounted for thereby; and that that trust being that the proceeds should be applicable to the debt of the banking-house, the risk must remain with the consignors, notwithstanding the change of property, and the consignors must suffer or be benefited by the loss or profit upon the sale. It would seem that the principle thus announced is equally applicable to the facts in the case in hand, though they differ in some particulars. Here, the wheat is bought by Sears & Daw for Brown, but, on the instant, the property in it is, by the bill of lading, vested in the plaintiff, but as an indemnity, and charged with a trust that it be sold, if not paid for by Brown, and the avails applied to repay the advance made upon it. In analogy with the decision in the case cited, why is not the risk upon Brown, and the profit or the loss his, though he have not the property in the wheat? It cannot be successfully contended that, until Brown paid the draft, he could have maintained an action for the delivery of the wheat, had the plaintiff retained it. He could not have shown that he ever had right to possession, or right to the dominion over it, to the exclusion of all others. "So long as the advances were not paid, there was no theory whereby" Brown "could claim title. It had never been in" him. "At the moment his interest, whatever it was, accrued, it came burdened with the formal ownership of the plaintiff." Bank of Toledo *v.* Shaw, 61 N. Y., *supra.* Had Sears & Daw advanced the money as factors, in compliance with the order of their principal and giving him credit, the purchase would have been for him at once, and he would, at the instant, have become the owner of the thing bought. But the facts are far otherwise, and must not be lost sight of. At the outset, as one of the first steps in the process, the legal title was lodged in the plaintiff, not to leave it until the payment by Brown of the draft.

Thus the case is kept out of the law governing the relations of pledgor and pledgee. The plaintiff was not a pledgee of the property of Brown. It had a right to it, not the qualified and special property of one holding, as a security, a chattel belonging to another. It had the legal title, under an agreement to transfer it on payment being made; it "held the title in trust for" Brown, "after its own claim was satisfied," 61 N. Y., *supra.* Nor does this conflict with Williams *v.* Littlefield, 12 Wend. 362. There the factor or agent bought on terms more favorable than he exacted of the principals; the variation he made was a departure from instructions and from the course of former dealing. Here, all that was done was in accord with previous understanding.

Such, it seems to us, is the result of the adjudications in this country. The basis of the opinion in 61 N. Y., *supra*, is that the legal title to the property was in the bank, as assignee of the bill of lading. It is well to notice here a distinction, that is attempted to be made, between the case just cited and the one in hand. It is said that there, there was an express agreement that the purchasing agent, or the discounting bank, should hold the property until the draft was paid. Such agreement was but putting into terms the legal effect of the transaction in the case before us. For we have shown, by authority, that the taking of the bill of lading in the name of the plaintiff, for its account, and the discount of the draft by it on the strength thereof, did transfer to it the title to the wheat. And in 61 N. Y., *supra*, the agreement between the agents and the bank was like that here, that the draft should be drawn on the principal, and that the bill of lading be taken in the name of the bank as security for the payment. Dows *v.* National Exchange Bank, 91 U. S. Rep. [1 Otto], 618, stands upon the same footing. The outset of the opinion, in that case, states the only question to be, whether the ownership of the property had been divested before the conversion; and that the court has only to inquire to whom the wheat belonged when it came to the hands of Dows & Co. The opinion declares that the agents at Milwaukee, having purchased and paid for it with their own money, became the owners of it. This is placed upon the fact, that not being furnished with funds by their principals, they raised them in the way used by Sears & Daw. It is said, in argument before us, that the position just stated was conceded by the counsel in that case, and the inference is then made here, that it was assumed by that court as the law of that case, without consideration or deliberate judgment, or as necessarily applicable to every case of like facts. We think that the position is stated by the court as the law of that case and of every case showing the same facts, in that respect; though, as the proposition was not controverted by counsel, a bare statement was thought to be enough without discussion or elaboration. Nor is there meant by the term "ownership" only a special property, like that of a lienor or pledgee; it is put as "the absolute ownership," "the complete power of disposition." In this view, those cases are not applicable here which hold that a delivery to a vendee, even upon condition expressed at the time, will maintain a right in a *bona fide* purchaser from the vendee. Smith *v.* Lynes, 5 N. Y. 41, is an example of such cases. Ballard *v.* Burgett, 40 *id.* 314, and Austin *v.* Dye, 46 *id.* 500, show the distinction which exists; and the same appears in considering Rawls *v.* Deshler, 3 Keyes, 572; and M. and Traders' Bank *v.* F. and Mechanics' Bank, 60 N. Y. 40.

Hence there was no relation between the plaintiff and Brown of pledgee and pledgor; and hence no giving up by it, as pledgee, of the possession of property, held by it in pledge, to him while the general owner of it. It is not, therefore, needed that we consider whether, if such were the case, the special property or lien in it of the plaintiff was lost thereby.

Much stress is put upon the assumed fact that the right of the plaintiff in the wheat was a secret lien, and no more. Whether a lien merely, or an ownership, the declaration of the bill of lading, even with the modification thereof, made by the matter stamped upon it by the plaintiff, evinced to any one looking at it, that Brown had no right or authority to dispose of the wheat, until he had paid the draft. As it is conceded that possession merely, without title, in one assuming to sell, does not give title to his vendee, what is required of the vendee in such case, if it be not to examine the bill of lading or other evidence of title? And here an examination would have shown that Brown could not give good title. It is said that, as the carrier could properly make delivery to Brown, the entire functions of the bill of lading were exhausted when the wheat was transferred from out the canal-boat into the sea-going steamer. But that is not so, for by that transfer there was but a change of possession, and if possession merely did not give title, there was still something further to be looked for and required, and the terms of the bill of lading, even as modified, still stood in the way of a transfer of the absolute ownership of the wheat by Brown.

And we now come back to the elementary rule with which we started. It appears that there were infirmities in the title which the appellants got from Brown, or rather they got no title from him; for there had never been a contract *de facto* which purported to pass the property from the owner to him. All that the appellants had, upon which they had a right to rely, was the fact of possession of the wheat by Brown, and the purchase of it by them, in accordance with the usual course of business on the produce exchange. We doubt not that the latter makes very easy and rapid the transaction of an immense trade in the agricultural products of the country; and that it would tend much to the security and confidence with which it could be done, if the law of market *overt* could be applied to it. But such is not the rule of this State, in the sale of chattel property, and we may not declare it so to be. The purchaser buys at his risk of the title, and if he would be safe, must make inquiry. He may not, with certainty, stop at the fact of possession, but must learn how the possession has been acquired. In every such case as this, the muniments of a real title are easy to be produced. When the property is, in fact, in the carrier's hands, the bill of lading will show to whom alone he has the right to deliver it. And if the directions of that document are relied upon, there cannot be much risk. A reliance upon it, and a prior inspection of it, may delay transactions, but they will protect all innocent and well-meaning parties, and thwart seriously only those who mean to do wrong or are too reckless to try to do right. The appellants were not protected by the fact of possession in Brown, because possession alone does not give the power to pass a valid title. Hence, when they bought of him they got no greater right than he had in the wheat. This need not be amplified or enforced, for the appellants concede that possession alone is not such evidence of ownership, or authority to sell, as that third persons have a right, as against the true owner, to rely thereon.

The appellants offered to prove, on the trial, an established course of business in the trade between Buffalo and New York, in respect to transactions of the kind involved in this action. The court excluded the evidence, and the appellants excepted. We think that there was no error in that. The manner in which this transaction was to be carried out was determined by the papers which were made between the parties to it. If that manner differed from the established course of business, then that course was overridden by them. If it agreed with them, then evidence of it would neither make nor mar.

The judgment appealed from should be affirmed.

All concur, except RAPALLO, J., not voting. *Judgment affirmed.*

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JOSEPH B. MOORS *v.* HENRY P. KIDDER ET AL.

NEW YORK COURT OF APPEALS, MARCH 25 — JUNE 7, 1887.

[*Reported in* 106 *New York*, 32.]

APPEAL from judgment of the General Term of the Supreme Court, in the first judicial department, entered upon an order made Jan. 28, 1885, which affirmed a judgment in favor of defendants entered upon an order dismissing the complaint on trial, and affirming an order denying a motion for a new trial. Reported below, 34 Hun, 534.

The action was brought against the members of the firm of Kidder, Peabody, & Co., Baring Brothers & Co., and John B. Hobby, Sons, & Co. to recover possession of 95 cases of shellac. Kidder, Peabody, & Co. were bankers in Boston, and agents of Baring Brothers & Co. John H. Hobby, Sons, & Co. were warehousemen in New York.

On August 3, 1881, Kidder, Peabody, & Co., as such agents, under an agreement with Paul M. Swain, issued a letter of credit, which was confirmed by their principals. The following are copies of the material portions of said instruments: —

KIDDER, PEABODY, & CO.,
40 STATE STREET,
BOSTON, August 3, 1881.

Messrs. C. C. BANCROFT & Co., Calcutta.

DEAR SIRS, — You are hereby authorized to value on Messrs. Baring Bros. & Co., London, for account of Paul M. Swain, Esq., Boston, Mass., by bills at three (3) months' sight for the cost of any shipment of goods *via* San Francisco and thence overland, or at three (3) to six (6) months' sight for the cost of goods by any other route, direct, or under through bills of lading to Boston or New York, to the extent of three thousand pounds sterling (say £3,000 stg.), and we hereby agree with the drawers, indorsers, and *bona fide* holders respectively of the bills drawn by virtue of this credit that the same shall be duly honored by Messrs. Baring Bros. & Co., upon presentation at their banking-house in London, if drawn and negotiated within six (6) months from this date, and if accompanied by bills of lading for such goods filled up to the order of Messrs. Baring Bros. & Co., and by invoice of the same to their order for the account of whom it may concern.

A duplicate of such invoices with consular certificate attached, together with one bill of lading, to be sent direct to us either by vessel or mail.

Very respectfully, your obedient servants,
KIDDER, PEABODY, & CO.

BOSTON, August 3, 1881.

Received the original of within letter of credit for three thousand pound sterling (say £3,000 stg.). In consideration whereof and of its confirmation by Messrs. Baring Bros. & Co., I hereby agree with Messrs. Baring Bros. & Co. and Messrs. Kidder, Peabody, & Co., respectively, to provide in London sufficient funds to meet the payment at maturity of whatever bills may be drawn or negotiated by virtue of such credit, together with Messrs. Baring Bros. & Co., commission upon the amount of such bills. . . . And all property which shall be purchased by means of the within credit and the proceeds thereof and the policies of insurance thereon (which insurance to the amount of the value of such property we agree shall be duly effected), together with the bills of lading for the same are hereby pledged and hypothecated to Messrs. Baring Bros. & Co. as collateral security for the payment as above promised, and also of any other sums which may at the time being be owing by us to Messrs. Baring Bros. & Co., and shall be held subject to their order on demand with authority to take possession and dispose of the same at discretion for their security or reimbursement and so to take possession and dispose of the same, either by themselves or their agents or by Messrs. Kidder, Peabody, & Co. . . . (Signed) PAUL M. SWAIN.

Against the said credit C. C. Bancroft & Co. drew their bill of exchange for account of Swain, for the cost of a hundred cases of shellac, of which the property in controversy is a part, and attached it to a bill of lading for the shellac to the order of Messrs. Baring Bros. & Co., deliverable in New York. Baring Bros. & Co. accepted said bill of exchange, and paid it at maturity.

On the 18th of November, Swain called at the office of Kidder, Peabody, & Co., in Boston, and asked for the papers for the shellac, stating to Mr. Collins, the merchandise clerk for Kidder, Peabody, & Co., that "he wanted to enter them at the custom-house, and warehouse them for account of Baring Bros. & Co." Mr. Collins, having obtained Mr. Peabody's consent, delivered the shipping papers to Swain, and received the following receipt and agreement in exchange for them: —

BOSTON, Nov. 18, 1881.

To Messrs. KIDDER, PEABODY, & Co., Boston.

GENTLEMEN, — I acknowledge receipt from you, as attorneys for Messrs. Baring Bros. & Co., of invoice and bill of lading of

New York, one hundred (100) cases shellac,
Rs. 15,678$\frac{5}{6}$

Shipped by C. C. Bancroft & Co., on board S. S. C/o "Manchester," at Calcutta, and consigned to the order of Messrs. Baring Bros. & Co. and indorsed by you, as their attorneys, to me. Such invoice and bill of lading are delivered to me for the purpose of enabling me to enter the goods referred to in them at the custom-house.

And I hereby agree to place the goods on storage for Messrs. Baring Bros. & Co., and subject to their order, and so that they may be applied to the due performance of the agreement contained in the receipt signed by me for your letter of credit on them, No. 2,419, or any other letter of credit on them, through which such goods have been purchased, we agreeing to keep them covered by insurance against fire for account of and loss payable to Messrs. Baring Bros. & Co.

It is understood that the said goods are to be warehoused in the name of Messrs. Baring Bros. & Co., and warehouse receipts therefor handed to you for them.

Very respectfully, your obedient servant,
(Signed) PAUL M. SWAIN.

Instead of doing as so agreed, upon receiving the shipping-papers, Swain entered these goods in the name of Wm. A. Brown & Co., his brokers, who obtained a certificate that they had made due entry of the shellac according to law, the goods being free from duty; and a permit was given to land the same.

On the 19th of November, Swain made application to plaintiff for a loan of $6,000, and offered in his application to give as security, among other things, ninety-five cases of the shellac, which he represented that he owned and would give a warehouse receipt for. The application was accepted, and a portion of the loan made on that day on other collaterals.

On the 21st, Swain gave an order on W. C. Casey, with whom the shellac was stored in New York, requesting him to deliver to the order of plaintiff the ninety-five cases of shellac; and on the 22d he forwarded that order, with a letter to Casey, asking him to send a non-negotiable receipt to plaintiff's order. A receipt was sent as requested; on delivery of this to plaintiff, the balance of the sum loaned was advanced.

Further facts appear in the opinion.

Edmund Randolph Robinson, for appellant.

Charles B. Alexander, for respondents.

FINCH, J. The entire argument of the appellant turns upon the proposition that Swain was the general owner of the shellac, and the Barings merely pledgees. Upon that assumption the argument runs smoothly to its conclusion, and encounters no serious obstacle. But the grave trouble is in the assumption itself, and the authorities which clash with it. The general subject was very thoroughly discussed in Farmers' and Mechanics' National Bank *v.* Logan, 74 N. Y. 568; and whether the doctrine there declared covers the facts now presented, and whether they have or do not have vital distinguishing features, are the real subjects for our consideration.

The doctrine stated was, in substance, that where a commercial correspondent, however set in motion by a principal for whom he acts, advances his own money or credit for the purchase of property and takes the bill of lading in his own name, looking to such property as the reliable and safe means of reimbursement up to the moment when the original principal shall pay the purchase-price, he becomes the owner of the property instead of its pledgee, and his relation to the original mover in the transaction is that of an owner under a contract to sell and deliver when the purchase-price is paid. The authorities which sustain and the reasons which justify the doctrine need not be repeated, and it is required only that we determine whether it applies to and settles the case in hand.

There are some facts in the cited case which are not in this, and there are some in this which were not present in that; and to these and their effect attention must be directed. In that case the purchase was made by the brokers or agents of him who, as the ultimate vendee, may be termed conveniently, if somewhat inaccurately, the principal. Such brokers were buyers and sellers on commission, and, it is said, were the commercial correspondents to whom the rule refers and who needed and received its protection; while here the only commercial correspondents were Bancroft & Co. at Calcutta, who are not before the court, and whose rights are not in question. But Bancroft & Co. were the sellers and not the buyers of the shellac, in their relation to the parties concerned. They passed their title either to the Barings or Swain; and while they were commercial correspondents in some sense, they were not such within the rule under discussion, for they advanced nothing on the credit of the property, and parted with title instead of taking it. The Barings, although bankers, were equally commercial correspondents, and they took title through the bill of lading and bought the property on their own credit. But if Bancroft & Co. be treated as the commercial correspondents, the case is not changed. Like Sears & Daw in the Logan Case, they bought the shellac on their own credit or with their own money, and got reimbursement by drawing upon the Barings, transferring title to them by the invoice and bill of lading to their order, as Sears & Daw did to the discounting banker in the Logan Case. The difference in the manner of making the advances is not material. In each case the bankers became owners or pledgees.

In the Logan Case the purchasing correspondent took from the vendor a bill of sale, as well as a bill of lading to his own order; but the Barings took only the bill of lading if the invoice to their order was not tantamount to a bill of sale. We do not deem that difference, if it was one, at all material. The title passed as effectually by the latter paper alone as if it had been preceded by the former; for we have uniformly held that the bill of lading is the evidence of title, and is sufficient to vest the ownership and absolute control in him to whose order it is drawn. The purchase in the case cited seems to have preceded the shipment, so as to make natural and convenient a bill of sale covering the interim. If it had been intended in this case to vest the general ownership in Swain and make him the purchaser, a bill of sale to him, or an invoice to his order, might naturally have been made; but as to the Barings, the purchase and the shipment were practically coincident.

In the cited case, again, the bill of lading, as attached to and sent forward with the discounted draft, had stamped upon it a statement addressed to the original principal, that the wheat and the insurance of it were pledged to the plaintiff as security for the payment of the draft; and that the wheat was put into his custody in trust for that purpose, not to be diverted to any other use until the draft was paid, and that upon his accepting and paying the draft, the claim of the plaintiff would cease. This appears to have been an effort to put in words upon the bill of lading the legal meaning of the transaction. It was not necessary to the certainty or scope of that legal meaning, and amounted only to a precaution. A similar distinction was sought to be drawn in the cited case itself, between it and First Nat. Bank of Toledo *v.* Shaw, 61 N. Y. 283, 69 *id.* 624. In that the bill of lading was, when forwarded, accompanied by a letter explicitly directing the property to be delivered only upon payment of the specified purchase-money. The comment of the court in the Logan Case was: "Such agreement was but putting into terms the legal effect of the transaction in the case before us; for we have shown by authority that the taking of the bill of lading in the name of the plaintiff for its account, and the discount of the draft by it on the strength thereof, *did* transfer to it the title to the wheat." Indeed, it seems to me that the title of the then plaintiff was rather weakened than strengthened by the matter stamped upon the bill of lading; for it speaks of the transaction as a pledge, when in truth it was an ownership; and it appears to be for that reason that the court, in upholding the banker's title founded on the bill of lading, speak of the latter "even with the modification thereof made by the matter stamped upon it," and "even as modified." So that the absence of the special indorsement in the case at bar at least does not weaken the bearing of the Logan Case upon it.

But a much more important suggestion made by the appellant is founded upon the terms of the written agreement between Swain and Kidder, Peabody, & Co. as agents of the Barings, which was intended to govern and control the entire transaction. They issued a letter of credit addressed to Bancroft & Co., and authorizing them for account of Swain to value on the Barings by bills for three thousand pounds sterling, and promised to accept and pay those bills "*if* accompanied by bills of lading for such goods filled up to the order of Messrs. Baring Bros. & Co., and by invoice of the same to their order, for account of whom it may concern." Swain, on his part, agreed to provide funds in London to meet such bills as should be drawn at their maturity, and that "all property which shall be purchased by means of the within credit, . . . together with the bills of lading for the same are hereby pledged and hypothecated to Messrs. Baring Bros. & Co. as collateral security for the payment as above promised, . . . and shall be held subject to their order on demand, with authority to take possession and dispose of the same at discretion, for their security and reimbursement." The argument upon this provision rests upon the words "pledged and hypothecated" and "collateral security," and avers as a consequence that Swain was, within the contemplation of the parties, general owner of the shellac, and the Barings merely pledgees. It is observable that Swain did not so understand it, for in his testimony he said: "Kidder, Peabody, & Co. were the owners of these goods till they arrived in Boston." It has already been mentioned that a similar expression was used by the plaintiff in the Logan Case in the matter stamped upon the bill of lading, describing the wheat as "pledged" to the plaintiff, and as "security" for the payment of the draft; and so little did the use of the inapt words affect the plain and unequivocal substance of the transaction in the mind of the court, that the use of the word "pledged" was not even made the subject of remark. It is further quite evident that from the moment of the shipment and the delivery of the bill of lading, the absolute *jus disponendi* was in Kidder, Peabody, & Co., by the very terms of Swain's agreement. They were at liberty to "dispose" of the property "at discretion," and either for "security" or reimbursement. It is also to be noted that what is spoken of as "pledged" is not merely the goods or the property, but the bills of lading also. These documents carry the title as well as the right of possession, and the pledge or hypothecation is expressly applied to both. The meaning, assuredly, was that the title should pass. Very likely, as is suggested for the defendant, the transfer was rather in the nature of a mortgage in which the title passes than in that of a pledge in which the pledgor is general owner. Here, then, we have a case where no title was attempted to be given to Swain, where it was given to the Barings by the bill of lading to them, where they paid for the property by their own credit and money, where it was the very pith of the adventure that the shellac should furnish the means of meeting the price, where the invoice was to be made to their order, where the possession was to be theirs, where they were to have the right of disposal at discretion, and Swain was to have no control until payment of the draft. In such a case he could not be general owner, and an inference to that effect from an inapt expression cannot be indulged. So far the case, in our judgment, cannot be distinguished from that against Logan, upon the authority and reasoning of which the Barings must be deemed owners, and not merely pledgees.

The settlement of that point disposes of the case as affected by the factor's acts of this State and Massachusetts, except in a single respect. It is not pretended that the plaintiff is protected under the provision which makes the transfer by an agent intrusted with the evidence of title and which has been made upon "the faith thereof" valid under some circumstances, even against the real owner; for the bill of lading with its indorsement was not shown to the plaintiff, and in no manner affected his action. But the appellant insists that there was evidence enough to go to the jury that Swain was intrusted with the property for the purpose of a sale, or of obtaining advances upon it, and so, under the factor's act, the plaintiff's title as pledgee is to be protected. The course of business brought the shellac to the custom house and into the "general order" stores. From that custody it could only be removed by some action of Kidder, Peabody, & Co. by force of their bill of lading. Swain applied for the papers to Mr. Collins, who was their merchandise clerk, and who testifies: "I asked what he was going to do with the papers, and he said he wanted to enter them at the custom house and warehouse them for account of Baring Bros. & Co." Collins repeated that request to Peabody, who gave his consent. Thereupon Swain signed a receipt for the papers, which specifies explicitly this one sole purpose for which they were put in his control; and thereupon they were indorsed in blank to enable Swain to make the entry and to warehouse the goods as agreed. Instead of doing that, Swain entered them in the name of his broker, and then pledged them to the plaintiff as security for a loan, the pledgee trusting to the representations of Swain and the warehouse receipt which he obtained. Peabody, so far as he was a party to the occurrence, fully corroborates Collins; and Swain was not thereafter called to deny, and did not deny, their version of the transaction. All that was later shown in rebuttal was a copy of the complaint in an action begun by Kidder, Peabody, & Co. against Swain and Casey, who was the warehouseman. The opinion of the General Term shows so fully that the statements of that complaint, taken together, were in no manner inconsistent with the evidence given for the defence as to make a repetition needless; and we may confine our attention to the evidence of Swain, and what it is claimed to establish.

Invariably the manner of dealing between the parties was like that developed in this case, so far as the written agreements were concerned. These were in two forms; one of them, that which we have described, which intrusted the shipping-papers to Swain solely that he might enter and warehouse the goods in the name of Barings, and the other, which recited their sale and gave them into the custody of Swain to make delivery and collect the proceeds which were stipulated to "belong" to the Barings and to be handed over to them. Swain could not name a single instance in which one or the other of these papers was not signed by him, but it was sought to show by him that the action under them was loose, and he was permitted to act differently. He said that he had been in the habit of entering the goods, sometimes in his own name, and of selling or pledging the goods and paying the proceeds long after to meet the drafts maturing in London. Under the second form of receipt a sale was contemplated and payment of proceeds over to Kidder, Peabody, & Co., and that they did not demand them immediately upon the sale and often accepted them later, although in time for the drafts, shows simply their confidence in Swain, but did not make their money his, and serves sufficiently to explain Peabody's alleged admission that Swain had been permitted to do as he pleased. And it is noticeable that the one single instance in which Swain says he can remember the facts of the deviation from the written stipulation was one under the second form of receipt, in which after a sale he did not deliver over the proceeds promptly upon obtaining them. But he admits that he never had any consent to warehouse the goods in any other name than that of Barings, and out of thirty-four instances in which the papers were put in evidence, Swain, with the aid of the books, was able to name but four instances in which he warehoused in his own name and pledged the goods. He does not pretend that the fact came to the knowledge of Kidder, Peabody, & Co., and any such knowledge is denied by them

The argument here is that they must have known, and the jury might have found that they did know. Our opinion is with that of the courts below, that such a finding would not have been warranted. All that Swain's evidence tends to show is, that in transactions under form No. 1, he often did not at once turn over the warehouse receipts and was not questioned about them, and in transactions under form No. 2, was not immediately called upon for the proceeds received. There was not enough to destroy the force, and work a modification in the written stipulations of the parties, and no verdict to that effect would have been justified.

The judgment should be affirmed with costs.

All concur except Rapallo, Earl, and Peckham, JJ., dissenting.

Judgment affirmed.

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FIRST NATIONAL BANK OF BATAVIA *v.* HORATIO N. EGE.

New York Court of Appeals, March 2 — April 10, 1888.

[*Reported in* 109 *New York*, 120.]

Ruger, C. J. This action was brought by the alleged owner, to recover the value of certain personal property, claimed to have been wrongfully converted by the defendants. The conversion is alleged to have been established by proof, that the defendants had in their possession on the 9th day of June, 1881, the property claimed, and that the plaintiff then demanded the same, and they refused to deliver it. Such evidence would, of course, authorize a finding of conversion of the property, and if accompanied by evidence of title would justify the recovery. The claim of title by the plaintiff is somewhat confused by reason of the peculiar mode adopted by one Williams, the general owner, in consigning produce purchased by him, to the defendants to sell on commission. Williams was a produce dealer, residing at Batavia, N. Y., and had for several years been in the habit of sending his property by railroad to the defendants, commission merchants in New York, to sell. He was accustomed when shipping goods, to obtain from the carrier two bills of lading, one called an original, and the other marked as a duplicate. The originals were sent directly to the defendants, and the duplicates were retained by Williams and attached to drafts drawn upon the defendants, which he procured to be discounted by the plaintiff. These drafts were frequently drawn without particular regard to the value of the property described in the bills attached thereto, and were usually accepted or rejected by the defendants according to the condition of Williams' account, and the value of the consigned property in their possession. This was the general course of business pursued by the parties, and was known to and apparently acquiesced in by all. The particular transaction in question grew out of the dealings occurring between Sept. 29, 1879, and Feb. 18, 1880. During that period Williams had drawn one hundred and forty-five drafts, accompanied by the same number of bills of lading, upon the defendants aggregating in amount $59,025. The first one hundred and thirty-five drafts, amounting to $53,725, were accepted and paid by the defendants, but the last ten, drawn between Jan. 31, 1880, and the 13th of February, thereafter, and aggregating $5,300, were not accepted, and, together with the bills of lading accompanying them, were returned to the plaintiff as dishonored bills.

The entire property covered by the one hundred and forty-five bills of lading, as shown by its subsequent sales, produced but $52,065.52, so that by the payment of the first one hundred and thirty-five drafts, the defendants had paid to the plaintiff an amount in excess of the total proceeds of the property consigned. The claim of the plaintiff is that the defendants had no right to apply the proceeds of the property received by them under the last ten bills of lading to the payment of liabilities incurred through the acceptance of previous drafts, and we are of the opinion that this contention is correct. The practice of carriers in issuing duplicate bills of lading to consignors of property shipped for sale has been much disapproved by the courts, for the reason that it affords a convenient opportunity for the commission of frauds by consignors, as well as subjecting the carrier to the hazard of making incorrect delivery of the property. Glyn, Mills, & Co. *v.* E. and W. India Dock Co., L. R. 7 App. Cases, 591.

No copies of the bills of lading issued in these transactions appear in the case, but we must assume that, in accordance with the usual custom in regard to such instruments, they authorized the delivery of the property by the carrier to the consignees named therein, according to the order in which they were presented to it. Kemp *v.* Falk, L. R. 7 App. Cases, 573; Glyn, Mills, & Co. *v.* E. and W. India Dock Co., *supra.* No question, however, arises in this case over conflicting claims between holders of respective bills of lading, so there can be no claim that the defendants acquired title to the property consigned, by virtue of the receipt of any bills by them.

It was said by Lord Westbury, in deciding the case of Barber *v.* Meyerstein, L. R. 4 E. and I. App. 317, "there can be no doubt, therefore, that the first person, who, for value, gets the transfer of a bill of lading, though it be only one of a set of three bills, acquires the property; and all subsequent dealings with the other two bills must, in law, be subordinate to that first one, and for this reason, because the property is in the person who first gets a transfer of the bill of lading. It might possibly happen that the ship-owner, having no notice of the first dealing with the bill of lading, may, on the second bill being presented by another party, be justified in delivering the goods to that party. But although that may be a discharge to the ship-owner, it will in no respect affect the legal ownership of the goods."

These expressions are approved in Glyn, Mills, & Co. *v.* E. and W

India Dock Company, *supra*, and undoubtedly state the conditions of the law in England on the subject at this time. See, also, Lickbarrow *v.* Mason, 2 T. R. 63, and notes to that case in Shirley's Leading Cases in Common Law, 204, Blackstone Series. The possession of these bills, therefore, gave the defendants no title to the property described therein, but simply conferred upon them the right to receive it from the carrier, and hold it subject to an accounting with the consignor when sold, or to the true owner when he should appear. If, however, before incurring liabilities upon the credit of such consignment, they received notice of its previous transfer to another party for value, they could not thereafter deal with the property to the prejudice of the rights of such party. By taking a transfer of a bill of lading from the consignor and discounting a draft upon the faith thereof, the plaintiff acquired title to the property described therein to the extent of the draft discounted by it, paramount to the claims of any other party. This would clearly be so unless such party had in good faith parted with value in reliance upon the possession of the property lawfully acquired. Commercial Bk. of Keokuk *v.* Pfeiffer, 108 N. Y. 242, and cases therein cited.

When a consignee of property to sell accepts drafts upon the faith of such consignment, he acquires the right to sell the property and apply its proceeds in payment of such drafts, but if such proceeds are insufficient for such purpose he must rely upon the responsibilty of the drawee alone, to repay any deficiency. By the mere receipt of subsequent shipments he acquires no lien thereon, to the prejudice of those who have advanced money upon them, and taken transfers of bills of lading, to secure such advances.

The defendants had notice, by the uniform course of dealing between the parties, and the invariable practice of Williams in raising money of the plaintiff to make purchases, that the consignments in question had been transferred to the plaintiff, and they could not prejudice its rights thus acquired, except by incurring in good faith new liabilities upon the faith of Williams' apparent ownership and their possession of the property, even if they could do so under such circumstances. It was the duty of the defendants, when they received notice of the ownership of consignments by the plaintiff, to hold and dispose of them on its account, applying the proceeds to the payment of the specific drafts accompanying the consignment, and if insufficient for that purpose to charge the deficiency to their consignor. The plaintiff, however, never incurred any liability to the defendants on account of the acceptance and payment of drafts by the defendants, for a greater amount than the value of the property consigned, and had the right to consider each subsequent consignment, as a new dealing, to be treated according to the specific rights thereby acquired.

With respect to the ten bills of lading in question, the evidence shows that the plaintiff advanced money upon the transfer thereof to it, and acquired title to the property therein described before any other right or claim could have attached thereto, and it is clear that they had the right to have its proceeds applied in satisfaction of the respective drafts accompanying the respective consignments, or to have the property delivered to them upon demand.

Some proof was given tending to show that the plaintiff was ignorant of its legal rights until after all the consignments were received by the defendants; but there is no evidence that the defendants were prejudiced by this conduct of the plaintiff, or that it was estopped from asserting its legal ownership by any steps taken by the defendants in reliance upon the plaintiff's conduct.

It is quite possible that the defendants might thereby have felt authorized to pursue a course of business which would not otherwise have been adopted; but this affords no reason why courts should disregard the plain legal rights of parties, unless some element of estoppel, as against such parties, is introduced into the transaction. The fact that a party has on other occasions omitted to enforce his clear legal rights as to some property, affords no reason why he should be defeated as to legal claims upon other property, when he does finally assert them.

The judgment of the General Term should be affirmed.

All concur.

Judgment affirmed.[1]

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DOUGLAS, Receiver, v. PEOPLE'S BANK OF KENTUCKY.

Kentucky Court of Appeals, October 18, 1887.

[*Reported in* 86 *Kentucky*, 176.]

Bennett, J. The appellee brought suit in the Louisville Chancery Court against the appellant, and the firm of Moise, Barbour, & Co., partners in the grain business in the city of Louisville. The appellee sought by the suit to recover judgment against the firm of Moise, Barbour, & Co., on a note for $5,000 which the firm executed to the appellee. The appellee also sought to recover judgment against the appellant for the value of corn and rye, the title to which was evidenced by six bills of lading, executed by the appellant as a common carrier, by which the appellant undertook to deliver to the firm of Moise, Barbour, & Co., in the city of Louisville, the grain mentioned in the bills of lading. Each bill of lading shows that the grain therein mentioned was shipped to the order of the shipper, per advice of Moise, Barbour, & Co., and each bill of lading was indorsed by the shipper; and that the firm of Moise, Barbour, & Co. was the owner of each of them. It was alleged by the appellee that Moise, Barbour, & Co., while they were the owners of these bills of lading, transferred and delivered them to it, in pledge as collateral security to the above-named note, and that the note was due and unpaid; and that the appellant refused to deliver the grain to the appellee. The appellee upon the foregoing allegations asserted its lien upon the grain, and sought judgment against the appellant for its value. The appellant put in issue the allegations of the appellee in reference to these matters; and a trial of the case resulted in a judgment against the appellant for the value of the grain. This appeal is prosecuted from that judgment.

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[1] "The doctrine is that where a commercial correspondent advances his own money or credit for a principal for the purchase of property for such principal, and takes the bills of lading in his own name, looking to the property as security for reimbursement, such correspondent becomes the owner of the property, instead of the pledgee, up to the moment when the original principal shall pay the purchase-price, and the correspondent occupies the position of an owner under a contract to sell and deliver when the purchase-price is paid. This doctrine is stated in Moors v. Kidder, 106 N. Y. 32, and founded upon the cases cited by Finch, J., in that case. Nothing therein gives color to the idea that the correspondent's ownership is of that character which would permit his exaction, even though agreed to by the principal, of a general lien upon the property for other and prior indebtedness of the principal as against one in the situation of St. Amant. The correspondent's position is one of ownership so far only as is necessary to secure him for the advances he made upon the merchandise described in the bill of lading, and in such a case as this he is bound to sell upon receipt of the purchase-price from the principal, or, in other words, upon receipt of the amount he advanced upon its credit. In no other sense is the correspondent the owner of the property." Drexel v. Pease, 133 N. Y. 129, 136.

A bill of lading does not possess the characteristics of bills of exchange, or other negotiable instruments, placed upon the footing of bills of exchange. The peculiar characteristics of these instruments rest either upon statute or commercial usage sanctioned by express decision. A bill of lading has neither of these foundations to rest upon. It does not represent money, but property. No one ever supposed that a written obligation to pay so much in property, or to deliver such and such property, possessed the characteristics of negotiability in the sense of a bill of exchange, or other instrument placed upon the footing of a bill of exchange. Such instruments represent money in commercial usage; and the innocent holder for value in the usual course of trade is protected against all equities of the antecedent parties. Nor is such innocent holder's right affected by any infirmity in such instruments. They are protected in some cases against the claim of the rightful owner, whereas the indorser or assignee of a bill of lading must trace his title back to its true owner. He has no greater right than the true owner. When it is said that a bill of lading is negotiable, it is only meant that its true owner may transfer it by indorsement or assignment so as to vest the legal title in the indorsee. See Pollard *v.* Vinton, 105 U. S. 7.

A sale and delivery of personal property by the owner perfect the title in the vendee. He thereby acquires a right to the property which is superior to antecedent equities and liens of which he had no actual notice, or such notice as the law requires him to take cognizance of. Both a contract of sale and delivery of personal property are necessary to the completion of title in the vendee; he thereby acquires a right to the property which is superior to antecedent equities, liens, or executory sales, as between the vendor and third persons of which he had at the time of his purchase no actual notice, or such notice as the law requires him to take cognizance of. And where the property is in transit by the carrier, the owner may deliver it to the purchaser symbolically. This may be done by the owner's indorsement of the bill of lading to the purchaser.

It is said, in Newsom *v.* Thornton, 6 East, 41, that "a bill of lading will pass the property upon a *bona fide* indorsement and delivery, when it is intended so to operate, in the same manner as a direct delivery of the goods themselves would do, if so intended; but it cannot go further."

In Hatfield *v.* Phillips, 9 Mees. & W. 648, it is said: "As soon as the goods are landed and warehoused in the name of the holder, he then becomes possessed of the goods themselves in the eye of the law, and derives his power not from the bill of lading, but from such possession. But while the cargo is still at sea, or the transit continues in any other form, the bill of lading stands for and represents the goods themselves, and will therefore enable the assignee to do as much, but no more, than he could have done if they had actually arrived and come to his possession."

In Meyerstein *v.* Barber, L. R. 2 C. P. 38, 45, it is said: "The bill of lading represents them [the goods], and the indorsement and delivery of the bill of lading operate exactly the same as a delivery of the goods themselves to the assignee after the ship's arrival would do." So, the assignment of a bill of lading for value, while the goods are in transit, is limited to the effect of symbolizing their sale and delivery; and the assignee is thereby invested with all the rights of a purchaser with actual delivery of possession, but no more.

It is also well settled that the owner of a bill of lading may pledge the same as collateral security for a debt; and, as it is indispensable to the validity of a pledge that the actual possession of the property pledged should pass to the pledgee, so the possession of the property which is sought to be pledged while it is in transit may be effected by transferring the bill of lading. Such transfer of the bill of lading is regarded as equivalent to investing the pledgee with the actual possession of the property. Such pledge does not invest the pledgee with title to the property. The title remains in the pledgor; but the pledgee acquires a lien upon the property for the security of his debt; and this lien, as long as he retains the possession of the property, either actual or symbolical, is a legal lien which is paramount to, and will therefore prevail against, any prior equities existing on behalf of third parties of which the pledgee had no notice, or of which he was not required by law to take notice. See Petitt *v.* Bank, 4 Bush, 338.

As before stated, the grain mentioned in the six bills of lading in controversy was made, by the terms of the bills of lading, deliverable to the shipper's order. Therefore the title to the grain did not pass to the consignees, Moise, Barbour, & Co., but remained in the shipper; and he could only pass his title to the grain to the consignees by an indorsement of the bills of lading. And the appellant, the railroad company, had not the right to deliver the grain to the consignees, or any one else except upon the order of the shipper. The shipper reserved to himself the right of property in the grain; and the railroad company undertook to transport it as his property, and to deliver it only upon his order; and it was the contract duty of the railroad company so to do; and if the company delivered the grain to Moise, Barbour, & Co., without their being the owners of it, which fact could only be manifested by the exhibition of the bills showing that they were the owners of them by the indorsement of the shipper, the company thereby rendered itself liable to the true owner of the grain for its value. See 2 Daniel, Neg. Inst. § 1740; Hutch. Carr. §§ 130, 133.

The appellant, the railroad company, delivered the grain to Moise, Barbour, & Co., and there is no doubt but, at the time of the delivery, they were the owners of the grain which the bills of lading represented. The appellee concedes this fact; but it contends that, at the time of the delivery, it was in the actual possession of the bills of lading, and was the owner of them as pledge for the security of Moise, Barbour, & Co.'s indebtedness to it, whereby it had a lien on the grain itself to secure said indebtedness. If it be true that, at the time the railroad company delivered the grain to Moise, Barbour, & Co., the appellee held the actual possession of these bills of lading in pledge for the security of their indebtedness to it, and the railroad company delivered the grain to Moise, Barbour, & Co., notwithstanding that fact, and without requiring them to show by the production of the bills of lading that they were the owners of the grain, they are in that case liable to the appellee for its value. On the other hand, if the grain was delivered to Moise, Barbour, & Co., by their exhibiting the bills of lading to the railroad company, which showed that they were the owners of them and entitled to them, and that Moise, Barbour, & Co. were enabled, by the conduct of the appellee, to thus exhibit said bills as their own, for the purpose of obtaining the delivery of the grain to themselves, and whereby they did obtain its delivery to themselves, then the appellee should not be allowed to recover the value of the grain from the appellant.

The railroad company's cashier swears that the company's place of switching its freight trains was in Jeffersonville, where the freight remained until orders were received where to deliver it; that the bills of lading were presented by Moise, Barbour, & Co. at the window of the cashier's office, and the numbers of the cars transcribed from the bills of lading to the books of the company, and the cars ordered over to Louisville, and the grain there delivered. While the cashier swears that he could not remember that these identical bills were presented at the cashier's office by Moise, Barbour, & Co., yet he is positive that they were so presented, properly indorsed, for the reasons that all bills of lading made to order of the shipper were required to be exhibited properly indorsed before the company would deliver the grain, and that a memorandum of each car containing the grain was taken directly from each bill of lading, from which memorandum the car was ordered over to Louisville. And while unable to recall to memory the particular bills of lading in controversy, he remembers that no grain was delivered to Moise, Barbour, & Co. on bills of lading requiring the grain to be delivered to the order of the shipper, unless they presented the bills properly indorsed. The chancellor was of the opinion that the cashier of the company was mistaken as to these particular bills of lading having been presented by Moise, Barbour, & Co.

We think that the evidence in the case fails to show a different state of case. His evidence is strong, consistent, and direct, and is circumstantially corroborated by the evidence of the appellee's cashier. He swears that it was the agreement between the appellee and Moise, Barbour, & Co. that the latter might withdraw the bills of lading deposited from time to time, by depositing other bills of lading of equal value in their place. The object of allowing the withdrawals and substitutions was to enable Moise, Barbour, & Co. to receive the freight on the bills of lading withdrawn. He also swears that not only Moise, Barbour, & Co., but their clerk, came to the bank whenever it suited them, and took the bills of lading in hand, and made such withdrawals and substitutions as they saw proper, without the supervision of any of the bank officers, and without their knowledge of what bills of lading were withdrawn, or what left in their place, if any. So we have no proof that these bills of lading were in the actual possession of the appellee at the respective times the grain was delivered; but we have proof that Moise, Barbour, & Co. had the appellee's authority to withdraw these bills of lading for the purpose of receiving the freight that they represented. We also have proof that they and their clerk handled the bills of lading at pleasure, and made such changes as they pleased. It also appears that they had the opportunity, furnished by the appellee, to withdraw these bills for the purpose of receiving the freight thereon, and then return them. With these facts before us, we find nothing in the record that directly, or by necessary implication, contradicts the evidence of the company's cashier.

While it may be admitted that the railroad company was not punctiliously exact in dealing with Moise, Barbour, & Co. as to the delivery of the grain, yet it may be regarded as a fact that the bills of lading properly indorsed were presented to the company by Moise, Barbour, & Co., who were in fact the legal owners of the grain which the bills represented, but subject to the appellee's lien; and that the grain was delivered to them on the faith of the presentation of the bills of lading properly indorsed, and the apparent ownership in Moise, Barbour, & Co.; and that the bills of lading were presented, and the grain delivered by the conduct and authority of the appellee. Therefore the proposition to allow the appellee to recover the value of the grain from the appellant, under these circumstances, contains no element of fair dealing, no equity, no legal right. It, the appellee, is estopped to gainsay and undo what was authorized and sanctioned by its conduct.

The judgment of the lower court is reversed, and the case is remanded, with directions to dismiss the appellee's petition.

W. & A. McARTHUR CO. *v.* OLD SECOND NATIONAL BANK OF BAY CITY.

SUPREME COURT OF MICHIGAN, OCTOBER 4 — DECEMBER 12, 1899.

[*Reported in* 122 *Michigan*, 223.]

LONG, J. The plaintiff is in the milling business, having its office and place of business at Cheboygan, this State. The First National Bank of Cheboygan does business there. The defendant does a banking business at Bay City. The plaintiff, at Cheboygan, on March 5, 1898, shipped a carload of wheat to Bay City, which had been sold by it to J. N. McDonald & Son, of Bay City. Upon such shipment it received from the railroad company a bill of lading showing that the wheat was consigned to itself at Bay City. Plaintiff indorsed the bill of lading in blank, made a draft upon J. N. McDonald & Son, and delivered the draft, with the bill of lading so indorsed, to the Cheboygan bank for collection. The Cheboygan bank forwarded the draft, with the bill of lading so attached, to the defendant, at Bay City, with the following letter: —

"CHEBOYGAN, MICH., March 7, 1898.

"OLD 2D, Bay City.

"*Dear Sir:* Inclosed as stated below for collection.

"Yours respectfully,
"A. W. RAMSAY, Cashier.

"J. N. McDonald & Son. No P. $600. B. L. attached. Hold for arrival of goods, if necessary."

The draft was dated March 5, 1898, made payable at sight, and indorsed by the Cheboygan bank: "Pay to Old Second National Bank, or order." The bill of lading was in the usual form. In the body of the bill, under the name of the consignee, was a statement to the railroad company: "Notify J. N. McDonald & Son, Bay City, Mich." It described one car of wheat. No other information or direction was given to the defendant, and it appears that the defendant had no notice of the dealings between McArthur & Co. and J. N. McDonald & Son, except such as could be inferred from the papers above set forth. The carload of wheat arrived in Bay City March 9, and the railroad company, acting upon a waybill, which is a duplicate of the bill of lading, notified J. N. McDonald & Son of its arrival. The letter of instruction, draft, and bill of lading reached the defendant March 7, and on that day was presented to J. N. McDonald & Son; but, the wheat not having arrived then, nothing was done. On March 11, the bank presented the draft to J. N. McDonald & Son, who wrote their acceptance thereon, and the bill of lading was delivered to them by the defendant. They presented the bill of lading, with the indorsement in blank of McArthur & Co. thereon, to the railroad company, who immediately delivered to them the carload of wheat. It appears that J. N. McDonald & Son were insolvent, and the draft was never paid. This suit was brought against the defendant to collect the amount of the draft, on the ground that the bank had been negligent in delivering the bill of lading to J. N. McDonald & Son upon the acceptance of the draft, and without the draft being first paid. There is no contention upon the facts. Upon the statements made by counsel in the court below, the court directed the verdict in favor of the plaintiff, and entered judgment thereon for the amount of the draft and interest, amounting to $630.30. Defendant assigns error.

It is the claim of defendant's counsel that, under the circumstances above stated, it was the duty of the defendant bank to deliver the bill of lading to the drawee upon acceptance of the draft. This claim is based upon the proposition that a sight draft is a time draft, as it is entitled to three days of grace, and that, the consignor having indorsed the bill of lading, and sent the same forward with this time draft, with no instruction to hold the bill of lading until the draft was paid, such action conclusively negatives the presumption of intention to have the bill held until the draft was paid. It is conceded that such presumption might arise from the fact that the shipment was made to the shipper as consignee, but it is urged that such presumption is conclusively rebutted by the above facts.

It is undoubtedly well settled that a sight draft is entitled to three days of grace. Story, Bills, § 342; 2 Edw. Bills & N. (3d Ed.) § 714; Cribbs *v.* Adams, 13 Gray, 597; Lucas *v.* Ladew, 28 Mo. 342; Thornburg *v.* Emmons, 23 W. Va. 334; Walsh *v.* Dart, 12 Wis. 635; Green *v.* Raymond Bros., 9 Neb. 295. It is also well settled that a blank indorsement upon a bill of lading is sufficient to pass the legal title to the goods, and that a delivery of goods by a common carrier to the consignee thereof is made at the peril of the carrier, unless, when made, the consignee surrenders the bill of lading either made to or indorsed to himself. Coleb. Coll. Sec. § 381; Hobart *v.* Littlefield, 13 R. I. 341; Gates *v.* Railroad Co., 42 Neb. 379; Weyand *v.* Railway Co., 75 Iowa, 580 (1 L. R. A. 650, 9 Am. St. Rep. 504). But we cannot agree with the contention of counsel for defendant that the fact that the bill of lading was indorsed in blank, and forwarded with the draft, under the circumstances here, negatives the presumption that the bill of lading was to be held until the draft was paid. The draft was sent to the defendant, as stated in the letter accompanying, for collection. The carload of wheat was not consigned to J. N. McDonald & Son, but to the plaintiff, who was the shipper. For the purpose of permitting J. N. McDonald & Son to at once get the wheat into possession, the bill of lading was indorsed, so that, when the draft was paid, there was nothing further to do by the defendant but to deliver the bill of lading to J. N. McDonald & Son, and the title to the wheat would at once pass to them.

Counsel, however, contends that the case is no different than as though the wheat had been consigned to J. N. McDonald & Son. There is, however, this difference: In case the consignment had been made direct to J. N. McDonald & Son, and no directions given for collection of the draft, no presumption would have arisen that it was intended as a cash transaction, and the title not to pass until payment; but, the property being consigned to the shipper himself, showing that something further was to be done by him to pass the title, the presumption was that it was a cash transaction; and we think this presumption was not negatived by the fact that the draft was entitled to three days' grace, and considered in law as a time draft. We are satisfied that the transaction did not import a sale of the goods upon credit.

In Security Bank of Minnesota *v.* Luttgen, 29 Minn. 363, it appeared that a merchant, having received an order for goods from a foreign correspondent, shipped the goods by a common carrier, taking bills of lading, by the terms of which the goods were deliverable at their destination to the shipper or his order. The merchant then drew bills of exchange for the price of the goods on the person ordering them, payable to the merchant's own order thirty days after sight. Attaching the bills of lading, indorsed in blank, to the drafts, and indorsing the latter in blank, the merchant had the drafts discounted at the bank, it being agreed in parol with the bank that the bills of lading should not be delivered until the drafts were paid. These drafts were sent forward by the bank to its correspondent, who presented them for acceptance, and they were duly accepted. Upon the acceptance of the drafts, and without payment, the bills of lading were delivered to the drawee, and the goods thus passed into his hands. The drawee shortly after this became insolvent, and the drafts were not paid. Action was commenced to recover against the drawer upon his indorsement of the drafts. The defence urged was that the bills of lading were to be treated as security for the payment of the drafts, and that the plaintiff had no right to deliver them to the drawee until such payment. It was held that, independent of the parol agreement, and considered as a matter of merely legal interpretation, the transaction did not import a sale of the goods on credit, or determine that the drawee was entitled to the bills of lading upon his acceptance of the drafts, and without payment. The court said: —

"The taking of bills of lading making the goods deliverable to the order of the shipper, rather than to the person for whom they are ultimately destined, has been considered 'almost conclusive' proof of an intention on the part of the consignor to retain the *jus disponendi*, although subject to be rebutted;" citing Benj. Sales (3d Ed.), 382, 400; Dows *v.* National Exchange Bank, 91 U. S. 618; Farmers & Mechanics' Nat. Bank *v.* Logan, 74 N. Y. 568; Seymour *v.* Newton, 105 Mass. 272; Jenkyns *v.* Brown, 14 Adol. & E. (N. S.) 496; Mason *v.* Railway Co., 31 U. C. Q. B. 73.

In the case of Bank *v.* Cummings, 89 Tenn. 609 (24 Am. St. Rep. 618), in an opinion written by Mr. Justice Lurton, it was held, upon a very similar state of facts as found in the Minnesota case, that, where bills of lading attached to time drafts left with a bank for collection are taken to the order of the vendor and drawer, instead of to the vendee and drawee, such fact is, when not rebutted by evidence to the contrary, almost conclusive to show that the bills were not to be surrendered to the vendee until the drafts should be paid, and is sufficient to require the bank to hold the bills until such payment. This is the rule recognized by Elliott in his work on Railroads (volume 4, § 1426).

Counsel for defendant cites many cases[1] which he claims have a tendency to support his contention. Those cases are readily distinguishable from the present and from the Minnesota and Tennessee cases. We do not deem it necessary to discuss the cases cited, as we are satisfied that a draft drawn as this was, and accompanied by a bill of lading showing that the shipper had consigned the goods to himself, is a clear indication that the shipper did not intend to extend credit.

The court very properly directed the verdict in favor of plaintiff. The judgment must be *Affirmed.*

GRANT, C. J., MONTGOMERY and HOOKER, JJ., concurred. MOORE, J., did not sit.

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[1] *Viz.* Lanfear *v.* Blossman, 1 La. Ann. 143 (45 Am. Dec. 76); Moore *v.* Louisiana Nat. Bank, 44 La. Ann. 99 (32 Am. St. Rep. 332); Nat. Bank of Commerce *v.* Merchants' Nat. Bank, 91 U. S. 92; Woolen *v.* Erie Bank, 12 Blatchf. 359; Marine Bank *v.* Wright, 48 N. Y. 1.

SECTION VII.

TRANSFER OF TITLE, WHEN GOODS ARE SENT C. O. D.

STATE *v.* JOHN O'NEIL.

VERMONT SUPREME COURT, OCTOBER TERM, 1885.

[*Reported in* 58 *Vermont*, 140.]

ROYCE, C. J. The first and most important question presented by these cases, is whether or not the intoxicating liquors in question were (in the first two cases) in contemplation of law sold, or furnished, by the respondent in the County of Rutland and State of Vermont; or (in the last two cases) held and kept for the purpose of sale, furnishing, or distribution contrary to the statute, within said county and State. The answer depends upon whether the National Express Company, by which some of said liquors were delivered to the consignees thereof, and in whose possession the remainder were found and seized before delivery, was in law the agent of the vendors or of the vendees. If the purchase and sale of the liquors was fully completed in the State of New York, so that upon delivery of them to the express company for transportation the title vested in the consignees, as in the case of a completed and unconditional sale, then no offence against the laws of this State has been committed. If, on the other hand, the sale by its terms could only become complete so as to pass the title in the liquors to the consignees upon the doing of some act, or the fulfilling of some condition precedent after they had reached Rutland, then the rulings of the County Court upon the question of the offence were correct.

The liquors were ordered by residents of Vermont from dealers doing business in the State of New York, who selected from their stock such quantities and kinds of goods as they thought proper in compliance with the terms of the orders, put them up in packages, directed them to the consignees, and delivered them to the express company as a common carrier of goods for transportation, accompanied with a bill, or invoice, for collection. The shipment was in each instance, which it is necessary here to consider, " C. O. D."; and the cases show that the effect of the transaction was a direction by the shipper to the express company not to deliver the goods to the consignees except upon payment of the amount specified in the C. O. D. bills, together with the charges for the transportation of the packages and for the return of the money paid. This direction was understood by the express company, which received the shipments coupled therewith.

Whether or not, and when, the legal title in property sold passes from the vendor to the vendee, is always a question of the intention of the parties, which is to be gathered from their acts, and all the facts and circumstances of the case taken together. In order that the title may pass, as was said by Morton, J., in Mason *v.* Thompson, 18 Pick. 305: "The owner must intend to part with his property, and the purchaser to become the immediate owner. Their two minds must meet on this point; and if anything remains to be done before either assents, it may be an inchoate contract, but it is not a perfect sale." The authorities seem to be uniform upon this point; and the acts of the parties are regarded as evidence by which the court or jury may ascertain and determine their intent. Benj. Sales, ss. 311, 319, note (*c*). When there is a condition precedent attached to the contract, the title in the property does not pass to the vendee until performance or waiver of the condition, even though there be an actual delivery of possession. Benj. Sales, s. 320, note (*d*). The Vermont cases to the above points are referred to in Roberts's Digest, 610 *et seq.*, and need not be specially reviewed here.

In the cases under consideration the vendors of the liquors shipped them in accordance with the terms of the orders received, and the mode of shipment was as above stated. They delivered the packages of liquors, properly addressed to the several persons ordering the same, to the express company, to be transported by that company and delivered by it to the consignees upon fulfilment by them of a specified condition precedent; namely, payment of the purchase-price and transportation charges, and not otherwise. Attached to the very body of the contract, and to the act of delivery to the carrier, was the condition of payment before delivery of possession to the consignee. With this condition unfulfilled and not waived, it would be impossible to say that a delivery to the carrier was intended by the consignor as a delivery to the consignee, or as a surrender of the legal title. The goods were intrusted to the carrier to transport to the place of destination named, there to present them for acceptance to the consignee, and if he accepted them and paid the accompanying invoice and the transportation charges, to deliver them to him; otherwise, to notify the consignor and hold them subject to his order. It is difficult to see how a seller could more positively and unequivocally express his intention not to relinquish his right of property or possession in goods until payment of the purchase-price than by this method of shipment. We do not think the case is distinguishable in principle from that of a vendor who sends his clerk or agent to deliver the goods, or forwards them to, or makes them deliverable upon the order of, his agent, with instructions not to deliver them except on payment of the price, or performance of some other specified condition precedent by the vendee. The vendors made the express company their agent in the matter of the delivery of the goods, with instructions not to part with the possession of them except upon prior or contemporaneous receipt of the price. The contract of sale therefore remained inchoate or executory while the goods were in transit, or in the hands of the express company, and could only become executed and complete by their delivery to the consignee. There was a completed executory contract of sale in New York; but the completed sale was, or was to be, in this State.

The authorities upon the above points and principles are so numerous, and are so fully collated in the brief of the learned counsel for the State, and in the text and notes of 2 Benj. Sales (4th Am. ed.), that we refrain from specific references in support of the conclusions at which we have arrived. These are fully supported by the decision of the U. S. District Court in Illinois in People *v.* Shriver, 31 Alb. L. J. 163, a case involving precisely the same question. Treat, J., says in the opinion: "In the case of liquor shipped by the defendant to Fairfield by express C. O. D., the liquor is received by the express company at Shawneetown as the agent of the seller, and not as the agent of the buyer, and on its reaching Fairfield it is there held by the company, as the agent of the seller, until the consignee comes and pays the money, and then the company, as the agent of the seller, delivers the liquor to the purchaser. In such case the possession of the express company is the possession of the seller, and generally the right of property remains in the seller until the payment of the price. An order from a person in Fairfield to the defendant at Shawneetown for two gallons of liquor, to be shipped to Fairfield, C. O. D., a mere offer by the person sending such order to purchase two gallons of liquor from the defendant, and pay him for it when he delivers it to him at Fairfield, and a shipment by the defendant according to such order is practically the same as if the defendant had himself taken two gallons of liquor from his store in Shawneetown, carried it in person to Fairfield, and there delivered it to the purchaser, and received the price of it. It would be different if the order from Fairfield to the defendant was a simple order to ship two gallons of liquor by express to the person ordering, whether such order was accompanied by the money or not. The moment the liquor under such an order was delivered to the express company at Shawneetown it would become the property of the person ordering, and the possession of the express company at Shawneetown would be the possession of the purchaser — the sale would be a sale at Shawneetown — and if it were lost or destroyed in transit the loss would fall upon the purchaser. But in the case at bar the shipping of the liquor to Fairfield, C. O. D., the defendant made no sale at Shawneetown; the right of property remained in himself, and the right of possession, as well as the actual possession, remained in him through his agent. Had it been lost or destroyed in transit the loss would have fallen on himself. He simply acted upon the request of the purchaser, and sent the liquor to

Fairfield by his own agent, and there effected a sale by receiving the money and delivering the liquor." [1]

Rea

COMMONWEALTH *v.* FLEMING.

PENNSYLVANIA SUPREME COURT, OCTOBER 15–NOVEMBER 4, 1889.

[*Reported in* 130 *Pennsylvania*, 138.]

MR. JUSTICE GREEN. In the case now under consideration, the liquor was sold upon orders sent by mail by the purchasers, living in Mercer County, to the defendant, who is a wholesale liquor-dealer in Allegheny County. The goods were set apart at the defendant's place of business in Allegheny County, and were there delivered to a common carrier, consigned to the purchaser at his address in Mercer County, and by the carrier transported to Mercer County, and there delivered to the purchaser, who paid the expense of transportation. Upon these facts alone, the decision of this court in the case of Garbracht *v.* Commonwealth, 96 Pa. 449, is directly and distinctly applicable, and requires us to reverse the judgment of the court below, unless there are other facts in the case which distinguish it from that of Garbracht.

It is claimed, and it was so held by the court below, that, because the goods were marked C. O. D., the sale was not complete until the delivery was made, and, as that took place in Mercer County, where the defendant's license was inoperative, he was without license as to such sales, and became subject to the penalty of the criminal law. The argument by which this conclusion was reached was simply that the payment of the price was a condition precedent to the delivery, and hence there was no delivery until payment, and no title passed until delivery. The legal and criminal inference was, that the sale was made in Mercer, and not in Allegheny. This reasoning ignores certain facts which require consideration. The orders were sent by the purchasers, in Mercer, by mail to the seller, in Allegheny, and in the orders the purchasers requested the defendant to send the goods C. O. D. The well-known meaning of such an order is that the price of the goods is to be collected by the carrier at the time of delivery. The purchaser, for his own convenience, requests the seller to send him the goods, with authority in the carrier to receive the money for them. This method of payment is the choice of the purchaser, under such an order; and it is beyond question that, so far as the purchaser is concerned, the carrier is his agent for the receipt and transmission of the money. If the seller accedes to such a request by the purchaser, he certainly authorizes the purchaser to pay the money to the carrier, and the purchaser is relieved of all liability to the seller for the price of the goods if he pays the price to the carrier. The liability for the price is transferred from the buyer to the carrier; and, whether the carrier receives the price or not, at the time of delivery, he is liable to the seller for the price if he does deliver. Substantially, therefore, if the delivery is made by the carrier, and he chooses to give credit to the purchaser for the payment of the price, the transaction is complete, so far as the seller is concerned, and the purchaser may hold the goods.

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[1] A portion of the opinion is omitted. This case was carried by writ of error to the Supreme Court of the United States. The majority of the court, holding that no Federal question was involved, dismissed the writ. In a dissenting opinion, Mr. Justice HARLAN intimates, *obiter*, his assent to the conclusion of the Vermont court that title to the liquor did not pass until it was received and paid for. O'Neil *v.* Vermont, 144 U. S. 323.

Of course, if the seller were himself delivering the goods in parcels upon condition that on delivery of the last parcel the price of the whole should be paid, it would be a fraud on the seller if the purchaser, after getting all the parcels, should refuse to perform the condition upon which he obtained them, and in such circumstances the seller would be entitled to recover the goods. This was the case of Henderson *v.* Lauck, 21 Pa. 359. The court below, in that case, expressly charged that if the seller relied on the promise of the purchaser to pay, and delivered the goods absolutely, the right to the property was changed, although the conditions were never performed; but if he relied, not on the promise, but on actual payment at the delivery of the last load, he might reclaim the goods if the money was not paid. The case at bar is entirely different. So far as the seller is concerned, he is satisfied to take the responsibility of the carrier for the price, in place of that of the buyer. He authorizes the purchaser absolutely to pay the price to the carrier; and, if he does so, undoubtedly the purchaser is relieved of all responsibility for the price, whether the carrier ever pays it to the seller or not. But the carrier is also authorized to deliver the goods. If he does so, and receives the price, he is of course liable for it to the seller. But he is equally liable for the price if he chooses to deliver the goods without receiving the price. It cannot be questioned that the purchaser would be liable also; but, as he had received the goods from one who was authorized to deliver them, his right to hold them even as against the seller is undoubted. In other words, the direction embodied in the letters C. O. D., placed upon a package committed to a carrier, is an order to the carrier to collect the money for the package at the time of its delivery. It is a part of the undertaking of the carrier with the consignor, a violation of which imposes upon the carrier the obligation to pay the price of the article delivered, to the consignor. We have been referred to no authority, and have been unable to discover any, for the proposition that in such a case, after actual, absolute delivery to the purchaser by the carrier, without payment of the price, the seller could reclaim the goods from the purchaser as upon violation of a condition precedent.

If, now, we pause to consider the actual contract relation between the seller and purchaser, where the purchaser orders the goods to be sent to him C. O. D., the matter becomes still more clear. Upon such an order, if it is accepted by the seller, it becomes the duty of the seller to deliver the goods to the carrier, with instruction to the carrier to collect the price at the time of delivery to the purchaser. In such a case it is the duty of the purchaser to receive the goods from the carrier, and, at the time of receiving them, to pay the price to the carrier. This is the whole of the contract, so far as the seller and the purchaser are concerned. It is at once apparent that when the seller has delivered the goods to the carrier, with the instruction to collect the price on delivery to the purchaser, he has performed his whole duty under the contract; he has nothing more to do. If the purchaser fail to perform his part of the contract, the seller's right of action is complete; and he may recover the price of the goods from the purchaser, whether the purchaser takes, or refuses to take, the goods from the carrier. Hence it follows that the passage of the title to the purchaser is not essential to the legal completeness of the contract of sale. It is, in fact, no more than the ordinary case of a contract of sale, wherein the seller tenders delivery at the time and place of delivery agreed upon, but the purchaser refuses performance. In such case it is perfectly familiar law that the purchaser is legally liable to pay the price of the goods, although, in point of fact, he has never had them. The order to pay on delivery is merely a superadded term of the contract; but it is a term to be performed by the purchaser, and has no other effect upon the contract than any other term affecting the *factum* of delivery. It must be performed, but performed by the purchaser, just as the obligation to receive the goods at a particular time or a particular place. Its non-performance is a breach by the purchaser, and not by the seller, and therefore cannot affect the right of the seller to regard the contract of sale as complete, and completely performed on his part, without any regard to the question whether the title to the goods has passed to the purchaser as upon an actual reception of the goods by him. If this be so, the case of the commonwealth falls to the ground, even upon the most critical consideration of the contract between the parties, regarded as a contract for civil purposes only.

The duties which lie intermediate between those of the seller and those of the purchaser are those only which pertain to, and are to be performed by, the carrier. These, as we have before seen, are the ordinary duties of carriage and delivery, with the additional duty of receiving the price from the purchaser, and transmitting it to the seller. The only decided case to which we have been referred which presents the effect of an order C. O. D. to a carrier, is Higgins *v.* Murray, 73 N. Y. 252.[1] There the defendant employed the plaintiff to manufacture for him a set of circus tents. When they were finished, the plaintiff shipped them to the defendant C. O. D., and they were destroyed by fire on the route. It was held that the defendant, who was the purchaser, should bear the loss; that the plaintiff had a lien on the tents for the value of his labor and materials, and his retaining his lien by shipping them C. O. D. was not inconsistent with, and did not affect his right to enforce the defendant's liability. In the course of the opinion Chief Justice Church said: "Suppose, in this case, that the defendant had refused to accept a delivery of the tent, his liability would have been the same, although the title was not in him. The plaintiff had a lien upon the article for the value of his labor and materials, which was good as long as he retained possession. . . . Retaining the lien was not inconsistent with his right to enforce the liability for which this action was brought. That liability was complete when the request to ship was made by the defendant, and was not affected by complying with the request, nor by retaining the lien the same as when the request was made. As the article was shipped at the request of and for the benefit of the defendant, (assuming that it was done in accordance with the directions,) it follows that it was at his risk, and could not impair the right of the plaintiff to recover for the amount due him upon the performance of his contract. . . . As before stated, the point as to who had the title is not decisive. It may be admitted that the plaintiff retained the title as security for the debt, and yet the defendant was liable for the debt in a proper personal action." It seems to us this reasoning is perfectly sound. Practically, it was ruled that the effect of the order C. O. D. was simply the retention of the seller's lien, and that such retention of lien is not inconsistent with a right of recovery for the price of the article, though, in point of fact, it is not delivered to the purchaser. In other words, the literal state of the title is not decisive of the question of liability of the purchaser, and he may be compelled to pay for the article, though he never received it into his actual possession. The Chief Justice propounds the very question suggested heretofore, of a refusal by the purchaser to accept the article, and holds that his liability would be the same, though the title was not in him.

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[1] Many authorities on the question whether shipment of goods C. O. D. will prevent title from passing on delivery to the carrier, are collected and discussed in an essay by Professo Gregory in 4 Col. L. Rev. 541.

In Hutchinson on Carriers, at § 389, the writer thus states the position and duty of the carrier: "The carrier who accepts the goods with such instructions [C. O. D.] undertakes that they shall not be delivered unless the condition of payment be complied with, and becomes the agent of the shipper of the goods to receive such payment. He therefore undertakes, in addition to his duties as carrier, to collect for the consignor the price of his goods." And again, in § 390: "When the goods are so received, the carrier is held to a strict compliance with such instructions; and, if the goods are delivered without an exaction from the consignee of the amount which the carrier is instructed to collect, he becomes liable to the consignor for it." This is certainly a correct statement of the position and liability of the carrier. He becomes subject to an added duty, that of collection; and, if he fails to perform it, he is liable to the seller for the price of the goods. We have searched in vain for any text-writer's statement, or any decision, to the effect that in such case no title passes to the purchaser. We feel well assured none such can be found. But, if this be so, the whole theory that the title does not pass if the money is not paid falls, and the true legal status of the parties results, that the seller has a remedy for the price of his goods against the carrier. In other words, an order from a seller to a carrier to collect on delivery, accepted by the carrier, creates a contract between the seller and the carrier, for a breach of which by the carrier the seller may recover the price from him. So far as the seller and purchaser are concerned, the latter is liable, whether he takes the goods from the carrier or not, and the order itself is a mere provision for the retention of the seller's lien. While, if the goods are not delivered to the purchaser by the carrier, the title does not pass, that circumstance does not affect the character of the transaction as a sale; and the right of the seller to recover the price from the purchaser, if he refuse to take them, is as complete as if he had taken them, and not paid for them.

Judgment reversed and defendant discharged.[1]

Read

SARAH S. LANE v. CHARLES F. CHADWICK.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, NOVEMBER 28, 1887 – JANUARY 9, 1888.

[*Reported in* 146 *Massachusetts*, 68.]

REPLEVIN of certain goods. Trial in the Superior Court, without a jury, before Hammond, J., who allowed a bill of exceptions in substance as follows: —

The plaintiff ordered the goods from wholesale druggists in Boston to be shipped to her by express C. O. D. The goods were so shipped, nailed up in two boxes, and accompanied by an itemized bill. The defendant, an express messenger, took the goods to the plaintiff's store, and demanded the amount of the bill with express charges on delivery of the boxes. The plaintiff refused to pay until she had had an opportunity to examine the contents of the boxes, and to compare the contents with the bill. The defendant refused to permit such an examination, and took the boxes away. There was evidence tending to show that the defendant told the plaintiff, when he brought the boxes, that if the boxes did not contain the goods ordered by the plaintiff he would not refund the C. O. D. charges after payment to him.

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[1] A portion of the opinion is omitted. Mr. Justice WILLIAMS delivered a dissenting opinion, in which, referring to Higgins *v.* Murray, 73 N. Y. 253, he said: "This case is not authority, therefore, for the doctrine advanced by the defendant in error, but turned upon another question, viz., the right of a manufacturer to payment when he has completed the article contracted for by his customer. The rule on that subject is well stated in Ballentine *v.* Robinson, 46 Pa. 177: 'When the manufacturer of an article ordered has completed it, and, upon notice of its completion, the buyer refuses or neglects to pay for it and take it, the maker may sue for its value, and the measure of damages is the contract price.' The manufacturer does not lose his right to sue upon his contract because, at the request of his customer, he sends the goods by a carrier with instructions to collect the price; but, if his contract had been to make and deliver at a place named, the title would not pass until delivery at the place named."

Subsequently the plaintiff procured this writ and went to the defendant with the officer, and in his presence tendered to the defendant the amount of the bill and express charges; and, showing the bill of items, demanded that those specific goods be delivered to her. The defendant replied that he knew nothing about those particular goods, and could not be responsible for the contents of the boxes, but said he was ready to deliver the boxes. The plaintiff refused to accept the boxes without knowledge of their contents, and the writ was served. The goods named in the itemized bill were all in the boxes. The plaintiff also introduced evidence tending to show that after this last tender she made an absolute tender of the money and demanded the boxes.

The plaintiff asked the judge to rule that, under a C. O. D. contract like the one in this case, if the consignee pays the carrier's charges, and tenders the price of the goods, the consignee has a right to have it certain that the goods are present before he actually parts with his money, especially when told that the money would not be refunded even if the boxes did not contain the goods so ordered C. O. D. The judge refused so to rule, and found for the defendant.

The plaintiff alleged exceptions.

P. H. Hutchinson and *C. G. M. Dunham*, for the plaintiff.

H. M. Knowlton, for the defendant.

MORTON, C. J. To maintain replevin, the plaintiff must show that, at the time she sued out her writ, she was entitled to the immediate and exclusive possession of the goods replevied. Collins *v.* Evans, 15 Pick. 63; Wade *v.* Mason, 12 Gray, 335.

The goods in suit were delivered to the defendant, who is a common carrier, by the consignor in Boston, to be transported to the plaintiff. They were in two boxes securely nailed up, and were accompanied by an itemized bill. The defendant was instructed to deliver the goods to the plaintiff upon the payment of the bill by her in cash.

The delivery to the carrier was not a delivery to the plaintiff. He was not her agent, but the agent of the consignor. Merchants' National Bank *v.* Bangs, 102 Mass. 291. Until he delivered the goods to her, no title or right of possession would pass to her, and it is immaterial whether he rightfully or wrongfully refused to make the delivery. At the time she replevied the goods she had no title or right of possession.

Exceptions overruled.

CHAPTER III.

EFFECT OF FRAUD AND RELATED MATTERS.

SECTION I.

FRAUD ON THE SELLER.

EARL OF BRISTOL *v.* WILSMORE.

IN THE KING'S BENCH, APRIL 24, 1823.

[*Reported in* 1 *Barnewall & Cresswell*, 514.]

DECLARATION by the plaintiff, as chief steward of the liberty of Bury St. Edmunds, stated that Elizabeth Carver had recovered £400 and costs against Wm. Miller, by the judgment of the Court of King's Bench, and had sued out a *testatum fi. fa.*, directed to the sheriff of Suffolk, to levy the amount, who made out his mandate to the plaintiff, as steward of the liberty, to levy that sum; that the plaintiff, by virtue of the mandate, took 100 sheep, which were then feeding in a field belonging to Miller; that while the sheep were in the custody of the plaintiff, the defendants wrongfully rescued them; by means whereof plaintiff was prevented from satisfying the debt and costs, and Elizabeth Carver commenced an action against him to obtain payment, and plaintiff was obliged to expend £100 in compromising that action. There was also a count in trover. Plea, not guilty. At the trial, before Abbott, C. J., at the Middlesex sittings after last Trinity Term, it was proved, on the part of the plaintiff, that the sheep were taken in execution by an officer of the plaintiff, under a mandate of the sheriff of Suffolk, as stated in the declaration. In the course of the night after they were seized in execution, and while they were in the custody of the officer, in a field belonging to Miller, next adjoining to a meadow belonging to the defendant Wilsmore, Page made a passage for the sheep into Wilsmore's field. The latter impounded them, and the next morning delivered them to Page, upon his paying the alleged amount of the damage done. This appeared to have been a contrivance between Wilsmore and Page, in order to enable the latter to obtain possession of the sheep. On the part of the defendant it was proved that Miller had obtained the sheep from Page under the following circumstances. They were offered to him for sale on Wednesday, the 16th May, 1821, by Lemon, the servant of Page. and Miller agreed to pay £78 in ready

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money for them. The bargain being made, the sheep were driven by Lemon to the house of Miller, at Nayland, about nine miles from Colchester. Upon their arrival there, Miller prevailed upon Lemon to accept a check for £78 upon Miles & Co., bankers at Colchester, by assuring him that it was as good as money. Miller's account at the bankers' had been overdrawn for some months before this transaction took place. Lemon then left the sheep in Miller's possession. Page, after keeping the check for two days, presented it at the banker's, and payment was refused. On the very day the sheep were obtained from Lemon, Elizabeth Carver, who was sister-in-law to Miller, went with him to the office of an attorney at Colchester, who was an entire stranger to them, and gave him instructions to prepare a warrant of attorney, which was done accordingly; and, upon that, judgment was entered up and execution issued against Miller, under which the sheep in question were taken. Miller absconded, and was not afterwards heard of. Upon these facts it was contended, on the part of the defendant, that no property in the sheep was vested in Miller by the sale, he having obtained possession of them by fraud. On the part of the plaintiff it was contended, that the property did pass, inasmuch as there was no false representation made to induce Page to part with the possession of the sheep; and the case of Rex v. Lara, 6 T. R. 565, was cited. The Lord Chief Justice, upon the authority of that case, was of opinion, that the property had passed to Miller; and the plaintiff, accordingly, had a verdict for £78. A rule *nisi* for a new trial having been obtained in last Michaelmas Term, —

Scarlet and *Chitty* now showed cause.

Marryat and *Walford*, contra.

Abbott, C. J. Upon further consideration we are all of opinion, that there ought to be a new trial. If Miller contracted for and obtained possession of the sheep in question with a preconceived design of not paying for them, that would be such a fraud as would vitiate the sale, and according to the cases which have been cited, would prevent the property from passing to him. Whether he obtained possession of the goods with such a preconceived design, is a question of fact which ought to be left to the jury, and for that purpose the case must go down to a second trial. At the former trial, the cases of Noble v. Adams, 7 Taunt. 59; Rex v. Jackson, 3 Camp. 370; and Read v. Hutchinson, 3 Camp. 352, were not cited. If the property in the sheep had not passed to Miller, it is clear that the plaintiff was not entitled to the possession of them, against the defendants. For the plaintiff had a right to seize, under the *fieri facias*, the property of Miller only. Unless the sheep, therefore, had become the property of Miller, the plaintiff had no right to take them, and still less to retain possession of them as against the rightful owner. *Rule absolute.*

Read

WILDER S. THURSTON *et al.* *v.* EDWIN A. BLANCHARD

SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH TERM, 1839.

[*Reported in* 22 *Pickering*, 18.]

TROVER, to recover the value of certain goods alleged to have been obtained by the defendant, from the plaintiffs, by means of false and fraudulent pretences.

The defendant offered no evidence in his defence, but relied upon the facts, that the note had not been given up or tendered to him by the plaintiffs, and that no demand had been made upon him for a return of the goods.

The plaintiffs produced the note in court and offered to give it up.

A verdict was taken for the plaintiffs, by consent.

If the Court should be of opinion, that the action could be maintained, judgment was to be rendered on the verdict; otherwise, the plaintiffs were to be nonsuited.[1]

SHAW, C. J., delivered the opinion of the Court. We are now to take it as proved in point of fact, to the satisfaction of the jury, that the goods, for which this action of trover is brought, were obtained from the plaintiffs by a sale, but that this sale was influenced and effected by the false and fraudulent representations of the defendant. Such being the case, we think the plaintiffs were entitled to maintain their action without a previous demand. Such demand, and a refusal to deliver, are evidence of conversion when the possession of the defendant is not tortious; but when the goods have been tortiously obtained, the fact is sufficient evidence of conversion. Such a sale, obtained under false and fraudulent representations, may be avoided by the vendor, and he may insist that no title passed to the vendee, or any person taking under him, other than a *bona fide* purchaser for value and without notice, and in such case the seller may maintain replevin or trover for his goods. Buffinton *v.* Gerrish, 15 Mass. R. 156.

Res.

The only important question is, whether the plaintiffs had done enough to rescind the contract and reclaim their goods in this action, without first tendering back the note of the defendant, which they had received on the sale. We are to take it as proved, that this was a negotiable note; that it had not been negotiated, either at the time the action was brought, or at the trial, or at any time; on the contrary, that it had always remained with the plaintiffs unindorsed, and was produced at the trial and offered to be surrendered, and placed on the files of the court for the defendant's use.

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[1] The statement of facts is abbreviated.

The rule undoubtedly is, that if the vendor under such circumstances would rescind the contract, and take back his property, if he has received a valuable consideration, he must restore it, whether it be money or goods, or the negotiable security of a third person. Kimball *v.* Cunningham, 4 Mass. R. 502.

The precise question then is this, whether the vendee's own note not negotiated, comes within the rule. Had it not been negotiable, we think it quite clear, that there would be no necessity of returning it. Rescinding the contract for the sale, rescinds the contract of payment by the vendee. A note not negotiable would have been nothing more than an express promise to pay for the goods, and would have been avoided with the sale. The Court are of opinion, that a note, though payable to order, whilst it remains in the hands of the promisee, the vendor of the goods, is to be put on the same footing, and that the delivering it up was not a condition precedent to bringing the action. If not produced at the trial, to be surrendered, it might be presumed that it had been negotiated, and that would have been a bar to the action, upon the rule stated.

It is somewhat analogous to a class of cases, which, though they do not arise here on account of our rule, treating a negotiable note given for goods sold as payment, yet are common in England and New York, where a different rule prevails. When a note is given on a sale of goods, but is not paid at maturity, the action is brought for goods sold, and the note is produced at the trial, to be surrendered, and to show that it is not outstanding. If not thus produced, the presumption would be, that it had been negotiated and was outstanding; and if it was so, the vendor could not recover as for goods sold. The negotiable security, actually negotiated and outstanding, would be deemed payment. But if not outstanding, such negotiable security would be deemed as only a collateral promise for the payment of the goods, and need not be tendered before bringing the action for goods sold and delivered.

Judgment on the verdict for the plaintiffs.[1]

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[1] See Mechem on Sales, § 914, *et seq.*

Read

JAMES CUNDY AND T. BEVINGTON, APPELLANTS, v. THOMAS LINDSAY, AND OTHERS, RESPONDENTS.

IN THE HOUSE OF LORDS, MARCH 1-4, 1878.

[*Reported in* 3 *Appeal Cases*, 459.]

APPEAL from a decision of the Court of Appeal, which had reversed a previous decision of the Queen's Bench.

In 1873, one Alfred Blenkarn hired a room at a corner house in Wood Street, Cheapside; it had two side windows opening into Wood Street, but though the entrance was from Little Love Lane it was by him constantly described as 37 Wood Street, Cheapside. His agreement for this room was signed "Alfred Blenkarn." The now respondents, Messrs. Lindsay & Co., were linen manufacturers, carrying on business at Belfast. In the latter part of 1873, Blenkarn wrote to the plaintiffs on the subject of a purchase from them of goods of their manufacture, — chiefly cambric handkerchiefs. His letters were written as from "37 Wood Street, Cheapside," where he pretended to have a warehouse, but in fact occupied only a room on the top floor, and that room, though looking into Wood Street on one side, could only be reached from the entrance in 5 Little Love Lane. The name signed to these letters was always signed without any initial as representing a Christian name, and was, besides, so written as to appear "Blenkiron & Co." There was a highly respectable firm of W. Blenkiron & Son, carrying on business in Wood Street, — but at number 123 Wood Street, and not at 37. Messrs. Lindsay, who knew the respectability of Blenkiron & Son, though not the number of the house where they carried on business, answered the letters, and sent the goods addressed to "Messrs. Blenkiron & Co., 37 Wood Street, Cheapside," where they were taken in at once. The invoices sent with the goods were always addressed in the same way. Blenkarn sold the goods, thus fraudulently obtained from Messrs. Lindsay, to different persons, and among the rest he sold 250 dozen of cambric handkerchiefs to the Messrs. Cundy, who were *bona fide* purchasers, and who resold them in the ordinary way of their trade. Payment not being made, an action was commenced in the Mayor's Court of London by Messrs. Lindsay, the junior partner of which firm, Mr. Thompson, made the ordinary affidavit of debt, as against Alfred Blenkarn, and therein named Alfred Blenkarn as the debtor. Blenkarn's fraud was soon discovered, and he was prosecuted at the Central Criminal Court, and convicted and sentenced. Messrs. Lindsay then brought an action against Messrs. Cundy as for unlawful conversion of the handkerchiefs. The cause was tried before Mr. Justice Blackburn, who left it to the jury to consider whether Alfred Blenkarn, with a fraudulent intent to induce the plaintiffs to give him the credit belonging to the good character of Blenkiron & Son, wrote the letters, and by fraud induced the plaintiffs to send the goods to 37

Wood Street, — were they the same goods as those bought by the defendants, — and did the plaintiffs by the affidavit of debt intend, as a matter of fact, to adopt Alfred Blenkarn as their debtor. The first and second questions were answered in the affirmative, and the third in the negative. A verdict was taken for the defendants, with leave reserved to move to enter the verdict for the plaintiffs. On motion accordingly, the court, after argument, ordered the rule for entering judgment for the plaintiffs to be discharged, and directed judgment to be entered for the defendants. 1 Q. B. D. 348. On appeal, this decision was reversed and judgment ordered to be entered for the plaintiffs, Messrs. Lindsay. 2 Q. B. D. 96. This appeal was then brought.

The Solicitor General (*Sir H. S. Giffard*) and *Mr. Benjamin*, Q. C. (*Mr. B. Francis Williams* was with them), for the appellants.

Mr. Wills, Q. C., and *Mr. Fullarton*, for the respondents.

The Lord Chancellor (Lord Cairns). My Lords, you have in this case to discharge a duty which is always a disagreeable one for any court, namely, to determine as between two parties, both of whom are perfectly innocent, upon which of the two the consequences of a fraud practised upon both of them must fall. My Lords, in discharging that duty your Lordships can do no more than apply, rigorously, the settled and well-known rules of law. Now, with regard to the title to personal property, the settled and well-known rules of law may, I take it, be thus expressed: by the law of our country the purchaser of a chattel takes the chattel, as a general rule, subject to what may turn out to be certain infirmities in the title. If he purchases the chattel in market overt, he obtains a title which is good against all the world; but if he does not purchase the chattel in market overt, and if it turns out that the chattel has been found by the person who professed to sell it, the purchaser will not obtain a title good as against the real owner. If it turns out that the chattel has been stolen by the person who has professed to sell it, the purchaser will not obtain a title. If it turns out that the chattel has come into the hands of the person who professed to sell it, by a *de facto* contract, that is to say, a contract which has purported to pass the property to him from the owner of the property, there the purchaser will obtain a good title, even although afterwards it should appear that there were circumstances connected with that contract, which would enable the original owner of the goods to reduce it, and to set it aside, because these circumstances so enabling the original owner of the goods, or of the chattel, to reduce the contract and to set it aside, will not be allowed to interfere with a title for valuable consideration obtained by some third party during the interval while the contract remained unreduced.

My Lords, the question, therefore, in the present case, as your Lordships will observe, really becomes the very short and simple one which I am about to state. Was there any contract which, with regard to the goods in question in this case, had passed the property in the goods from the Messrs. Lindsay to Alfred Blenkarn? If there was any contract passing that property, even although, as I have said, that contract might afterwards be open to a process of reduction, upon the ground of fraud, still, in the mean time, Blenkarn might have conveyed a good title for valuable consideration to the present appellants.

Now, my Lords, there are two observations bearing upon the solution of that question which I desire to make. In the first place, if the property in the goods in question passed, it could only pass by way of contract; there is nothing else which could have passed the property. The second observation is this: your Lordships are not here embarrassed by any conflict of evidence, or any evidence whatever as to conversations or as to acts done; the whole history of the whole transaction lies upon paper. The principal parties concerned, the respondents and Blenkarn, never came in contact personally,—everything that was done was done by writing. What has to be judged of, and what the jury in the present case had to judge of, was merely the conclusion to be derived from that writing, as applied to the admitted facts of the case.

Now, my Lords, discharging that duty and answering that inquiry, what the jurors have found is in substance this: it is not necessary to spell out the words, because the substance of it is beyond all doubt. They have found that by the form of the signatures to the letters which were written by Blenkarn, by the mode in which his letters and his applications to the respondents were made out, and by the way in which he left uncorrected the mode and form in which, in turn, he was addressed by the respondents; that by all those means he led, and intended to lead, the respondents to believe, and they did believe, that the person with whom they were communicating was not Blenkarn, the dishonest and irresponsible man, but was a well known and solvent house of Blenkiron & Son, doing business in the same street. My Lords, those things are found as matters of fact, and they are placed beyond the range of dispute and controversy in the case.

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If that is so, what is the consequence? It is that Blenkarn—the dishonest man, as I call him—was acting here just in the same way as if he had forged the signature of Blenkiron & Son, the respectable firm, to the applications for goods, and as if, when, in return, the goods were forwarded and letters were sent, accompanying them, he had intercepted the goods and intercepted the letters, and had taken possession of the goods, and of the letters which were addressed to, and intended for, not himself, but the firm of Blenkiron & Son. Now, my Lords, stating the matter shortly in that way, I ask the question, How is it possible to imagine that in that state of things any contract could have arisen between the respondents and Blenkarn, the dishonest man? Of him they knew nothing, and of him they never thought. With him they never intended to deal. Their minds never, even for an instant of time, rested upon him, and as between him and them there was no *consensus* of mind which could lead to any agreement or any contract whatever. As between him and them there was merely the one side to a contract, where, in order to produce a contract, two sides would be required. With the firm of Blenkiron & Son of course there was no contract; for as to them the matter was entirely unknown, and therefore the pretence of a contract was a failure.

The result, therefore, my Lords, is this, that your Lordships have not here to deal with one of those cases in which there is *de facto* a contract made which may afterwards be impeached and set aside, on the ground of fraud; but you have to deal with a case which ranges itself under a completely different chapter of law, the case, namely, in which the contract never comes into existence. My Lords, that being so, it is idle to talk of the property passing. The property remained, as it originally had been, the property of the respondents, and the title which was attempted to be given to the appellants was a title which could not be given to them.

My Lords, I therefore move your Lordships that this appeal be dismissed with costs, and the judgment of the Court of Appeal affirmed.[1]

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ALVIN RODLIFF *v.* FRANK W. DALLINGER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, NOVEMBER 10, 1885 — JANUARY 11, 1886.

[*Reported in* 141 *Massachusetts,* 1.]

REPLEVIN of wool. From the bill of exceptions it appeared that the plaintiffs, wool dealers in Boston, delivered the wool to one Clementson, a wool broker.

The plaintiffs testified that they had sold wool to Pomeroy & Sons, of Pittsfield, through Clementson, and that he, on applying for the wool in suit, said that he had an offer from a manufacturer for the wool, whose name he would not disclose, but who was as good as Pomeroy & Sons. Finally the plaintiffs allowed him to take the wool with the understanding that he was to pay them immediately the sum he received from his principal.

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[1] Lords HATHERLEY and PENZANCE delivered concurring opinions. Lord GORDON also concurred. In the opinions reliance was placed on Hardman *v.* Booth, 1 H & C. 803, and Higgons *v.* Burton, 26 L. J. Ex. 342. Lord Hatherley also said: "We have been pressed very much with an ingenious mode of putting the case on the part of the counsel, who have argued with eminent ability for the appellants in this case, namely, suppose this fraudulent person had gone himself to the firm from whom he wished to obtain the goods, and had represented that he was a member of one of the largest firms in London. Suppose, on his making that representation, the goods had been delivered to him. Now I am very far, at all events on the present occasion, from seeing my way to this, that the goods being sold to him as representing that firm, he could be treated in any other way than as an agent of that firm; or suppose he had said: 'I am as rich as that firm; I have transactions as large as those of that firm; I have a large balance at my bankers,' — then the sale would have been a sale to a fraudulent purchaser on fraudulent representations, and a sale which would have been capable of being set aside, but still a sale would have been made to the person who made those false representations; and the parting with the goods in that case might possibly — I say no more — have passed the property."

The sale was entered by the plaintiffs on their books as a sale to Clementson. On receiving the wool Clementson stored it with the defendant, a public warehouseman, and immediately pledged the warehouse receipts with the Massachusetts Loan and Trust Company as security for a loan of $2,000.

It was an undisputed fact that Clementson had not any such offer, and did not act for any such person as the plaintiffs testified that he represented at the time of obtaining the wool.

The judge instructed the jury that there were three possible views of the transaction: (1) that they might find it was an ordinary sale to Clementson; or (2) that it was not a sale to Clementson, but was a delivery to Clementson as a broker, with a view to his selling it to some customer, whom he expected afterward to negotiate with, and to consummate a sale with him; and, if they found this, then there was a special provision of the statute which protects persons dealing in good faith with a broker having property in that way, so far as they make advances or loans upon property in pledge, in good faith, to persons who have custody of property as brokers, with authority to sell or dispose of it; or (3) that it was not a sale to Clementson, or a delivery to him as broker with authority to sell, but that it was a delivery to Clementson, upon his representation that he came from a purchaser, representing him, with an offer for it, — a purchaser whose name he did not disclose, — and that these goods were delivered to him as the agent of that purchaser, as a sale to that purchaser; and if this was the fact, that the plaintiffs were entitled to the property, notwithstanding it was subsequently pledged to the Massachusetts Loan and Trust Company.

The judge further instructed the jury, upon the third view, "that, if this was a transfer upon a false representation made by Clementson, — a representation that he came with an offer from a third person whose name he did not wish to disclose, — and the goods were delivered to Clementson as a sale to him as the agent of this third person whose offer he was bearing, with the view that the property should pass at the time to that third person and thus constitute a sale to such person, from whom payment was to be made subsequently, and the payment to be brought back by Clementson as the agent of that third person, Clementson had no right afterward to deal with that property at all: that he got it into his possession by fraud, and he got it into his possession without any authority to make any subsequent sale, or to do anything with it; and that it was wrongly in his possession from the start, and any person who saw fit to advance money upon it or to buy it, however honestly, and in perfect good faith, would be the loser, and the plaintiffs could pursue the property and get it wherever they could find it, whenever the fraud practised upon them should come to their knowledge."[1]

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[1] The statement of the case has been abbreviated.

The jury returned a verdict for the plaintiffs; and the defendant alleged exceptions.

H. D. Hyde, for the defendant.

A. Hemenway, for the plaintiffs.

HOLMES, J. The plaintiffs' evidence warranted the conclusion that they refused to sell to Clementson, the broker, but delivered the wool to him on the understanding that it was sold to an undisclosed manufacturer in good credit with the plaintiffs. This evidence was not objected to, and was admissible, notwithstanding the fact that the sale was entered on the plaintiffs' books as a sale to Clementson, and that a bill was made to him. Commonwealth *v.* Jeffries, 7 Allen, 548, 564. It was admitted that Clementson, in fact, was not acting for such an undisclosed principal; and it follows that, if the plaintiffs' evidence was believed, there was no sale. There could not be one to this supposed principal, because there was no such person, and there was not one to Clementson, because none purported to be made to him, but, on the contrary, such a sale was expressly refused and excluded. Edmunds *v.* Merchants' Despatch Transportation Co. 135 Mass. 283.

It was suggested that this case differed from the one cited, becau there the principal was disclosed, whereas here he was not, and th credit could not be supposed to have been given to an unknown person. We have nothing to say as to the weight which this argument ought to have with a jury, beyond observing that the plaintiffs had reason in Clementson's representations for giving credit to the supposed manufacturer. But there is no rule of law that makes it impossible to contract with or sell to an unknown but existing party. And if the jury find that such a sale was the only one that purported to be made, the fact that it failed does not turn it into a sale to the party conducting the transaction. Schmaltz *v.* Avery, 16 Q. B. 655, only decides that a man's describing himself in a charter-party as "agent of the freighter" is not sufficient to preclude him from alleging that he is the freighter. It does not hint that the agent could not be excluded by express terms, or by the description of the principal, although insufficient to identify the individual dealt with, as happened here; still less, that in favor of third persons the agent would be presumed without evidence to be the undisclosed principal, although expressly excluded.

The invalidity of the transaction in the case at bar does not depend upon fraud, but upon the fact that one of the supposed parties is wanting, it does not matter how. Fraud only becomes important, as such, when a sale or contract is complete in its formal elements, and therefore valid unless repudiated, but the right is claimed to rescind it. It goes to the motives for making the contract, not to its existence; as when a vendee expressly or impliedly represents that he is solvent and intends to pay for goods, when in fact he is insolvent, and has no reasonable expectation of paying for them; or, being identified by the senses and dealt with as the person so identified, says that he is A, when in fact he is B. But when one of the formal constituents of a legal transaction is wanting, there is no question of rescission; the transaction is void *ab initio*, and fraud does not impart to it, against the will of the defrauded party, a validity that it would not have if the want were due to innocent mistake.

The sale being void, and not merely voidable, or, in simpler words, there having been no sale, the delivery to Clementson gave him no power to convey a good title to a *bona fide* purchaser. He had not even a defective title, and his mere possession did not enable him to pledge or mortgage. The considerations in favor of protecting *bona fide* dealers with persons in possession, in cases like the present, were much urged in Thacher *v.* Moors, 134 Mass. 156, but did not prevail. Much less can they be allowed to prevail against a legal title, without the intervention of statute.

Exceptions overruled.[1]

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[1] Smith Co. *v.* Stidger, 18 Col. App. 261; Baehr *v.* Clark, 83 Ia. 313; Rogers *v.* Dutton, 182 Mass. 187; Hamet *v.* Letcher, 37 Ohio St. 356, *acc.*

In Stoddard *v.* Ham, 129 Mass. 383, one Leonard, a commission merchant, who sometimes bought goods on his own account, purchased bricks of the plaintiffs. They supposed they were selling the bricks to the defendant through Leonard as his agent, and would not have sold them to Leonard personally. Leonard was not and did not represent that he was the defendant's agent. Immediately thereafter Leonard sold the bricks to the defendant. Leonard, having failed, and the defendant denying his agency, the plaintiffs brought an action for conversion after demand and refusal. The trial judge ruled that the plaintiffs could not recover and reported the case. Colt, J., said in part: "It is not enough to give the plaintiffs a right to recover, that they supposed they were selling bricks to the defendant, through Leonard his agent, and that they would not have sold them to Leonard on his sole credit. The judge found that they were in fact sold to Leonard. There was no fraud, no false representation of agency, or pretence on the part of Leonard that he was buying for any one else. He was a commission merchant, who was in the habit of purchasing goods on his own account, and who honestly bought the bricks for himself, and sold them to the defendant as his own. It was not a case of mistaken identity. The plaintiffs knew that they were dealing with Leonard; they did not mistake him for the defendant; nothing was said as to any other party to the sale. The conclusion is unavoidable that the contract was with him. The difficulty is, that the plaintiffs, if they had any other intention, neglected then to disclose it. It was a mistake on one side, of which the other had no knowledge or suspicion, and which consisted solely in the unauthorized assumption that Leonard was acting as agent for a third person, and not for himself.

"It is elementary in the law governing contracts of sale and all other contracts, that the agreement is to be ascertained exclusively from the conduct of the parties and the language used when it is made, as applied to the subject matter and to known usages The assent must be mutual, and the union of minds is ascertained by some medium of communication. A proposal is made by one party and is acceded to by the other in some kind of language mutually intelligible, and this is mutual assent. Met. Con 14. A party cannot escape the natural and reasonable interpretation which must be put on what he says and does, by showing that his words were used and his acts done with a different and undisclosed intention. Foster *v.* Ropes, 111 Mass. 10, 16. Daley *v.* Carney, 117 Mass. 288. Wright *v.* Willis, 2 Allen, 191. 2 Chit. Con. (11th Am. ed.) 1022. It is not the secret purpose, but the expressed intention, which must govern, in the absence of fraud and mutual mistake. A party is estopped to deny that the intention communicated to the other side was not his real intention. To hold otherwise would be to put it in the power of the vendor in every case to defeat the title of the vendee, and of those holding under him, by proving that he intended to sell to another person, and so there was no mutual assent to the contract."

WHITE *v.* GARDEN.

IN THE QUEEN'S BENCH, MAY 1, 1851.

[*Reported in* 10 *Common Bench,* 919.]

TROVER for iron. Pleas: first, not guilty; secondly, not possessed.

At the trial, before Jervis, C. J., at the sittings in London, after the last term, the evidence disclosed the following facts: —

One Parker, in August, 1850, bought of the defendants seventy tons of iron, paying for it £83 in cash, and giving a bill for the residue, £113 14*s.*, purporting to be accepted by one Thomas, a seedsman at Rochester. Parker afterwards sold the iron to the plaintiff, to whom it was, by Parker's order, delivered by the defendants.

On the 1st of October, Parker made a further purchase of fifty tons of iron from the defendants, for which he gave them a bill also purporting to be accepted by Thomas. This second parcel of iron was likewise sold by Parker to the plaintiff, and was forwarded to the plaintiff's wharf on the 4th of October, by one Riddell, the defendants' lighterman, pursuant to a delivery order signed by Parker on the 3d. The barge containing the fifty tons was left, with the delivery order, by Riddell, alongside the plaintiff's wharf, to be unloaded. Subsequently, the defendants, having discovered that the supposed acceptor of the bills was a fictitious person, and that they had been defrauded, sent Riddell to the plaintiff's wharf to get back the iron. Riddell accordingly took away the lighter, with twenty-nine tons of the iron which remained therein; and the defendants gave the plaintiff notice of the fraud, and desired him not to part with any of the iron in his possession purchased of Parker.

The purchases were *bona fide* on the part of the plaintiff, and had been made at the fair market price, and through the intervention of a broker.

It appeared that Parker had given the defendants a false address; but it did not appear that the defendants had made any inquiry either about him or the acceptor of the bills, until after the iron had been sent by them to the plaintiff's wharf.

On the part of the defendants, it was insisted, that, the transaction being a fraud on the part of Parker, no property in the iron passed to him, and consequently none could be acquired by his vendee, though no party to the fraud.

For the plaintiff, it was submitted, that the right in the original vendors to rescind the sale, was at an end when the goods had come to the hands of a *bona fide* purchaser for value.

The Lord Chief Justice left four questions to the jury, — first, whether the plaintiff had purchased the iron from Parker, *bona fide;* secondly, whether there had been a delivery of the iron by the defendants to the plaintiff; thirdly, whether Parker had obtained the iron *animo furandi;*

fourthly, whether he had obtained it by fraud. The jury answered the first two questions in the affirmative, and the third in the negative but, as to the fourth, they said they could not agree in finding fraud, though they were all of opinion that Parker never intended to pay for the iron.

His Lordship thereupon directed a verdict to be entered for the plaintiff for £75, the value of the twenty-nine tons of iron removed from alongside the plaintiff's wharf, — leave being reserved to the defendants to move to enter a verdict for them, if the court should be of opinion that no property in the iron passed by the sale from Parker to the plaintiff.

Byles, Serjt., and *Hugh Hill*, now showed cause.

Humfrey and *Willes*, in support of the rule.

Cresswell, J. I am of opinion that this rule must be discharged. It appears that the plaintiff made a contract with Parker for the purchase of fifty tons of iron. It may be very doubtful whether Parker had the iron at the time. But afterwards (or before, as the case may be) he purchased fifty tons of iron from the defendants, giving them in payment a bill purporting to be accepted by a supposed seedsman at Rochester. It turned out that that was a fictitious bill; no such person as that described as the acceptor being to be found at Rochester. The transaction on the part of Parker was altogether fraudulent. Having thus by fraud induced the defendants to trust him, Parker sells the iron to the plaintiff, and gives him a delivery order, which is acted upon by the defendants, who send the iron to the plaintiff's wharf by their own lighterman. Having received the iron alongside his wharf, the plaintiff pays Parker for it; and the defendants afterwards, having in the *interim* discovered that they had been defrauded, seize the iron. The question is, whether the plaintiff, who, it is admitted, acted *bona fide*, by this purchase obtained a property in the iron. It seems to me that the case of Parker *v.* Patrick, 5 T. R. 175, as explained in Load *v.* Green, 15 M. & W. 216, well warrants us in discharging this rule. Parke, B., there says that that case may be supported on the ground that the transaction is not absolutely void, except at the option of the seller; that he may elect to treat it as a contract, and he must do the contrary before the buyer has acted as if it were such, and re-sold the goods to a third party; and that Wright *v.* Lawes is an authority to the same effect. I think it is. And I see no difficulty or hardship in so deciding. One of two innocent parties must suffer; and surely it is more just that the burthen should fall on the defendants, who were guilty of negligence in parting with their goods upon the faith of a piece of paper which a little inquiry would have shown to be worthless, rather than upon the plaintiff, who trusted to the possession of the goods themselves. Though Parker could not have enforced the contract, I see no reason why the plaintiff should not. *Rule discharged.*[1]

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[1] Williams and Talfourd, JJ., and Jervis, C. J., delivered concurring opinions.

PEASE v. GLOAHEC.

In the Privy Council, June 15, 16, 23, 1866.

[*Reported in Law Reports*, 1 *Privy Council*, 219.]

In this appeal the suit was instituted by the appellants, the assignees of a bill of lading of a cargo of linseed meal, against the ship "Marie Joseph," and also against the respondent, the master and owner of that vessel.

Mr. Mellish, Q. C., and *Mr. E. C. Clarkson*, for the appellants.

Dr. Deane, Q. C., and *Dr. Swabey*, for the respondent.

The Lord Chancellor (Lord Chelmsford). The question raised by the suit is the right of the shippers of the linseed cake to stop the same *in transitu*, under the following circumstances.

In February, 1864, Messrs. Maxwell & Dreossi, of Bordeaux, through their agent, Walter Stericker, sold to Messrs. Scarborough & Tadman, of Hull, sixty tons of linseed cake at £7 12*s.* 6*d.* per ton, payable by bill at three months from the date of the bill of lading. On the 11th of February the goods were shipped on board the "Marie Joseph" at Bordeaux, by Maxwell & Dreossi, and a bill of lading for the same was signed by the respondent, the master. Maxwell & Dreossi indorsed the bill of lading to order and assigns, and drew a bill of exchange for the price on Messrs. Scarborough & Tadman, and sent the bill of lading and bill of exchange to their agent, Stericker. On the 16th of February, Stericker took the bill of lading and the bill of exchange to Scarborough & Tadman, when the bill was accepted by Scarborough, and Stericker thereupon indorsed the bill of lading and delivered it to Scarborough, together with a policy of insurance which had been effected upon the goods. A conversation then ensued between Stericker and Scarborough respecting the dealings of Scarborough & Tadman with a person named Moore, whose circumstances were supposed to be embarrassed, and Stericker asked Scarborough whether he had any objection to his holding the bill of lading. Scarborough told Stericker to take it, and delivered back the bill of lading to Stericker, who thereupon signed the memorandum of the 16th of February, 1864.

On the 18th of February, Tadman, the other partner in the firm of Scarborough & Tadman, called upon Stericker and stated to him that his firm had sold the linseed cake to a Mr. Croysdale, who would accept a draft against the bill of lading. The linseed cake had not been sold to Croysdale, nor to any other person. Trusting to this misrepresentation, Stericker returned the bill of lading and the policy of insurance to Tadman. On the same day, after thus obtaining the bill of lading, in consequence of a message received from the appellants, Messrs. Pease & Co., bankers in Hull, to whom Scarborough &

Tadman were largely indebted, Tadman went to the bank, and Mr. Pease called his attention to the state of his account and to the amount of the bills under discount, and asked him for security. Tadman thereupon indorsed the bill of lading in the name of his firm, and delivered it, together with the policy of insurance, to Mr. Pease, and gave Messrs. Pease & Co. an unsigned memorandum authorizing them to sell the linseed cake and to place the proceeds to the credit of Scarborough & Tadman on account. Moore, in whose transactions Scarborough & Tadman were supposed to be involved, became bankrupt on the 4th of March, and on the 7th of March Scarborough & Tadman stopped payment. On the 5th of March a telegram was sent from Maxwell & Dreossi to Stericker, directing him to stop the delivery of the linseed cake; and on the 7th of March he received from Maxwell & Dreossi a bill of lading indorsed to himself. The "Marie Joseph" arrived at Hull on the 5th of April. The linseed cake was demanded on behalf of the appellants, upon the bill of lading indorsed to them; but Stericker afterwards went on board and presented his bill of lading, and obtained possession of the goods under an indemnity from Maxwell & Dreossi to the respondent.

Upon these facts the learned judge of the Court of Admiralty was of opinion that, the bill of lading having been obtained from Stericker by the false representations and fraud of Tadman, and having afterwards been negotiated without the consent of Stericker or of his principals, and contrary to the understanding between Stericker and Tadman, the fraudulent conduct of Tadman invalidated the indorsement to Pease & Co., and he accordingly pronounced against them.

The question is one of nicety and difficulty; and, as was stated by the counsel in argument, no direct authority is to be found by which it can be decided. Principles, however, may be extracted from previous decisions, which will serve as guides to its right determination. A bill of lading for the delivery of goods to order and assigns is a negotiable instrument, which by indorsement and delivery passes the property in the goods to the indorsee, subject only to the right of an unpaid vendor to stop them *in transitu*. The indorsee may deprive the vendor of this right by indorsing the bill of lading for valuable consideration, although the goods are not paid for, or bills have been given for the price of them which are certain to be dishonored, provided the indorsee for value has acted *bona fide*, and without notice. Although a bill of lading is a negotiable instrument, it is so only as a symbol of the goods named in it; and, as was said by Lord Campbell in Gurney *v.* Behrend, 3 E. & B. 634, "although the shipper may have indorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority; and if it be stolen from him, or transferred without his authority, a subsequent *bona fide* transferee for value cannot make title under it as against the shipper of the goods." This *dictum* is very carefully confined in its terms to the original transfer of a bill of lading deliverable to the assigns of the shipper. In the cases which it supposes, there could be no lawful assigns of the shipper, and consequently the bill of lading could have no existence as a negotiable instrument. But in the present case the shippers of the goods, having obtained a bill of lading, indorsed it to order and assigns, and forwarded it to Stericker for the express purpose of its being indorsed by him, and handed over to Scarborough & Tadman. By the indorsement and delivery to Scarborough & Tadman they acquired the complete property in the goods and control over the bill of lading, subject only to the right of Maxwell & Dreossi to stop *in transitu* as long as it remained in their hands. This is not denied by the respondent; but his case is that Scarborough & Tadman having, after the indorsement and delivery of the bill of lading, returned it to Stericker to retain as a security for the payment of the bill of exchange accepted for the price of the goods, and having afterwards obtained it from him by a misrepresentation, they had no power to pass a title in it to Pease & Co., at least without being subject to the lien created by the deposit with Stericker, and consequently that the right to stop *in transitu* against Pease & Co., though *bona fide* indorsees for valuable consideration, still subsisted.

There can be no doubt that, although the vendors had parted with the property in the bill of lading, by the indorsement to Scarborough & Tadman they acquired a title to hold it by the terms of the agreement under which it was deposited with Stericker. These terms do not include any stipulation that the vendees should not so deal with the bill of lading as would, in the event of their insolvency, defeat the right to stop *in transitu.*

It is not even stipulated that the vendors should hold the bill of lading till the sub-vendees should give them a bill of exchange or other security for payment. The bill of lading was not made subject to any new condition or limitation, but was merely deposited with the vendors till the arrival of the ship or the sale of the goods.

Scarborough & Tadman had power to sell, not by reason of any authority arising out of the agreement, but by virtue of their ownership in the goods. The power to sell of course included a power to pledge. The vendors, by keeping the bill of lading in their hands, might have prevented Scarborough & Tadman from dealing with it. They chose to deliver it back to them, induced to do so, indeed, by the fraudulent representation of Tadman, but still consenting to their possession of it. The indorsees acquired no new title from the vendors by the fraud which Tadman practised, but merely obtained their own property and the means of effectually disposing of it. The vendors had not, strictly speaking, a lien, which means a right to retain property against the will of the owner of it, and which is lost when the possession is parted with. They had, by the agreement of the indorsees and owners, a right to hold a bill of lading as a security. As in the case of lien, so in this case, as long as the bill of lading remained with the parties who had fraudulently obtained it, the vendors who had been cheated out of the possession might have reclaimed and recovered it. But the moment it passed into the hands of Pease & Co., to whom it was pledged and indorsed for valuable consideration without notice, the right of the vendors to follow it was taken away. This is a much stronger case than that put by Abbott, C. J., in Dyer *v.* Pearson, 3 B. & C. 42, of the real owner of goods who suffers another to have possession of his property, and of those documents which are the evidence of property, being bound by a sale which he has thus enabled the other person to make; for here the person entitled to retain the possession of the instrument which represented the goods against the real owners, relinquished the possession of it to them, and enabled them to deal with the property in their true characters of owners. In the case of Kingsford *v.* Merry, 11 Ex. 577, it was held that, "When a vendee obtains possession of a chattel, with the intention, by the vendor, to transfer both the property and possession, although the vendee has committed a false and fraudulent misrepresentation in order to effect the contract or obtain the possession, the property vests in the vendee until the vendor has done some act to disaffirm the transaction; and the legal consequence is, that if before the disaffirmance the fraudulent vendee has transferred either the whole or a partial interest in the chattel to an innocent transferee, the title of such transferee is good against the vendor."

Although this case was reversed in the Exchequer Chamber, 1 H. & N. 503, yet it was upon a ground which did not affect the rule of law above laid down, but made it inapplicable, because in the judgment of the court the relation of vendor and vendee did not exist between the owner of the goods and the fraudulent possessor. Here the possession was not only united to the previous ownership, with the consent (however obtained) of the person temporarily entitled to it, but transferred for the express purpose of giving to the owner absolute dominion over his own property.

An ownership which was at the time perfect at law, though voidable as to part, viz., the possession, cannot in principle be treated differently from an ownership voidable as to the whole, but in the *interim* protected by the interposition of a *bona fide* purchaser for valuable consideration.

For these reasons their Lordships will humbly recommend to Her Majesty that the decree appealed from be reversed, with costs.

[illegible]
power to sell, which power was exercised. P sues D. Held for D.

BABCOCK v. LAWSON.

In the Queen's Bench Division, June 10, 1879.

[*Reported in 4 Queen's Bench Division, 394.*]

The judgment of the court (Cockburn, C. J., and Mellor, J.) was delivered by

Cockburn, C. J. This was an action for the wrongful conversion of a quantity of flour alleged to be the property of the plaintiffs.

The facts were shortly these: The plaintiffs, who are merchants at Liverpool, had lent to the firm of Denis Daly & Sons, also merchants at Liverpool, their acceptances for the sum of £11,500 (for which Denis Daly & Sons undertook to provide at or before maturity), on the security of certain flour, a memorandum as to such security being given by Denis Daly & Sons in these terms: "As security for the due fulfilment on our part of this undertaking, we have warehoused in your name sundry lots of flour, and in consideration of your delivering to us, or our order, said flour as sold, we further undertake to specifically pay you proceeds of all sales thereof immediately on their receipt."

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The flour was accordingly warehoused in the name of the plaintiffs in a room let to them for the purpose, and of which they kept the key and paid the rent.

Three of the acceptances thus given by the plaintiffs, amounting in the whole to £6,500 having been in due time provided for by Denis Daly & Sons, it was agreed between them and the plaintiffs that the two remaining bills, for £2,500 each, should be renewed, which was accordingly done, a memorandum similar to the former one being again given by Denis Daly & Sons, whereby they undertook to provide for the acceptances at or before maturity, with this addition: "As security for the due fulfilment on our part of this undertaking, you hold two lots of Baltic whites flour, warehoused in December and January last." The Baltic whites flour thus mentioned consisted of 1,500 sacks, being the flour originally pledged to the plaintiffs.

In the interval between the giving of these last-mentioned acceptances and the time of their becoming due, one of the firm of Denis Daly & Sons, on the 13th of May, 1878, applied to the defendants to advance them a sum of £2,500 on the security of the 1,500 sacks of flour deposited, as has been stated, with the plaintiffs, but without in any way communicating to them the fact of the flour having been so deposited. The defendants, in entire ignorance of this fact, and believing the flour to be the property of Denis Daly & Sons, agreed to advance the £2,500 on the security of the flour, but on the terms that they were to have absolute possession of the flour, and to warehouse it in their own name, and to have power to sell it.

For the fraudulent purpose of obtaining possession of the flour, so as to be able to give possession of it to the defendants, Arthur Daly, one of the firm of Denis Daly & Sons, brought to the plaintiffs, but unknown to the defendants, a memorandum in these terms: "14th May, 1878. We have sold Messrs. R. & J. Lawson 1,500 sacks of Baltic whites, payment as follows; £1,000 upon delivery, £1,000 in 14 days, £1,000 in a month, which amounts we will hand you as received. D. Daly & Sons."

The plaintiffs by the fraudulent misrepresentation that Denis Daly & Sons had found a purchaser for the flour, and would hand over to them the amount to be received as the price, were induced to part with the possession of the flour, and for that purpose gave, as requested, on the 14th of May, a delivery order to Denis Daly & Sons; and subsequently addressed a written direction to the landlord of the warehouse, which they delivered to Arthur Daly, to transfer the room in which the flour was deposited to Lawson & Co., which was accordingly done.

The defendants on the same day that the delivery order was given by the plaintiffs to Denis Daly & Sons, namely, the 14th of May, advanced to Denis Daly & Sons the sum of £1,725, and on the next day the further sum of £775 in cash.

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It is stated in the case that the fraudulent memorandum of the sale to the defendants, by which the plaintiffs were induced to give the delivery order for the flour, was brought to them by Arthur Daly after banking hours on the 14th, from which it may be inferred that the £1,725 advanced by the defendants to Denis Daly & Sons on that day, was advanced before the possession of the flour had been given up to the latter by the plaintiffs. Possession of the flour having been transferred to defendants, they, between the 18th of May and the 1st of June, by virtue of the right to sell vested in them by the agreement with Denis Daly & Sons, sold the flour in the Liverpool market for sums amounting in the whole to £2,647 10*s.* 3*d.*, and the flour was delivered to the respective purchasers.

Held: c

Of the £2,500 thus advanced by the defendants to Denis Daly & Sons, £500 was paid by the latter to the plaintiffs, as part of the price received on the sale of the flour. But the plaintiffs have received no further payment, and Denis Daly & Sons have become bankrupts.

We have in this case to discharge the unpleasant duty of deciding on which of two innocent parties the loss, occasioned to one or other of them by the fraud of a third shall fall. In discharging such a duty a court, to use the words of Lord Cairns in Cundy *v.* Lindsay, 3 App. Cas. 463, "can do no more than apply rigorously the settled and well-known rules of the law." Unfortunately, however, some difficulty presents itself in the present case in applying the law. For the case is, so far as we are aware, *sui generis*, the contract out of which the claim of the plaintiffs arises being of an altogether exceptional character. The contract is not one in which goods are deposited upon the ordinary terms incidental to a bailment of pledge, namely, that the thing pledged shall remain in the possession of the pledgee until the engagement of the pledgor, which it was given to insure, has been fulfilled.

Here the pledgors, when they find a purchaser, are to have possession of the thing pledged, in order to sell it, not in the name, or even on behalf of the pledgees, but as their own, subject only to the condition of handing over the proceeds in liquidation of the debt.

It may be doubted whether, under such a contract, any special property, however limited, vested in the pledgees, or whether their right was not limited to the possession and custody of the goods, so as to secure to them the knowledge of any sale which the owners might be able to make, and so to afford them the opportunity of insisting on the price being handed over to them as soon as paid.

Assuming, however, that under the contract with Denis Daly & Sons the plaintiffs acquired, as pledgees, a special property in the flour deposited in their name, it was subject to the right of the pledgors to have the flour given up to them on their finding a purchaser for the purpose of the sale by them as owners, without any intervention on the part of the pledgees. If, having obtained the goods for the purpose of selling them, and having sold them, the pledgors had kept the price instead of handing it over to the pledgees, the latter could not have disputed the title of the buyer, and would have had no remedy except by action against the pledgors for breach of contract.

In compliance with the agreement, the flour was delivered by the plaintiffs to Denis Daly & Sons, the pledgors, with the full intention that they should sell it as their own and make a good title to it to their vendees.

It is true that the possession of the goods was obtained by the fraud of the pledgors, but this appears to us to make no difference in the result. The flour having been given up by the plaintiffs to Denis Daly & Sons, conformably to the contract, to sell as their own, the special property vested in the plaintiffs as pledgees, whatever it may have been, was intentionally surrendered; and the possession having been parted with, the contract of pledge was, at all events for the time being, at an end. The abandonment of the property in, and the surrender of, the thing pledged might, as between the pledgees and pledgors, have been revoked as having been obtained by fraud, so long as the goods remained in the hands of the pledgors. But when, prior to any such revocation, the property in the goods had been transferred by the owners for good consideration to a *bona fide* transferee, the latter acquired, as it appears to us, an indefeasible title. The analogy to a case of sale where the vendor is induced to part with his property by fraud appears to us complete; and the principle laid down by the Court of Common Pleas in White *v.* Garden, 10 C. B. 919, and by the House of Lords in Cundy *v.* Lindsay, 3 App. Cas. 459, and acted upon by this court in Moyce *v.* Newington, 4 Q. B. D. 32, is, we think, applicable to the case before us; and we are therefore of opinion that the defendants acquired a good title to the flour by their contract with Denis Daly & Sons.

Our view of the case being founded on the assumption that the property in the goods became by the act of the pledgees revested in the pledgors, it makes no difference that the goods, having been parted with by the plaintiffs with a view to their being sold, were, instead of being sold, pledged. The property having by the act of the pledgees become revested in the pledgors, the latter were as competent to dispose of the goods by way of pledge as by that of sale.

Nor in this view of the case is it in any way material that the larger portion of the money advanced by the defendants to Denis Daly & Sons was paid (if we are to take the fact to have been so) before the possession of the flour was given up by the plaintiffs. The property in the flour was made over to the defendants, and the possession of it given up to them, by Denis Daly & Sons for good consideration when the full property in it was, as we think, in the latter, and the transfer took place by virtue of a contract whereby the money was to be advanced on the pledge of the goods. That the money was paid down before the goods were delivered, provided the property in the goods was in Denis Daly & Sons when, in fulfilment of the contract, they transferred the property in, and gave possession of, the flour, can make no difference.

But there is a further ground on which we are of opinion that the defendants are entitled to our judgment. We are prepared to hold, as we intimated in Moyce *v.* Newington, 4 Q. B. D. 35, that where one of two innocent parties must suffer from the fraud of a third, the loss should fall on the one who enabled the third party to commit the fraud. It has been so held by the Supreme Court of Judicature of the State of New York in a case of Root *v.* French, 13 Wendell, 570. In Vickers *v.* Hertz, Law Rep. 2 H. L., Sc. 115, Lord Chancellor Hatherley says: "If one person arms another with a symbol of property he should be the sufferer, and not the person who gives credit to the operation and is misled by it." It is on this principle that the legislation with reference to fraudulent sales made by factors or agents intrusted with the possession of goods or of the documents of title to goods has been based. It was on this ground that the Court of Session in Pochin *v.* Robinows, 3d Series, vol. vii. p. 622, and in Vickers *v.* Hertz, independently of the Factors Acts, and proceeding on general principles, decided in favor of an innocent purchaser. And though in Vickers *v.* Hertz in the House of Lords the case was decided in favor of the defendant, as coming under the Factors Acts, Lord Colonsay expressly says that the judgment appealed from was well founded independently of those Acts.

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Now, in the case before us Denis Daly & Sons were allowed by the plaintiffs to appear as the ostensible owners of the flour, and to exercise uncontrolled dominion over it, without the plaintiffs, by intervening themselves in the transaction, as they might have done, securing themselves against any fraudulent conduct on the part of Denis Daly & Sons. It would, therefore, be in the highest degree unjust and inequitable that the defendants, Lawson & Co., who have innocently advanced money

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on the goods in the ordinary course of commercial dealing, should be sufferers through the improvident contract of the plaintiffs with Denis Daly & Sons, or want of proper caution on their part.

We, therefore, on both grounds, give judgment for the defendants.

Judgment for the defendants.[1]

LEASK *v.* SCOTT BROTHERS.

In the Queen's Bench Division, Court of Appeal, May 5, 1877.

[*Reported in* 2 *Queen's Bench Division*, 376.]

Interpleader action to try the right of the plaintiff as against the defendants to 100 bags of nuts.

At the trial before Field, J., at the London Michaelmas sittings, 1876, the following facts appeared in evidence: On the 22d of December, 1875, Geen, Stutchbury, & Co., fruit merchants in London, agreed to purchase of the defendants a shipment of nuts from Naples to London by the "Trinidad," "reimbursement as usual," which was by acceptance at three months on delivery of the shipping documents. On Saturday, the 1st of January, 1876, being prompt day, Geen & Co., being already indebted to the plaintiff, their fruit broker, in between £10,000 and £11,000, Mr. Geen applied to him for a further advance of £2,000. The plaintiff said, "You may have it, but you must first cover up your account." Geen said that he would give him cover, and the plaintiff's cashier at once handed to Geen a check for £2,000. On Tuesday, the 4th of January, the bill of lading, dated the 29th of December, 1875, indorsed by defendants in blank (the nuts being made deliverable to their order), was handed by their agent to Geen & Co., and they at once accepted a draft for the price, £224 16*s.* 2*d* ; and on the next day Geen & Co. handed to the plaintiff the bill of lading and other similar documents to the value of about £5,000, in performance of their promise on the Saturday to give the plaintiff cover. On Saturday, the 8th of January, Geen & Co. stopped payment. The "Trinidad" arrived off Liverpool on the 3d of February, and the defendants sought to stop the nuts *in transitu*, the plaintiff claiming them under the bill of lading. The nuts were landed, warehoused, and sold, the price being held to abide the result of this interpleader action.

In answer to questions by the judge, the jury found that the plaintiff received the bill of lading honestly and fairly; that valuable consideration was given on the understanding of security being given; and that the security given was to secure the £2,000, and also the old account.

The learned judge, after argument, directed judgment to be entered for the defendants, being of opinion that the facts of the case brought it within the principle of Rodger *v.* Comptoir d'Escompte de Paris, Law Rep. 2 P. C. 393, affirmed by the decision of Chartered Bank of India, &c., *v.* Henderson, Law Rep. 5 P. C. 501.

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[1] Affirmed by the Court of Appeal 5 Q B. D. 284.

Watkin Williams, Q. C., moved to enter judgment for the plaintiff.

R. E. Webster (with him *Murphy*, Q. C.), for the defendants.

Cur. adv. vult.

The judgment of the court (Lord Coleridge, C. J., and Bramwell and Brett, L. JJ.), was delivered by

Bramwell, L. J. The defendants have stopped *in transitu* the goods, the subject of this proceeding. They have done so effectually and rightfully, unless the plaintiff has obtained a title to them which cannot be defeated by such stoppage. Whether he has is the question. The facts are few, and as follows: Geen & Co., the consignees of the goods, were indebted to the plaintiff. On Saturday, the 1st of January, they applied to the plaintiff for a further advance, which he agreed to make on being first covered. Geen & Co. promised to give him cover (not naming anything in particular), and the plaintiff advanced them a further sum of £2,000, the plaintiff being content with their promise. On the following Tuesday the bill of lading of the goods in question, consigned by the defendants to Geen & Co., came to the possession of the latter, who, on the following day, Wednesday, deposited it with the plaintiff in fulfilment of their promise to cover him. No question turns on the quantity of property so handed over, nor in any way as to the validity of the transfer; for the jury on this have found entirely in favor of the plaintiff.

This being so, the plaintiff contended that he was a *bona fide* holder of the bill of lading for valuable consideration by transfer from the former lawful holder and proprietor thereof and of the goods mentioned in it. This was not denied by the defendants. Their contention was that, though the plaintiff was such holder effectually as against Geen & Co., and their assignees, if they had become bankrupt, or any one claiming through or against them, except the defendants, yet they, the defendants, had not lost their right to stop *in transitu*. That the right of stoppage *in transitu* is available and effectual against every one, except the assignee of a bill of lading for valuable consideration, and unless that valuable consideration had been got by means of the bill of lading; that, if the consideration were past, it was not such a consideration, and the title gained by it was not such a title as would defeat the equitable right of stoppage *in transitu*. That such right was only defeated where there was a transfer for present consideration. That it was so in such case, because the consignor, or stopper *in transitu*, had by parting with the bill of lading enabled the consignee to get valuable consideration by means of it; and so had indirectly caused the giving of the consideration by the assignee of the bill of lading; but that that was not so where the consideration was past. There the giver of the valuable consideration was not prejudiced by means of the bill of lading, and consequently there was no reason why the equitable right of stoppage *in transitu* should be lost.

Mr. Webster, for the defendants, at first put it that the equitable right of the consignor should prevail against the equitable right of the transferee of the bill of lading. But, on it being pointed out to him that the title of the transferee was legal, he altered his argument to what is above mentioned, viz., that the equitable right of stoppage prevailed against a legal title acquired by receiving the bill of lading for a consideration, no part of which was caused to be given by the bill of lading. The distinction of the two propositions is material.

In support of his argument Mr. Webster cited Rodger *v.* Comptoir d'Escompte de Paris, Law Rep. 2 P. C. 393, before the Judicial Committee of the Privy Council. We think that that case justifies his argument, and is in point. There may be differences in the facts of the two cases, but the *ratio decidendi* was clearly that advanced for the defendants in the present case. We are not bound by its authority, but we need hardly say that we should treat any decision of that tribunal with the greatest respect, and rejoice if we could agree with it. But we cannot. There is not a trace of such distinction between cases of past and present consideration to be found in the books. It is true there is no decision the other way; but wherever the rule is laid down it is laid down without qualification, viz., that a transfer of a bill of lading for valuable consideration to a *bona fide* transferee defeats the right o stoppage *in transitu*. It is true, no doubt, that opinions must be taken *secundum subjectam materiam*, but it is strange that no judge, no counsel, no writer ever guarded himself against appearing to lay down the rule too widely by mentioning this qualification, if he thought it existed. We cannot help saying then that not only is the case a novelty. but it is a novelty opposed to what may be called the silent authority of all the previous judges and writers who have dealt with the subject. More than that, in Vertue *v.* Jewell, 4 Camp. 31, where Lord Ellenborough goes out of his way to say that the plaintiff was not a transferee for valuable consideration so as to defeat the right of stoppage, he puts it, not on the ground that the consideration was past, as was the fact, but on the ground that the transferee had notice of the transferor's insolvency. Further, it is noticeable that this point does not seem to have been mentioned in Rodger *v.* Comptoir d'Escompte de Paris, *supra*, till the reply. The cases cited in the argument at the opening of counsel in that case seem directed to the question of *bona fides*. Still further, with all respect be it said, the reason given in the judgment is not satisfactory. It is said (Law Rep. 2 P. C. 405), "The general rule, so clearly stated and explained by Lord St. Leonards in the case of Mangles *v.* Dixon, 3 H. L. C. 702, is, that the assignee of any security stands in the same position as the assignor as to the equities arising upon it." No doubt. But that rule does not apply here. Lord St. Leonards said that in reference to a case where the title was to a chose in action, an equitable title only, or, dropping such an expression, a right against a person liable on a contract; and he held that the assignee of that right was in the same situation as the assignor. Here the plaintiff's title is, as it was in Rodger *v.* Comptoir d'Escompte de Paris, *supra*, a title to property in ownership, and, to use the old expression, a legal right.

If, besides dealing with the authorities, we look at the reason of the thing, we are led, with deference, to the same conclusion. All the arguments used by Mr. Justice Buller, in Lickbarrow *v.* Mason, 2 T. R. 63, p. 75, apply to such a case as the one before us. Practically such a past consideration as is now under discussion has always a present operation. It stays the hand of the creditor. If the plaintiff had agreed on the day the bill of lading was handed to him to give a week's time, there would have been a present consideration. Is it necessary there should be a formal agreement in lieu of that which, whether it would support legal proceedings, as was contended by the plaintiff, or not, was, no doubt, such an understanding that, if the plaintiff had taken proceedings against Geen & Co. the day after he had received the security, he would have committed a breach of faith? If in this case the plaintiff had bought the goods out and out and been paid part of his debt with the price, the consideration would have sufficed, if the transaction was not colorable. If the plaintiff had said, "I cannot take this bill of lading safely as the consideration would be past, do it with the broker next door and give me his check," that would have been valid. Is it desirable to introduce such niceties into commercial law? Moreover, there really always is a present consideration. It is not necessary to consider whether specific performance would be decreed as to this document which was not specified to the plaintiff; but the case of Alliance Bank *v.* Broom, 2 Dr. & Sm. 289; 34 L. J. (Ch.) 256, shows that a general performance would be decreed; and certainly an action would lie for not covering. Therefore the assignor, for such consideration as this, always gets the benefit of performing his contract, and so saving himself from a cause of action. If Geen & Co. in this particular case, had said that this bill of lading was coming forward, and they would hand it to the plaintiff, then value would have been obtained by means of the bill of lading; so if they had said generally that they had securities coming forward and would deposit them; and what is the difference between a promise with such a statement and a promise without it? In the analogous cases of goods obtained under a fraudulent contract, where the vendor loses his title if there is a transfer for value, there is no authority to show that a past value is not sufficient.

On these grounds we are unable to concur in the opinion of the Judicial Committee in Rodger *v.* Comptoir d'Escompte de Paris, *supra*, or with the argument for the defendants. As to the judgment of Mr. Justice Field, it is enough to say that it proceeded wholly on that case and in deference to it.

We are of opinion that judgment should be reversed, and entered for the plaintiff. *Judgment reversed, and entered for the plaintiff.*[1]

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[1] Munroe *v.* Philadelphia Warehouse Co., 75 Fed. Rep. 545, *acc.* See also Taylor *v.* Blakelock, 32 Ch. D. 560.

SALTUS & SALTUS *v.* EVERETT.

NEW YORK COURT FOR THE CORRECTION OF ERRORS, 1838.

[*Reported in* 20 *Wendell*, 267.]

ERROR from the Supreme Court. Everett brought an action of trover in the Superior Court of Law of the city of New York against Messrs. Saltus, for a quantity of lead. In August, 1825, Bridge & Vose, merchants at New Orleans, shipped 179 pigs of lead on board the brig "Dove," of which William Collins was master, consigned to Messrs. Tufts, Eveleth, & Burrell, of New York, on account and risk of Otis Everett, the plaintiff, to whom they referred for instructions. The "Dove" put into Norfolk, in distress, and part of the lead was sold to pay expenses, and the residue was transferred in December, 1825, by an agent of Captain Collins, to the schooner "Dusty Miller," Captain Johnson, who signed a bill of lading, acknowledging the lead to have been shipped by F. M., agent for William Collins, and promising to deliver the same in New York, to order, on payment of freight. The "Dusty Miller" met with a disaster on her voyage to New York, and on her arrival there, the lead, by the order of Captain Collins, was delivered to the firm of Coffin & Cartwright, who paid the freight, and $72.87, the average contribution charged upon the lead, for the loss occasioned by the disaster to the "Dusty Miller." On the 9th March, 1826, Coffin & Cartwright sold the lead to the Messrs. Saltus, the defendants, for $542.74, and received payment. The freight of the lead from New Orleans to New York amounted to $14.72. Everett brought an action against Coffin & Cartwright to recover the value of the lead, but was non-suited, in failing to prove that before suit brought he offered to pay the freight, average, and charges to which the lead was liable, and which had been advanced by Messrs. Coffin & Cartwright, and this court, on application, refused to set aside the non-suit. See 6 Wendell, 603. In October, 1831, the plaintiff demanded the lead of the Messrs. Saltus, and offered to pay any lawful demands they had on the same; to which they answered, that they would have no further communication on the subject. It was proved that in March, 1826, one of the firm of Tufts, Eveleth, & Burrell demanded of the Messrs. Saltus the lead, or its value, and received for answer, that they had bought the lead, and paid for it, and would not do anything about it. Upon this evidence the plaintiff was again non-suited. Whereupon he sued out a writ of error, removing the record into the Supreme Court, where the judgment of the Superior Court was reversed. See opinion delivered in the Supreme Court, 15 Wendell, 475 *et seq.* The defendants then removed the record into this court, where the cause was argued by

T. T. Payne, for the plaintiffs in error.

T. Sedgwick, Jr., and *S. P. Staples*, for the defendant in error.

SENATOR VERPLANCK.[1] The universal and fundamental principle of our law of personal property is, that no man can be divested of his property without his own consent; and, consequently, that even the honest purchaser under a defective title cannot hold against the true proprietor. That "no one can transfer to another a better title than he has himself," is a maxim, says Chancellor Kent, "alike of the common and the civil law, and a sale, *ex vi termini*, imports nothing more than that the *bona fide* purchaser succeeds to the rights of the vendor." The only exception to this rule in the ancient English jurisprudence was that of sales in markets overt, a custom which has not been introduced among us. "It has been frequently held in this country that the English law of markets overt had not been adopted, and consequently, as a general rule, the title of the true owner cannot be lost without his consent." 2 Kent's Comm. 324, and cases there cited.

I have stated the general and governing law; let us now see what are precisely the exceptions to it.

The first and most remarkable class of these exceptions relates to money, cash, bank bills, checks and notes payable to the bearer or transferable by delivery, and in short, whatever comes under the general notion of currency.

Setting wholly aside this part of the law as to cash, bank notes, and bills to bearer, as founded on the peculiar necessities of currency and trade, and regulated by decisions and usages peculiar to itself, what rules do we find to obtain in other instances of conflict between the rights of original owners and those of fair purchasers? After a careful examination of all the English cases and those of this State that have been cited or referred to, I come to this general conclusion, that the title of property in things movable can pass from the owner only by his own consent and voluntary act, or by operation of law; but that the honest purchaser who buys for a valuable consideration in the course of trade, without notice of any adverse claim, or any circumstances which might lead a prudent man to suspect such adverse claim, will be protected in his title against the original owner in those cases, and *in those only*, where such owner has, by his own direct voluntary act, conferred upon the person from whom the *bona fide* vendee derives title, the apparent right of property as owner, or of disposal as an agent. I find two distinct classes of cases under this head, and no more.

I. The first is, when the owner, with the intention of sale, has in any way parted with the actual property of his goods, with his own consent, though under such circumstances of fraud or error as would make that consent revocable, rescind the sale, and authorize the recovery of the goods as against such vendee. But if the property passes into the hands of honest purchasers, the first owner must bear the loss. Thus, to take an instance from our own reports, where goods were obtained by a sale on credit, under a forged recommendation and guaranty, and then sold to a *bona fide* purchaser in the customary course of trade.

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[1] A portion of the opinion is omitted.

the second buyer was protected in his possession against the defrauded original owner. Mowry *v.* Walsh, 8 Cowen, 243. So, again, where the owner gave possession and the apparent title of property to a purchaser, who gave his worthless note, in fraudulent contemplation of immediate bankruptcy, a fair purchase from the fraudulent vendee was held to be good against the first owner. Root *v.* French, 13 Wendell, 572. See also McCarty *v.* Vick, 12 Johns. R. 348. In all such cases, to protect the new purchaser, there must be a full consent of the owner to the transfer of property, though such consent might be temporary only, obtained by fraud or mistake, and therefore revocable against such unfair first purchaser.

II. The other class of cases in which the owner loses the right of following and reclaiming his property is, where he has, by his own voluntary act or consent, given to another such evidence of the right o selling his goods as, according to the custom of trade, or the common understanding of the world, usually accompanies the authority of disposal; or, to use the language of Lord Ellenborough, when the owner "has given the external *indicia* of the right of disposing of his property." Here it is well settled that, however the possessor of such external *indicia* may abuse the confidence of his principal, a sale to a fair purchaser divests the first title, and the authority to sell so conferred, whether real or apparent, is good against him who gave it.

Thus the consignee, in a bill of lading, is furnished by his consignor with such evidence of right of disposal, according to the custom and law of trade, so that the *bona fide* holder of the bill indorsed by the consignee is entitled to all the rights of property of the consignor in those goods, if bought fairly in the course of business, although the actual consignee, under whose indorsement he holds, has no right to the goods, as against the former owner. If such goods were not paid for, they might be stopped *in transitu* by the owner, unless his consignee has already assigned his bill of lading; but that assignment divests the owner of his right of stoppage against such assignee.

The famous series of decisions in the various courts in the case of Lickbarrow *v.* Mason, 2 T. R. 63, 2 H. Black. R. 11, 5 T. R. 367, which led to the establishment of the doctrine of this qualified negotiability of bills of lading, memorable alike in legal and commercial history, strongly illustrates the whole question before us. There, Buller and his associate judges, trained up at the feet of the great father of English commercial jurisprudence, maintained and established the law as we now hold it, under the influence of Mansfield's genius, upon his reasoning and on his authority, against those of Lord Loughborough and others, the most learned lawyers of their times. All the arguments and admissions of both sides show how deeply the general principle is rooted in the law of England, that (to use Lord Loughborough's words) "mere possession, without a just title, gives no property, and the person to whom such possession is transferred by delivery, must take the hazard of the title of its author." It is only as an express exception to this rule that it was maintained, and finally established, that the custom of merchants, evidenced and sanctioned by legal decisions, and founded on those conveniences of trade, so admirably stated by Buller, had compelled the courts to consider the owner as giving his consignee evidence of the power of disposal, which it was not for him to dispute when the goods had fairly passed into other hands on the faith of that evidence. But there is no case to be found, or any reason or analogy anywhere suggested in the books, which would go to show that the real owner could be concluded by a bill of lading not given by himself, but by some third person, erroneously or fraudulently, as in this present case. The assignment of the bill of lading conveys, not an absolute right to goods, but the right and title merely of the actual consignor, who alone is bound by it.

Again: the owner may lose the right of recovering his goods against purchasers, by exhibiting to the world a third person as having power to sell and dispose of them; and this, not only by giving a direct authority to him, but by conferring an implied authority. Such an authority may be implied by the assent to and ratification of prior similar dealings, so as to hold such person out to those with whom he is in the habit of trading, as authorized to buy or sell. It may be inferred from the nature of the business of the agent, with fit accompanying circumstances. "If a man," says Bayley, J., in Pickering *v.* Buck, 15 East, 44, "puts goods into another's custody, whose common business it is to sell, he confers an implied authority to sell;" and the cause was decided on that ground. But this implied authority must arise from the natural and obvious interpretation of facts, according to the habits and usages of business; and it never applies where the character and business of the person in possession do not warrant the reasonable presumption of his being empowered to sell property of that kind. If, therefore, to use an illustration of Lord Chief Justice Ellenborough, in the case just cited, a person intrusts his watch to a watchmaker to be repaired, the watchmaker is not exhibited to the world as an owner or agent, and credit is not given as such, because he has possession of the watch; the owner, therefore, would not be bound by his sale. When these exceptions cease, the general rule resumes its sway; and the law is therefore clear that an agent, for a particular purpose, and under a limited power, cannot bind his principal if he exceed his power. "Whoever deals with an agent constituted for a special purpose, deals at his peril, when the agent passes the precise limits of his power." 2 Kent's Comm. 621, and the authorities there cited.

Beyond the precise exceptions I have above stated, I think our law has not carried the protection of the fair vendee against the defrauded or unfortunate owner. It protects him when the owner's misplaced confidence has voluntarily given to another the apparent right of property or of sale. But if the owner loses his property, or is robbed of it, or it is sold or pledged without his consent by one who has only a temporary right to its use by hiring, or otherwise, or a qualified possession of it for a specific purpose, as for transportation, or for work to be performed on it, the owner can follow and reclaim it in the hands of any person, however innocent. Among the numerous cases to this effect, I will cite only that of Howe *v.* Parker, 2 T. R. 376, which I select not only on account of the strong and unhesitating manner of the decision, but because it was pronounced by the very judges who, in the case of Lickbarrow *v.* Mason, had carried the protection of a *bona fide* purchaser under a bill of lading far beyond the rigor of the ancient law. There, plate had been pawned by a widow who had only a life interest in it under her husband's will, of which fact the pawnee had no notice. It was not doubted that the lien for the moneys advanced on such pledge was void against the remainder-man, after the widow's death. "*Per curiam:* This point is clearly settled, and the law must remain as it is until the legislature think fit to provide that the possession of such chattels is proof of ownership."

In order to decide in such conflicts between the claims of equally meritorious sufferers by the wrong of a third party, public policy must draw an arbitrary line somewhere, and the greatest merit of such a rule must be its certainty and uniformity.

The rule of our law, as I understand it, is perfectly consistent with the equity between the parties, as far as such equity can apply; and it serves the great interests of commerce, in a State of such extensive foreign and domestic trade as ours, by protecting the property of the stranger, as well as of our own citizens, against the possible frauds of carriers by sea, or by internal transportation, whilst it throws upon the resident merchant the responsibility of taking care with whom he deals, and teaches him a lesson of wholesome caution. It is no mean proof of the wisdom of the rule, that it agrees in substance with the provisions of the Napoleon Code. The code, like our law, holds as a general rule, that the sale of goods by any but the true holder, is a nullity. "La vente de la chose d'autrui est nulle." Code Civil, III. art. 1599. It confines the authority of the special agent or *mandataire* to the strict limits of his power; and in sales, the power must always be special and express. Code Civil, art. 1989. It allows the right of revendication or stoppage *in transitu* against the insolvent or fraudulent purchaser or consignee; but that right ceases, as with us, against the consignee when the goods have been fairly sold according to the bills of lading: "vendues sans fraude sur factures et connaissements." Code de Commerce, Liv. III. art. 576, 577, 578. The Scotch law, as I gather from Bell's Commentaries, lays down a different rule, that "a purchaser, in the course of trade, should be protected in the purchase of goods from any one who has them in lawful possession." This agrees with the doctrine of our Superior Court, and might be a safe enough rule, if generally adopted and understood. But it is not the rule of our own law, which is perhaps quite as wise, as well as certainly founded on a much larger and wider commercial experience.

Let us apply these conclusions to the present case. Collins, the person whose sale it is asserted must divest the original owner of his rights in favor of the *bona fide* purchaser, stands, it is said by the Superior Court, in a double relation of "a master, who is at the same time the consignee of the goods, and who himself filled the character of shipper, and has therefore an undoubted power to sell, and his *bona fide* transfer will be effectual to purchasers against any secret trust for others with which his apparent title might be affected." Had the lead been consigned to Collins from the intermediate port, by the owner or his agent, this would be true. But it is shipped by Myers, of whom neither the owner, nor any one with full power to represent him in this matter, had any knowledge as an agent, and under whose care the vessel and cargo were placed by Collins, so that he appeared only as his representative, and thus he styles himself in the bill of lading. The plaintiff below comes in no wise within the rule I have stated. He has neither given to Collins documentary and mercantile evidence of property in a bill of lading from himself or his own agent with competent power, nor the evidence customary in business, such as to hold him out as an agent authorized to change the title of his property in his goods. The assumed authority of shipping goods in his own name and to his own order, at Norfolk, and the documentary evidence of it in the bill of lading, can have no more effect as to the title of the property than if he had forged such a bill of lading at New Orleans.

Neither does the selection of a ship and its master vest in the master any implied authority to sell the ship, or any part of her cargo. His business is to carry the goods, and no more, with some other clearly defined and very limited powers, to be exercised only in cases of absolute necessity. He stands in the same legal relation to his cargo with the watchmaker, in the case supposed by Lord Ellenborough, who has in his hands a watch to be repaired. He is not exhibited to the world as the owner, or agent for selling; and if he does sell it, the sale is void against the true proprietor. The law of shipping is well known to the commercial world to declare that the master has no authority to sell the cargo, or any part of it, unless under circumstances of pressing necessity abroad; and of that absolute necessity, the burden of proof rests on the purchaser, and the presumption is against it. As Judge Bayley states the law (3 Barn. & Cress. 196): "The captain has no right to act as *agent* for the owner of goods, unless in absolute necessity. The purchaser obtains no property by the act of his professing to sell." And this was held where the master acted in perfect good faith. How much stronger is the case of a probable fraud! Thus again: in Freeman *v.* East India Co., 5 Barn. & Cress. 619, Abbott, Ch. J., says: "A sale of a cargo, or any part of it, by the master, can confer no title, unless there was an absolute necessity;" and the reason of the rule is thus assigned by Judge Best in the same case: "A carrier by sea and by land stands in the same relation to the owner of goods to be carried. Their duty is to carry the goods, and the authority only such as is necessary. The purchaser, knowing that necessity alone can justify the sale, and give him a title to what he buys, will assure himself that there is a real necessity for the sale before he makes the purchase; and caution on his part will prevent what has frequently happened, — the fraudulent sale of ships and cargoes in foreign ports." Such, then, being the well-settled and generally known law, the selection of a master, or any other carrier, by sea or land, does nothing to exhibit such a carrier to the world as having the power of disposing of the goods he carries. The owner does nothing to enable him to commit a fraud on third persons. He gives merely a qualified possession, and if that is turned into an assumed right of ownership, it is a tortious conversion, and will not divest the owner's title.

It is true that the rule will sometimes, as was urged by Chief Justice Jones, "involve purchasers in great perils;" but that peril can scarcely be called "unreasonable," since there is a reason of public policy of at least equal weight to counterbalance this inconvenience. It is the same which is the ground of the absolute prohibition to a master or carrier to sell the goods he transports, except under insurmountable necessity; it is to prevent, in the language of the court in the case just quoted (5 Barn. & Cress. 620), "fraudulent sales of ships and cargoes in foreign ports." Now, the fraudulent consignment or change of the apparent evidence of property for the purpose of selling elsewhere, is but another form of the same evil. I may add that this same rule, however rigid and occasionally hard in its operations, is no small safeguard to the protection of the owner's rights in goods and other property, in active commerce necessarily placed under the temporary control, and in the legal though qualified possession of agents, sailors, carriers, boatmen, servants, and clerks, as well as of those who may have them stored for safe keeping, and their clerks, porters, and servants.

On the other question, as to the right of the defendants below to stand in the place of their vendor, and to be protected to the extent of the charges on the lead for freight, as claimed by Collins, I need say but little. The right of lien in such circumstances (if any right exist here) depends upon actual possession by the factor, or carrier, or his immediate agent. When the goods are sold and delivered to a third person, the lien, as such, expires with the possession. This is the distinction between the present case and the former suit against Coffin & Cartwright, who were immediate agents or bailees of Collins.

The two courts below have agreed in deciding against the validity of the objections to the evidence raised on the trial of the cause, and I have nothing to add to the reasons they assign; to all which I fully assent.

The importance of the principles and rules not only of decision, but of active business involved in this cause, especially in relation to that vast and busy community which I immediately represent in this body, has led me to examine this whole head of law with an interest and at a length wholly disproportioned to the amount of value in controversy. If the views I have been able to present shall in any way, directly or indirectly, tend to settle the law on this head, or make it more clearly and correctly understood, the study I have given the subject will have been well bestowed.

I am of opinion that the judgment of the Supreme Court, reversing that of the Superior Court of New York, be affirmed.

Judgment unanimously affirmed.[1]

BARNARD *v.* CAMPBELL.

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NEW YORK COURT OF APPEALS, DECEMBER 17, 1873, JANUARY 20, JUNE 16, 1874.

[*Reported in* 55 *New York*, 456; 58 *New York*, 73.]

APPEAL from order of the General Term of the Supreme Court in the first judicial department, reversing a judgment in favor of plaintiffs and granting a new trial.

This was an action of replevin to recover possession of 1,370 bags of linseed.

Defendants, who were merchants in New York, had, prior to August 21, 1863, been negotiating with one E. P. Jeffries, of Boston, for the purchase of a quantity of linseed; the negotiations were closed on the twenty-first, by a sale of Jeffries, through his broker in New York, of 1,800 bags. Pursuant to the terms of sale, defendants, on the same day, mailed to Jeffries their notes for the seed purchased, which were received by him and immediately pledged as collateral for a loan. During these negotiations, Jeffries had been negotiating with plaintiffs, at Boston, for the purchase of linseed, and on the twenty-first contracted for 1,800 bags. It was disputed upon the trial whether the sale was to be for cash or upon a ten days' credit. On the twenty-fourth of August, plaintiffs, induced by fraudulent representations upon the part of Jeffries, delivered to him an order for 1,370 bags, which were delivered to him and shipped to defendants. A bill of lading was taken deliverable to them, which was forwarded by mail on the twenty-fifth. Jeffries failed on the twenty-seventh. On the arrival of the seed in New York, it was demanded by plaintiffs.

Further facts appear in the opinion.

James C. Carter, for the appellants.

Edwards Pierrepont, for the respondents.

ALLEN, J. The only question involved in the action is, whether the plaintiffs and original owners or the defendants, the purchasers from Jeffries, the fraudulent vendee of the plaintiffs, have the better title to the merchandise in controversy. That, as against Jeffries, the right of the plaintiffs to rescind the sale and reclaim the goods, by reason of the fraud of the former, is perfect, is conceded, and was so held upon the trial. Such right continues as against any one acquiring title under

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[1] Chancellor WALWORTH delivered a brief opinion in favor of affirming the judgment of the Supreme Court.

Jeffries, unless under well-recognized principles of law, and, under the circumstances of this case, Jeffries could transfer a better title than he had, or the plaintiffs, by their acts, are estopped from asserting title as against a purchaser from him.

But two questions of fact were submitted to the jury: 1. Whether the sale to Jeffries was for cash or upon credit; and, 2. If for cash, whether payment was waived and the goods delivered so as, but for the fraud, to vest the property in Jeffries.

The jury found, either that the sale was upon credit, or that the payment of the purchase-price, as a condition precedent to the delivery of the property to and the vesting of the title in Jeffries was waived, and that the delivery to him was absolute and unconditional: and the defendants had a verdict, under the instructions of the judge, that the equitable rule applied, that when one of two innocent parties must suffer loss by reason of the fraud or deceit of another, the loss shall fall upon him by whose act or omission the wrong-doer has been enabled to commit the fraud; and that the plaintiffs were in the position of a party who lets another have property unconditionally, and thereby enables him to sell the same and receive the purchase-price from a third person; and that in such case the purchaser takes the title. In other words, the plaintiffs were held to be estopped from claiming the goods from the defendants in case the jury found that there had been an unconditional delivery by the plaintiffs to Jeffries, notwithstanding, as the judge at the circuit expressly declared, and as the evidence showed, the defendants purchased the goods from a broker of Jeffries in New York on the twenty-first of August, and paid for them the same day by transmitting their notes to Jeffries, at Boston, who at once negotiated them; and Jeffries obtained neither the property nor any order for its delivery, or documentary evidence of title or of his purchase, until the twenty-fourth of the same month, three days after the transaction was consummated as between Jeffries and the defendants. That is, it was held at the circuit that the subsequently acquired possession of Jeffries operated by relation to create an estoppel as of the twenty-first of August, in favor of the defendants and against the plaintiffs; and the jury were in terms instructed that the defendants were purchasers in good faith, for value, and acquired a title paramount to that of the plaintiffs, and were entitled to a verdict; and they had a verdict and judgment, upon this view of their rights.

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That the defendants were purchasers in good faith, that is, without notice or knowledge of the fraud of Jeffries, or of the defects in his title, for a full consideration actually paid to Jeffries, is not disputed. Both plaintiffs and defendants are alike innocent of any dishonest or fraudulent intent, and one or the other must suffer loss by the frauds of one with whom they dealt in good faith, for legitimate purposes, and with honest intention. Both were alike the victims of the same fraudulent actor, and if one rather than the other of the parties has done any act enabling the fraud to be committed, and without which it could not have been perpetrated upon the other in the exercise of ordinary care and discretion, the loss should, within the rule before referred to, fall on that one of the parties aiding and abetting the fraud, or enabling it to be committed. But good faith, and a parting of value by the one, will not alone determine who should have the loss, or fix the ownership of the property fraudulently purchased from the one and sold to the other. The general rule is that a purchaser of property takes only such title as his seller has, and is authorized to transfer; that he acquires precisely the interest which the seller owns, and no other or greater. *Nemo plus juris ad alium transferre potest quam ipse habet.* Broom's Leg. Max., 452. The general rule of law is undoubted that no one can transfer a better title than he himself possesses. *Nemo dat quod non habet.* Per Willes, J., Whistler *v.* Forster, 14 C. B. [N. S.] 248. To this rule there are, however, some exceptions, and unless the defendants are within the exceptions they must abide by the title of Jeffries.

One of the recognized exceptions applies to negotiable instruments only, and depends for its existence upon the law-merchant and the reasons of public policy upon which that branch of the law rests. To make this exception available, the negotiable paper must be actually transferred by indorsement in the usual form and for value. Whistler *v.* Forster, *supra;* Muller *v.* Pondir, 55 N. Y. 325; Story on Prom. Notes, § 120 [note 1]; Calder *v.* Billington, 15 Maine, 398; Southard *v.* Porter, 43 N. H. 379. Another exception is in the case of a transfer by indorsement and delivery of a bill of lading, which is the symbol of the property itself, to a *bona fide* purchaser for value, by a consignee to whom the consignor and original owner of the goods has indorsed and delivered it. This exception is founded on the nature of the instrument, and the necessities of commerce. The bill of lading, for the convenience of trade, has been allowed to have effect at variance with the general rule of law. But this operation of a bill of lading is confined to a case where the person who transfers the right is himself in possession of the bill of lading so as to be in a situation to transfer the instrument itself, the symbol of the property transferred. Jenkyns *v.* Usborne, 7 M. & G. 678; Akerman *v.* Humphery, 1 C. & P. 53.

Bills of lading differ essentially from bills of exchange and other commercial negotiable instruments; and, even possession of a bill of lading, without the authority of the owner and vendor of the goods, or when obtained by fraud, will not authorize a transfer so as to defeat the title of the original owner, or affect his right to rescind the sale and stop the goods in transit. While possession of a bill of lading, or other document of like nature may be evidence of title, and in some circumstances and for some purposes equivalent to actual possession of the goods, it does not constitute title, nor of itself affect the operation of the general rule that property in chattels cannot be transferred except by one having the title or an authority from the true owner. Gurney *v* Behrend, 3 Ellis & Black, 622; Dows *v.* Perrin, 16 N. Y. 325; see also

Saltus *v.* Everett, 20 Wend. 267; Brown *v.* Peabody, 3 Kern. 121. Jeffries had no bill of lading from the plaintiffs, the vendors of the goods, or any document of like character transferable in the usual course of business, and the transfer and delivery of which to a purchaser for value would have operated as a symbolical delivery of the goods, and been the equivalent of an actual delivery, so as to terminate the right of the plaintiffs to rescind the sale and reclaim the goods.

Another exception to the general rule exists in the case of a sale in market overt; but as we have no markets overt, and there are no sales, public or private, known to our law, which relieve the buyer of merchandise from the rule of *caveat emptor*, as applied to the title, this exception need not be further considered.

The defendants can only resist the claim of the plaintiffs to the merchandise by establishing an equitable estoppel, founded upon the acts of the plaintiffs, and in the application of the rule applied by the judge at the circuit, by which, as between two persons equally innocent, a loss resulting from the fraudulent acts of another shall rest upon him by whose act or omission the fraud has been made possible. This rule, general in its terms, only operates to protect those who, in dealing with others, exercise ordinary caution and prudence, and who deal in the ordinary way and in the usual course of business and upon the ordinary evidences of right and authority in those with whom they deal, and as against those who have voluntarily conferred upon others the usual evidences or *indicia* of ownership of property, or an apparent authority to deal with and dispose of it. In such case, for obvious reasons, the law raises an equitable estoppel, and, as against the real owner, declares that the apparent title and authority which exists by his act or omission shall *quoad* persons acting and parting with value upon the faith of it, stand for and be regarded as the real title and authority. It is not every parting with the possession of chattels or the documentary evidence of title that will enable the possessor to make a good title to one who may purchase from him. So far as such a parting with the possession is necessary in the business of life, or authorized by the custom of trade, the owner of the goods will not be affected by a sale by the one having the custody and manual possession. Dyer *v.* Pearson, 3 B. & C. 38; Newsom *v.* Thornton, 6 East, 17; Dayton *v.* Kynne, 3 B. & A. 320; Ballard *v.* Burgett, 40 N. Y. 314. But the owner must go farther, and do some act of a nature to mislead third persons as to the true position of the title. Pickering *v.* Busk, 15 East. 38.

Two things must concur to create an estoppel by which an owner may be deprived of his property, by the act of a third person, without his assent, under the rule now considered. 1. The owner must clothe the person assuming to dispose of the property with the apparent title to, or authority to dispose of it; and, 2. The person alleging the estoppel must have acted and parted with value upon the faith of such apparent ownership or authority, so that he will be the loser if the appearances to which he trusted are not real. In this respect it does not differ from other estoppels *in pais*. Weaver *v.* Barden, 49 N. Y. 286; McGold-

rick *v.* Willets, 52 *id.* 612; City Bank *v.* R. W. & O. R. Co., 44 *id.* 136; Saltus *v.* Everett, 20 Wend. 267; Wooster *v.* Sherwood, 25 N. Y. 278; Brower *v.* Peabody, 3 Kern. 121.

In the case before us every element of an estoppel is wanting, and no case was made for the application of the rule by which, under some circumstances, one, rather than the other of two innocent persons, is made to bear the loss occasioned by the fraud of a third person.

The defendants consummated their purchase from Jeffries, acting through his broker in New York, and paid for the merchandise by remitting, at his request, directly to Jeffries on the twenty-first of August, at which time Jeffries had neither the possession nor right of possession of the property, nor any documentary evidence of title or any *indicia* of ownership, or of dominion over the property of any kind. The plaintiffs had done nothing to induce the defendants to put faith in or give credit to the claim of Jeffries of the right, to sell the property. The defendants then parted with the consideration for the purchase of the seed, not upon the apparent ownership of Jeffries, but upon his assertion of right of which the plaintiffs had no knowledge, and for which they are not responsible. Neither did the defendants at any time do or forbear to do any act in reliance upon the apparent ownership of the property by Jeffries, or induced by any act or declaration of the plaintiffs. In Knights *v.* Wiffen, L. R. 5 Q. B. 660, the plaintiff was induced to rest satisfied under the belief that he had acquired title to the property purchased, and so to alter his position, by abstaining from proceedings to recover back the money which he had paid to his vendor, by the declaration of the defendant that it was all right, and his promise that when the forwarding note should be received he would put the barley on the line. The defendants here at no time had any declaration or statement of the plaintiffs upon which to rely, and were not led to act or forbear to act by any documentary evidence of title in Jeffries emanating from them. There is a manifest equity in holding the owner of property estopped from asserting title as against one who, for value actually paid, has purchased it from one having, by the voluntary act or negligence of the owner, the apparent title with right of disposal, but with this limitation there is no hardship in holding to the rule that the right of property in chattels cannot be transferred unless on the ground of authority or title. Public policy requires that purchasers of property should be vigilant and cautious, at least to the extent of seeing that their vendors have some and the usual evidence of title, and if they are content to rest upon their declarations they may not impose the loss, which is the result of their own incautiousness or credulity, on another. The payment for or parting with value for the goods by the purchaser from the fraudulent vendee lays the foundation of the estoppel, for, if he has parted with nothing, he can lose nothing by the retaking of the goods by the original owner, and that payment must be occasioned by the acts or omissions of such owner. It is the payment that creates the estoppel, and if that is not made in reliance on the acts of the owner, the latter is not and cannot, in the nature of things, be estopped.

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The order granting a new trial must be affirmed, and judgment absolute for the plaintiffs.

All concur. *Order affirmed, and judgment accordingly.*

A motion for reargument was made and was argued by

James C. Carter, for the motion.

Edwards Pierrepont, opposed.

ALLEN, J. The question considered by this court, and discussed in the opinion delivered on giving judgment upon this appeal was that distinctly presented by the exceptions to the ruling and decisions of the judge upon the trial, and as that was decisive and led to an affirmance of the order granting a new trial and a final judgment for the plaintiffs, it was not deemed necessary, in assigning the reasons for the judgment, to canvass particularly the argument, or review in detail the authorities cited by counsel upon a somewhat different view of the case. The entire brief, and all the authorities cited, were, nevertheless, carefully examined and considered; and, had the court adopted the views of the learned counsel for the appellants, it is possible a way might have been found to sustain the defendants' claim to the property, notwithstanding the pointed exceptions to propositions in the instructions to the jury, which were deemed erroneous. The case has been again carefully examined, and upon the theory of the counsel for the appellants, and with the aid of his very able brief, submitted upon the present motion, and the court sees no reason to interfere with the judgment already given. It is proper to say that the unusual delay in passing upon the present application has not been because of any intrinsic difficulties in the question presented, or any serious doubt as to the correctness of the former decision.

Isolated expressions may be found in elementary treatises, as well as in judicial opinions, which give color to the claim of the defendants, to hold the property in dispute as against the plaintiffs, but these were not intended to, and do not, give the rule by which this and like cases are controlled. They are all proper, in the connection in which they are found and for the purposes for which they were used, and ought not to receive any other interpretation than such as was designed by the authors. It must be conceded that upon the delivery of the goods to Jeffries by the plaintiffs, under the circumstances, the property passed to Jeffries, and the fact that the delivery was induced by fraud did not render the contract void. It was merely voidable at the instance of the plaintiffs, who might elect to disaffirm the contract and reclaim the property. That is, the contract of sale was defeasible at the election of the plaintiffs, the vendors, if the election was seasonably made, and the goods reclaimed in proper time, after the discovery of the fraud. The plaintiffs could lose the right by delay as against the wrong-doer, if, in consequence of such delay, his position should be changed, and they would have lost it absolutely if during the interval between the delivery of the goods, the vesting of this defeasible title in the purchaser, Jeffries, and the disaffirmance of the sale by the plaintiffs, the goods had been sold to an innocent third party for a valuable consideration. The superior equity of a purchaser of property from one who has acquired a title defeasible at the election of the former owner and vendor, by reason of fraud, to that of such owner seeking to reclaim his property, is based upon the fact that acting upon the evidence of title which the owner has permitted the wrong-doer to assume and possess, he has been induced to part with value, and will be the loser because of the credit given to the apparent ownership if he is compelled to surrender the property. The mere possession by the party claiming to hold will not sustain his claim, but the circumstances under, and consideration upon which he has acquired the possession are also material. Were it otherwise, an assignee for the benefit of creditors, or one who should take as collateral security for the payment of a precedent debt, would hold as against the original owner, which is not claimed and is contrary to the whole current of authority. Several things must concur to bar the claim of the defrauded vendor. 1. He must have parted with possession of his property with intent to pass the title to the wrong-doer, thus giving him the apparent right of disposal. If property is taken feloniously or without the consent of the owner, the taker can make no title to it, even to an innocent purchaser for value. 2. A third party must have acquired title from the wrong-doer without notice of the defects in his title or knowledge of circumstances to put him to an inquiry as to the source of his title. And, 3. Such third party must have parted with value upon the faith of the apparent title of the wrong-doer, and his right to dispose of the property. If any of these elements are wanting, the vendor seasonably pursuing his legal right may have his property. That this formula very closely resembles that by which an estoppel *in pais* is defined and limited is true, and this must necessarily be so, so long as the rights based upon each have the same equitable foundation. The defendants parted with no value, incurred no liability, and in no respect changed their situation in the interval between the delivery of the merchandise by the plaintiffs to Jeffries, and their disaffirmance of the contract, and reclaiming the goods. In other words, they did nothing in consequence of such delivery to Jeffries or based upon his title and possession, and are in precisely the same situation as if the goods had never left the possession of the plaintiffs. They parted with their notes and incurred obligations upon the faith of the promise and agreement of Jeffries and upon his credit alone.

It is possible that the claim of the defendants to hold as *bona fide* purchasers for value is sustained by Fenby *v.* Pritchard, 2 Sandf. 151, but this case is so at war with principles recognized as well settled by this court in analogous cases, that it cannot be regarded as well decided. The cases cited from Maine and Illinois (Lee *v.* Kimball, 45 Me. 172; Butters *v.* Haughwout, 42 Ill. 18[1]), treat the case as analogous to a transfer of negotiable paper, and hold that a precedent debt is a valuable consideration for the transfer, and gives the transferee a good title as against the former owner. This is in direct conflict with the uniform decisions in this State, from Bay *v.* Coddington, 5 J. Ch. 54; affirmed, 20 J. R. 637, to Weaver *v.* Barden, 49 N. Y. 286; affirmed, Turner *v.* Treadway, 53 *id.* 650. One other case from Maine cited by the counsel for the appellants (Titcomb *v.* Wood, 38 Me. 561), recognizes the necessity of a valuable consideration, as that term is understood and used by the courts of this State, as necessary to give the purchaser of property from a fraudulent vendor a superior equity and title to that of the former owner, and find such a consideration in the transfer of property before then stolen from the defendant. The court say: "Here the defendant being the owner of stolen property, with his right and title unimpaired by the felony, transferred it to McClure for the property in question, in part payment, at least. This constituted a valuable consideration for his purchase, given at the time. Thus, it appears that he was a purchaser of the gold watch, *bona fide*, for a valuable consideration, and without notice of the fraud by which his vendor acquired it. This gives him a superior equity and a better right, and enables him to hold the property against the defrauded vendor." Hutton *v.* Cruttwell, 1 El. & Bl. 15, and Mercer *v.* Peterson, Law Rep. 2 Ex. 304, relied upon in support of this application, presented questions under the English Bankrupt Acts, and merely decide that a transfer of effects, by the bankrupt, in performance of a prior executory agreement, for which a full consideration had been paid at the time of the agreement, was not within the condemnation of the act or affected by the proceedings in bankruptcy. They do not bear upon the question before us. In Clough *v.* L. & N. W. R. Co., L. R. 7 Exch. 26, the question was whether the claim to disaffirm the sale of the goods was seasonably made by the defrauded vendor. The vendor had first sought to stop the goods *in transitu,* which was an act in affirmance of the sale; but the transit was ended before notice reached the carrier. There was no act avoiding the contract on the ground of fraud done by the vendor, until the plea in the action by Clough, who was found by the jury to be cognizant of, and a party to, the fraud in the purchase. No question of consideration or the validity of any sale of the goods by the fraudulent purchaser was in the case, or considered by the court. Disbrow *v.* McDonald, 5 Bos. 130; s. c., *sub nom.* Winne *v.* McDonald, 39 N. Y. 233, was clearly within the rule upon the interpretation given to the transaction by the courts. It was said by the Superior Court that Perry & Co., the purchasers of the wheat, had the full possession of it in the precise manner that the contract between them and the plaintiffs contemplated, and that the purchase and possession of Perry were such as to enable him to confer upon a *bona fide* purchaser, a pledgee for value, a title valid as against the plaintiffs; and that the advance was made by the defendants after the delivery to Perry & Co. of the documentary evidence of title, and the wheat pledged as security at the time of the advance. The evidence upon the record in this court, it would seem, left the precise time when some of the occurrences took place in doubt, but that the specific wheat was pledged, at the time of the advance, was established, although possibly the muniments of title were not then delivered. The title and possession had vested in Perry & Co. at the time of the pledge; and that fact clearly distinguished that from the present case.

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[1] This decision was followed in Kranert *v.* Simon, 65 Ill. 344.

Judge Bosworth, in Caldwell *v.* Bartlett, 3 Duer, 341, and Keyser *v.* Harbeck, *id.* 372, recognizes the doctrine that the advance must be made or consideration parted with upon the faith of the title of one in actual possession of the property, or the written evidence of title, to give an indefeasible title as against the true owner. All the authorities are direct and to the effect that no one but a *bona fide* purchaser, or pledgee for value — that is, one who gives value for or makes advances upon goods obtained from the owner by fraud or fraudulent representation — and that he who has paid value, or made advances, or incurred responsibilities upon the credit of them, can alone claim to hold them as against such owner. Root *v.* French, 13 Wend. 573; Mowrey *v.* Walsh, 8 Cow. 238; Hoffman *v.* Noble, 6 Met. 68. There is no good reason or equity in placing the burden of a fraudulent sale upon a *bona fide* vendor rather than upon a *bona fide* purchaser from the fraudulent vendee, unless the purchaser has parted with his money, or some value, upon the credit of possession or some evidence of title in the vendee, received from the original owner, and by means of which he has induced the purchaser to treat with him as owner.

The motion for a reargument must be denied.

All concur except JOHNSON, J., not sitting. *Motion denied.*

PARKER *v.* BAXTER.

NEW YORK COURT OF APPEALS, MAY 21, 1881, NOVEMBER 22, 1881.

[*Reported in* 86 *New York*, 586.]

THIS action was brought by plaintiffs, who composed the firm of Parker & Howland, against the members of the firm of Archibald Baxter & Co., and the members of the firm of Brown Brothers & Co., to determine who was entitled to the proceeds of a quantity of corn in the hands of Brown Brothers & Co. The corn in question was sold and delivered by plaintiffs to Baxter & Co.; plaintiffs claimed to be entitled to retake it, upon the ground that the delivery was obtained by fraud, and that such delivery was conditional. Brown Brothers & Co. claimed as *bona fide* pledgees of the corn, they alleging that they purchased a bill of exchange drawn by Baxter & Co., for which the corn was security, in good faith and in reliance upon the bills of lading of the corn, and upon an agreement between Baxter & Co. and the Bank of Liverpool, the drawee of the bill, by which the drawers were authorized to draw against shipments of grain, the bills of lading whereof to be sent direct to the bank by the drawers, with the letter of advice of the drawing of the bill. The agreement being indicated on the face of the bills by the words "as advised." By agreement between plaintiff's firm and Brown Brothers & Co., the corn was sold and the proceeds were held by the latter, subject to the decision of this action, which was commenced in pursuance of said agreement.

M. W. Divine, for appellants.

Clarkson N. Potter, for respondents.

RAPALLO, J. Upon the question whether the delivery of the corn to A. Baxter & Co. was obtained by fraud, or with the design not to pay for it, the testimony was conflicting, and the finding of the referee is conclusive on this appeal.

The remaining questions are, first, whether the uncontroverted testimony, or the specific facts found, so clearly establish a conditional delivery, that the referee's conclusion that, by the delivery of the ship's receipts for the corn, the plaintiffs waived the condition in the terms of sale, and the title to the corn passed absolutely to Baxter & Co., was erroneous; and secondly, whether the finding that the defendants, Brown Brothers & Co., purchased the bill of exchange for which the corn was security, in good faith, for full value and in reliance upon the arrangement with the Bank of Liverpool and upon the security of the bills of lading of the corn, was so totally unsupported by evidence as to constitute legal error.

A determination of either of these questions adversely to the appellants leads to an affirmance of the judgment; for, even if the delivery was conditional, so that the title did not pass as between the plaintiffs and Baxter & Co., they could, nevertheless, give a good title to a *bona fide* purchaser or pledgee. Smith *v.* Lynes, 5 N. Y. 41; Comer *v.* Cunningham, 77 *id.* 391, 396. And it is equally plain that if the delivery was absolute and the title passed to Baxter & Co., the plaintiffs parted with all right to reclaim the goods or their proceeds, and could only look to Baxter & Co. for the price.

[The court, after an examination of the facts, held that the referee's conclusion that the condition was waived might be supported, and added:]

This view is sufficient to dispose of the case without deciding the question whether Brown Brothers & Co. stand in the position of *bona fide* pledgees of the corn. The principal points made by the appellants on that branch of the case are that Brown Brothers & Co. did not buy the bill of exchange drawn by Baxter & Co. upon the Bank of Liverpool, for which the bill of lading of the corn was pledged as security, upon the faith of that bill of lading, or of the ship's receipts which had been delivered by the plaintiffs to Baxter & Co., none of those documents having been exhibited to Brown Brothers & Co., and they not having even been informed what particular merchandise was pledged to the bank for the bill. But the case shows that the form of the bill, in connection with the established course of dealing between Baxter & Company and Brown Brothers & Company, plainly indicated that the bill was drawn against a shipment of merchandise, and constituted a representation to that effect, and the referee finds that Brown Brothers & Company purchased the bill in reliance upon such shipment. If no shipment had been, in fact, made, and the property, or the legal evidences of title thereto, had not, at the time of the purchase of the bill by Brown Brothers & Co., been obtained from the plaintiff, the case would have been within Barnard *v.* Campbell (55 N. Y. 456, and 58 *id.* 73), and a subsequent conditional delivery of the property to Baxter & Co. would not have availed the holders of the bill. As is said in Barnard *v.* Campbell (55 N. Y. 464), the purchasers of the bill would, under the circumstances, have parted with the consideration upon the assertion of a right by Baxter & Co., for which the plaintiffs were in no way responsible. But the distinction between that case and the present is, that here, at the time Baxter & Co. represented that they had shipped the property, they had in fact shipped it, and the plaintiffs had clothed them with the *indicia* of title, and although they did not actually exhibit these *indicia* to Brown Brothers & Co., yet they represented to them in substance that they had the property and had shipped it, and the plaintiffs had enabled them to make that representation truly. It cannot, therefore, be said that Brown Brothers & Co. trusted to an assertion of title for which the plaintiffs were in no way responsible. If the property had not been delivered to Baxter & Co., they could not, without making a false representation, have sold exchange against it, and it cannot be assumed that they would have done so. There is strong ground for sustaining the claim of Brown Brothers & Co., as *bona fide* pledgees, but the disposition made of the first branch of the case renders it unnecessary to pass finally upon this question.

The judgment should be affirmed, with costs.

All concur. *Judgment affirmed.*[1]

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[1] Taking chattels in payment of a preëxisting debt is not generally held in this country a purchase for value. Commercial Bank *v.* Pirie, 82 Fed. Rep. 799 (C. C. A.); Henderson *v.* Gibbs, 39 Kan. 679; Hurd *v.* Bickford, 85 Me. 217; Schloss *v.* Feltus, 103 Mich. 525; Case Works *v.* Ross, 74 Mo. App. 437; Sleeper *v.* Davis, 64 N. H. 59; Eaton *v.* Davidson, 46 Ohio St. 355; Belleville Works *v.* Samuelson, 16 Utah, 234; Woonsocket Rubber Co. *v.* Loewenberg, 17 Wash. 29. But see *contra*, Butters *v.* Haughwout, 42 Ill. 18; Horton *v.* Williams, 21 Minn. 187; Shufeldt *v.* Pease, 16 Wis. 659.

"Whatever may be the law in the case of a transfer of chattels in payment of a preexisting debt, when the debt is thereby discharged, we think that by the weight of authority a pledging of chattels as security for a preëxisting debt, when there is no present consideration whatever for the pledge, does not constitute the pledgee a holder for value." Goodwin *v.* Mass. Loan & Trust Co., 152 Mass. 189, 199. See further to the same effect as to pledges and mortgages, Reid *v.* Bird, 15 Col. App. 116; Adam *v.* Meldrum, 157 Ind. 678; Cox Shoe Co. *v.* Adams, 105 Ia. 402; Phelps *v.* Samson, 113 Ia. 145; Edson *v.* Hudson, 83 Mich. 450; Kemper *v.* Kidder Bank, 81 Mo. App. 280; Phoenix Co. *v.* McEvony, 47 Neb. 228; Tate *v.* Security Trust Co., 63 N. J. Eq. 559; Button *v.* Rathbone, 126 N. Y. 187, 192. But see *contra*, Chapman *v* Hughes, 134 Cal. 641, 658; Knox *v.* McFarran, 4 Col. 586, 596; Kranert *v.* Simon, 65 Ill. 344.

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VAN DUZOR *v.* G. H. ALLEN.

ILLINOIS SUPREME COURT, SEPTEMBER TERM, 1878.

[*Reported in* 90 *Illinois*, 499.]

MR. JUSTICE WALKER delivered the opinion of the Court: —

It appears that one Gaston purchased of Van Duzor a threshing-machine, but they seem to disagree as to the terms of purchase. Van Duzor claims Gaston was to give notes, with certain persons agreed upon as sureties. Gastom claims he was to give his notes and a chattel mortgage on the machine. Neither notes nor security of any kind was given. Van Duzor gave Gaston an order to get the machine, which was then at Gilman. He went for and got it and brought it to Clifton, where they resided, and left it over night in the street in front of Van Duzor's office, and took it away next morning to use in threshing grain. Gaston continued to so use it from about the 7th of September until the middle of November, 1875. Van Duzor seems to have known he was so using the machine, having seen him threshing for Hethinger, and several times inquired how the machine worked.

It also appears that one Campbell and one Kinson worked for Gaston whilst engaged in threshing. Campbell seems to have furnished four horses to work on the machine during all the time it was run, for which or for his labor Gaston paid him nothing, nor did he pay Kinson anything, and on the 22d day of November, 1875, he confessed a judgment in favor of Campbell for $184, for his labor and the use of horses, and on the same day he confessed a judgment before the same justice of the peace, in favor of Kinson for $57 for his labor, and they both swore out executions and placed them in the hands of a constable, who levied them on the machine, on the 23d of the month, and Van Duzor brought an action of replevin to recover the thresher, and on the 29th, it was, by virtue of the writ of replevin, taken by the sheriff from the constable.

Among other pleas, the defendant justified under these executions, and claimed the right to hold the property under the levies thereunder. A trial was had, resulting in favor of defendant, and that the property was subject to levy under the executions. A motion for a new trial was overruled and judgment entered on the verdict, and plaintiff appeals and asks a reversal.

It clearly appears, from the evidence, that as between appellant and Gaston, the trade was not so far executed as to pass the title to the property to the latter. As between them, appellant could, no doubt, have maintained replevin for its recovery. But the question is presented, whether or not there was such a sale and delivery as to render the property liable to levy and sale on execution against Gaston; — whether it was not such a sale and delivery as passed the title to the purchaser as to creditors or purchasers without notice.

In the case of Brundage *v.* Camp, 21 Ill. 330, there was a full and careful review of the authorities, both English and American, and the rule announced, that where a party sells goods to another and delivers them to the purchaser, although it is agreed the purchaser shall give a note with security at a future day, a sale by the purchaser to another without notice will pass the title to the latter, and he will hold the goods as against the first vendor. It was there said, as the conclusion reached after the review of authorities, that the first vendor having trusted his vendee by making a sale and delivery of the mules to him, and having put it in his power to defraud others by a sale of them, an innocent purchaser of the property for a valuable consideration, without notice, ought to be protected, and the cases of Morris *v.* Grover, 2 Scam. 528; Jennings *v.* Gage, 13 Ill. 610; Murch *v.* Wright, 46 *id.* 487; McCormick *v.* Hadden, 37 *id.* 370; and Michigan Central Railroad Company *v.* Phillips, 60 *id.* 190, and other cases in this court, all recognized the same doctrine.

A *bona fide* creditor, who, under a judgment and execution, acquires a lien on property thus situated, occupies the same position in all respects as does a *bona fide* purchaser. Where the apparent owner of property thus acquired has the *indicia* of ownership and may sell and pass a good title to a purchaser, without notice, a *bona fide* creditor may seize the property on execution and sell it thereunder and pass the title, not only against the apparent, but also the real owner. The creditor and purchaser stand on the same footing, and each will be equally protected.[1]

The question then remains, whether, on the sale of this machine, appellant delivered possession or has done acts from which his consent for Gaston to take possession, under the contract, can be fairly inferred. A formal delivery need not be proved. It was unnecessary that appellant should go with Gaston to the property and formally say he delivered possession, but his consent that he should take it into his possession would be all that is required. Here, after the terms of the sale, whatever they were, had been agreed upon, appellant gave a written order on the person in Gilman who had the machine, to deliver it to Gaston, and under that order Gaston received it into possession, and removed it to and placed it in the street in front of appellant's office, in Grafton. Here was an actual delivery of the property into the possession of Gaston after the terms of sale were agreed upon, and the purchaser the next morning took the property and commenced using, and continued to use it for about two and a half months as his own.

When the purchaser left the machine in the street in front of appellant's office, there is no evidence that it was delivered to him, or that he was then aware of the fact, or that he or Gaston intended it as a delivery to appellant. It then appears he delivered the property to Gaston, under the sale, and it was never redelivered to appellant. The evidence shows that he knew that Gaston was threshing grain with it, and that he received a payment on it. He took no steps to recover the machine. He seems not even to have demanded its return. We regard the evidence as abundantly sufficient to warrant the jury in finding that there was a sale and delivery, and we have seen that the agreement or understanding that Gaston was to give notes and security could not affect innocent purchasers or *bona fide* creditors.

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[1] An attaching creditor is generally held to acquire no greater rights in attached property than the debtor himself had. Thompson *v.* Rose, 16 Conn. 71; Oswego Starch Factory *v.* Lendrum, 57 Ia. 573; Jordan *v.* Parker, 56 Me. 557; Tarr *v.* Smith, 68 Me. 97; Atwood *v.* Dearborn, 1 Allen, 483; Thaxter *v.* Foster, 153 Mass. 151; Bradley *v.* Obear, 10 N. H. 477; Fitzsimmons *v.* Joslin, 21 Vt. 129.

Here, these creditors seem to have held just debts against Gaston, and they obtained judgments therefor, and obtained executions and had them levied upon the property whilst he was in possession, and they both swore they had no notice of the terms of his purchase, or that he was not the owner, and the jury seem to have believed them, and it was their province to pass upon and give such weight to the evidence as they believed it deserved. *Judgment affirmed.*[1]

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F. B. BODENHAMMER *v.* WILLIAM NEWSOM.

NORTH CAROLINA SUPREME COURT, DECEMBER TERM, 1857.

[*Reported in* 5 *Jones* (*Law*), 107.]

ACTION of trover tried before Manly, J., at the last fall term of Forsyth Superior Court.

The plaintiff declared for the conversion of a horse.

A witness, by the name of Reich, stated that the horse in controversy had belonged to him, and being indebted to one Ledford in the sum of $100, with the plaintiff as surety, he agreed to sell the horse to plaintiff, and work out the residue of the $100, upon condition that plaintiff would assume, as principal obligor, the payment of said debt, and thereupon the horse was claimed and used as the plaintiff's. He further swore that he was himself in the service of the plaintiff, and wishing to visit a relation at a distance of a few miles, he borrowed the horse to perform the trip, promising and intending to return in the course of a day or two. While gone upon this visit, he swapped the horse away to the defendant without any authority from the plaintiff, and when he returned with the horse he got from the defendant, the plaintiff refused to accept him in lieu of the other. He swore the horse was worth sixty-five dollars, but no price had been agreed upon between himself and plaintiff, the price being left to be determined by the sum which the plaintiff might realize in his sale. A demand was made of the defendant a few days after the swap, which was refused.

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[1] A portion of the opinion is omitted.

The defendant's counsel, among other things, contended that it was a mere pledge of the property to secure the plaintiff against responsibility, and the thing pledged having been redelivered to the person making the pledge, he had a right to sell and make title.

His Honor, upon this point, instructed the jury that if the horse were pledged to secure Bodenhammer, and in conformity with the pledge, passed into Bodenhammer's possession, he would have such a property in the animal as would enable him to maintain the action of trover, and a loan of the animal to Reich for a special use, under the circumstances stated by him, would not be such change or interruption of possession as to prevent a recovery, provided the pledge and possession were *bona fide* in Bodenhammer. Defendant excepted.

Verdict for the plaintiff. Judgment and appeal.

McLean and *Fowle*, for the plaintiff.

Miller, for the defendant.

BATTLE, J. Among the instructions given by his Honor to the jury was the following: "If the horse were pledged to secure the plaintiff, and, in conformity with that pledge, passed into the plaintiff's possession, and continued in his possession, he would have such a property in the animal as would enable him to maintain the action of trover; and a loan of the animal to Reich for a special use, under the circumstances stated by him, would not be such a change or interruption of possession as to prevent a recovery, provided the pledge and possession were *bona fide* in the plaintiff." With this instruction we do not agree, and we think it is opposed, in principle, to the recent case, decided in this court, of Smith *v.* Sasser, 4 Jones, 43. The only difference between the facts of that case and the present, is the length of time during which the pawnor had the article in possession, after a redelivery by the pawnee, before he sold it. But that cannot make any difference in the rule of law applicable to the transaction. By giving up the possession of the article pawned, the pawnee lost his lien, and it would be a fraud upon an innocent purchaser from the pawnor, if the pawnee were permitted to recover the pawn from him. In the case of Roberts *v.* Wyatt, 2 T. R. 268, it was made a question whether, even as between the parties themselves, a redelivery of the thing pledged, for a temporary purpose only, would not prevent the pawnee from recovering it back from the pawnor, after the purpose was fulfilled. It was, indeed, decided that the pawnee might recover from the pawnor; but if a doubt existed in such a case as that, it would hardly be pretended that a recovery would be allowed from one who claimed as a *bona fide* purchaser from the pawnor. See Story on Bailments, sec. 299.

The judgment must be reversed, and a *venire de novo* awarded.

Per curiam. *Judgment reversed.*

Ex parte FITZ. Re RAWSON et al.

United States District Court, for the District of Massachusetts, November, 1876.

[*Reported in* 2 *Lowell*, 519.]

Lowell, J. The petitioner lent money to Rawson & Hittinger, and took from them at the same time the notes of Jacob Hittinger, not a member of the firm, and bills of sale of certain locomotive engines, then in their machine-shop in Cambridgeport, as additional security. Rawson & Hittinger have become bankrupt, and Jacob Hittinger has paid the debt; and the petitioner, acting as trustee for him, asks that the engines or their proceeds be now applied to pay the debt. Jacob Hittinger has become a party to the petition, and submits his rights to the determination of the court.

It was argued in behalf of the petitioner that the bills of sale were mortgages, and that the failure to record them would not, under the circumstances of the case, be fatal to the title of the mortgagee. I take it, however, to be clear that, by the law of Massachusetts, as of the other States, the bill of sale, intended for security, operated as a pledge and not as a mortgage, and neither required nor admitted of registration. Walker *v.* Staples, 5 Allen, 34; Kimball *v.* Hildreth, 8 *id.* 167; and, incidentally, Newton *v.* Fay, 10 *id.* 505; Drake *v.* White, 117 Mass. 10. As a general rule, the pledgee must take and keep possession of the chattels, or his title will not be valid against the assignee in bankruptcy. My decision, that a mortgagee had a better title than the assignee in some cases, though he neither took possession nor recorded his mortgage, does not apply to pledges, but turned on the words of a statute, construed with the aid of the rule of the common law of Massachusetts, that the possession of a mortgagor is consistent with the title of the mortgagee. Still, on the question of what is a sufficient taking and keeping, the cases arising under mortgages are in point.

I understand the law to be that there must be a delivery before the pledgee's lien will attach; but the delivery may be either actual or constructive. Meyerstein *v.* Barber, L. R. 2 C. P. 38, 661; 4 H. L. 317; Young *v.* Lambert, L. R. 3 P. C. 142. Then, as to keeping possession, it may be kept by an agent, and that agent may be the pledgor. If the circumstances make out a good reason for giving the custody and apparent control to the pledgor, there may not even be evidence of fraud; but, at most, his possession will only be evidence either that the pledge has been abandoned, or that the transaction is covinous. See Sumner *v.* Hamlet, 12 Pick. 76; Macomber *v* Parker, 14 *id.* 497; Hays *v.* Riddle, 1 Sandf. 248; Way *v.* Davidson, 12 Gray, 465; Cooper *v.* Ray, 47 Ill. 53; Martin *v.* Reid, 11 C. B. n. s. 730; Thayer *v.* Dwight, 104 Mass. 254; Thorndike *v.* Bath, 114 *id.* 116; Weld *v.* Cutler, 2 Gray, 195.

On the question of fact, whether possession was taken and kept, there is, unfortunately, a direct contradiction between the only two witnesses to the acts done. The petitioner testifies that, soon after the bills of sale were given, he went to the shop of the pledgors, and in presence of one of them, Michael Hittinger, took possession of every one of the engines, put his hand upon each, and told Michael Hittinger to hold them as his agent, and that if any of them were sold he would give an order for the delivery. Michael Hittinger says that the petitioner came over to the shop, and one engine was pointed out to him, but he did nothing about taking possession, and gave no orders. Supposing, as I do, that the witnesses are equally veracious, I feel bound to give greater credit to the evidence of the petitioner; because he cannot be mistaken, and Mr. Hittinger may have forgotten the circumstances. The petitioner went to the factory, according to his story, with a definite purpose, and must recollect what it was, and what he did in pursuance of it. Both stand before the court unimpeached, and with no serious bias, because the debt has been paid to Mr. Fitz, and he is proceeding for the benefit of a surety; and Mr. Hittinger, on his part, has assigned all his title by his petition and the proceedings in bankruptcy. I can only regret that the parties did not see fit to submit the decision of this question to a jury.

Taking it, as I feel bound to do, that Mr. Fitz's recollection is the more accurate, it seems to me, as matter of law, that his possession was sufficient. I do not consider that a pledgee is bound to remove locomotive engines, and put them into his house or into a warehouse. He might well leave them with the pledgor, to be finished, or even to be sold. There is somewhat more danger of fraud if the pledgor himself is intrusted with the possession, than if a third person was employed; but there is no difference in principle between the appointment of Hittinger and of one of his clerks. It comes back to a question of fraud or good faith. Of course, it is well understood that an assignee in bankruptcy is not a purchaser without notice.[1]

It is argued that there was no sufficient designation of the particular engines pledged. I do not understand the evidence to be undisputed on this point. Mr. Fitz said that the engines mentioned in his bill of sale could be easily picked out from the others; and Mr. Hittinger again differed from him on this point. But this matter is set at rest by the evidence, which I have accepted as accurate, that each engine was in fact designated and pointed out when Mr. Fitz went over to the shop and took possession, which was long before the bankruptcy.

Petition granted.

R. D. Smith, for the petitioner.
T. F. Nutter, for the assignee.

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[1] Donaldson *v.* Farwell, 93 U. S. 631; Ratcliffe *v.* Sangston, 18 Md. 383; Bussing *v.* Rice, 2 Cush. 48; Goodwin *v.* Mass. L. & T. Co., 152 Mass. 189, 199; Farley *v.* Lincoln, 51 N. H. 577; Wallace *v.* Cohen, 111 N. C. 103; Belding *v.* Frankland, 8 Lea, 67, *acc.* Wickham *v.* Martin, 13 Gratt. 427; Oberdorfer *v.* Meyer, 88 Va. 384, however, decide that a trustee for creditors is a purchaser for value.

SECTION II.

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How far Retention of Possession by the Seller is Fraudulent.

TWYNE'S CASE.

In the Star-Chamber, 1601.

[*Reported in* 3 *Coke,* 80 *b.*]

In an information by Coke, the Queen's Attorney General, against Twyne of Hampshire, in the Star-Chamber, for making and publishing of a fraudulent gift of goods: the case on the stat. of 13 Eliz. cap. 5,[1] was such; Pierce was indebted to Twyne in four hundred pounds, and was indebted also to C. in two hundred pounds. C. brought an action of debt against Pierce, and pending the writ, Pierce being possessed of goods and chattels of the value of three hundred pounds, in secret made a general deed of gift of all his goods and chattels real and personal whatsoever to Twyne, in satisfaction of his debt; notwithstanding that Pierce continued in possession of the said goods, and some of them he sold; and he shore the sheep, and marked them with his own mark: and afterwards C. had judgment against Pierce, and had a *fieri facias* directed to the sheriff of Southampton, who by force of the said writ came to make execution of the said goods; but divers persons, by the command of the said Twyne, did with force resist the said sheriff, claiming them to be the goods of the said Twyne by force of the said gift; and openly declared by the commandment of Twyne, that it was a good gift, and made on a good and lawful consideration. And whether this gift on the whole matter, was fraudulent and of no effect by the said act of 13 Eliz. or not, was the question. And it was resolved by Sir Thomas Egerton, Lord Keeper of the Great Seal, and by the Chief Justice Popham and Anderson, and the whole court of Star-Chamber, that this gift was fraudulent within the Statute of 13 Eliz. And in this case divers points were resolved: —

1st. That this gift had the signs and marks of fraud, because the gift is general, without exception of his apparel, or anything of necessity; for it is commonly said, *quod dolus versatur in generalibus.*

2d. The donor continued in possession, and used them as his own;

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[1] By the Statute 13 Eliz. c. 5, § 2 (made perpetual by Statute 29 Eliz. c. 5), for the avoiding of feigned, covinous, and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments, executions, &c. devised to the intent to delay, hinder, or defraud, creditors and others of their just and lawful actions, &c., it is enacted, that all and every feoffment, gift, grant, alienation, &c. and all and every bond, suit, judgment, and execution, for any intent or purpose before declared, shall be utterly void as against persons whose actions, debts, &c., shall or might be in any wise disturbed, hindered, delayed, or defrauded. A proviso follows that the act shall not extend to any grants, &c. upon good consideration and *bona fide.*

and by reason thereof he traded and trafficked with others, and defrauded and deceived them.

3d. It was made in secret, *et dona clandestina sunt semper suspiciosa.*

4th. It was made pending the writ.

5th. Here was a trust between the parties, for the donor possessed all, and used them as his proper goods, and fraud is always apparelled and clad with a trust, and a trust is the cover of fraud.

6th. The deed contains, that the gift was made honestly, truly, and *bona fide; et clausulæ inconsuet' semper inducunt suspicionem.*

Secondly, it was resolved, that notwithstanding here was a true debt due to Twyne, and a good consideration of the gift, yet it was not within the proviso of the said act of 13 Eliz. by which it is provided, that the said act shall not extend to any estate or interest in lands, &c. goods or chattels made on a good consideration and *bona fide;* for although it is on a true and good consideration, yet it is not *bona fide*, for no gift shall be deemed to be *bona fide* within the said proviso which is accompanied with any trust; as if a man be indebted to five several persons, in the several sums of twenty pounds, and hath goods of the value of twenty pounds, and makes a gift of all his goods to one of them in satisfaction of his debt, but there is a trust between them, that the donee shall deal favorably with him in regard of his poor estate, either to permit the donor, or some other for him, or for his benefit, to use or have possession of them, and is contented that he shall pay him his debt when he is able; this shall not be called *bona fide* within the said proviso; for the proviso saith on a good consideration, and *bona fide;* so a good consideration doth not suffice, if it be not also *bona fide:* and therefore, reader, when any gift shall be to you in satisfaction of a debt, by one who is indebted to others also; 1st, Let it be made in a public manner, and before the neighbors, and not in private, for secrecy is a mark of fraud. 2d, Let the goods and chattels be appraised by good people to the very value, and take a gift in particular in satisfaction of your debt. 3d, immediately after the gift, take the possession of them; for continuance of the possession in the donor is a sign of trust. And know, reader, that the said words of the proviso, on a good consideration, and *bona fide*, do not extend to every gift made *bona fide;* and therefore there are two manners of gifts on a good consideration. scil. consideration of nature or blood, and a valuable consideration. As to the first, in the case before put: if he who is indebted to five several persons, to each party in twenty pounds, in consideration of natural affection, gives all his goods to his son, or cousin, in that case, forasmuch as others should lose their debts, &c. which are things of value, the intent of the act was, that the consideration in such case should be valuable; for equity requires, that such gift, which defeats others, should be made on as high and good consideration as the things which are thereby defeated are; and it is to be presumed, that the father, if he had not been indebted to others, would not have dispossessed himself

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of all his goods, and subjected himself to his cradle; and therefore it shall be intended, that it was made to defeat his creditors: and if consideration of nature or blood should be a good consideration within this proviso, the statute would serve for little or nothing, and no creditor would be sure of his debt. And as to gifts made *bona fide*, it is to be known, that every gift made *bona fide* either is on a trust between the parties or without any trust; every gift made on a trust is out of this proviso; for that which is betwixt the donor and donee, called a trust *per nomen speciosum*, is in truth, as to all the creditors, a fraud, for they are thereby defeated and defrauded of their true and due debts. And every trust is either expressed, or implied: an express trust is, when in the gift, or upon the gift, the trust by word or writing is expressed; a trust implied is, when a man makes a gift without any consideration, or on a consideration of nature, or blood only: and therefore, if a man before the Stat. of 27 H. 8 had bargained his land for a valuable consideration to one and his heirs, by which he was seised to the use of the bargainee; and afterwards the bargainor, without a consideration, infeoffed others, who had no notice of the said bargain; in this case the law implies a trust and confidence, and they shall be seised to the use of the bargainee: so in the same case, if the feoffees, in consideration of nature, or blood, had without a valuable consideration enfeoffed their sons, or any of their blood who had no notice of the first bargain, yet that shall not toll the use raised on a valuable consideration; for a feoffment made only on consideration of nature or blood, shall not toll an use raised on a valuable consideration, but shall toll an use raised on consideration of nature, for both considerations are *in æquali jure*, and of one and the same nature.

And when a man, being greatly indebted to sundry persons, makes a gift to his son, or any of his blood, without consideration, but only of nature, the law intends a trust betwixt them, scil. that the donee would, in consideration of such gift being voluntarily and freely made to him, and also in consideration of nature, relieve his father, or cousin, and not see him want who had made such gift to him, vide 33 H. 6, 33, by Prisot, if the father enfeoffs his son and heir apparent within age *bona fide*, yet the lord shall have the wardship of him: so note, valuable consideration is a good consideration within this proviso; and a gift made *bona fide* is a gift made without any trust either expressed or implied: by which it appears, that as a gift made on a good consideration, if it be not also *bona fide*, is not within the proviso; so a gift made *bona fide*, if it be not on a good consideration, is not within the proviso; but it ought to be on a good consideration, and also *bona fide*.

To one who marvelled what should be the reason that acts and statutes are continually made at every parliament without intermission, and without end; a wise man made a good and short answer, both which are well composed in verse.

"Quæritur, ut crescunt tot magna volumina legis?
In promptu causa est, crescit in orbe dolus."

And because fraud and deceit abound in these days more than in former times, it was resolved in this case by the whole court, that all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud. Note, reader, according to their opinions, divers resolutions have been made.[1]

EDWARDS *v.* HARBEN.

IN THE KING'S BENCH, MAY 31, 1788.

[*Reported in* 2 *Term Reports*, 587.]

ASSUMPSIT for goods sold to the defendant's testator. The defendant pleaded that he was not executor, nor had ever administered as such; and, secondly, that he had fully administered, &c. Replication, that he had administered divers goods, &c., of the testator; and issue thereon. And to the second plea, that the defendant, at the time of exhibiting the plaintiff's bill, had, and still has, goods and chattels of the deceased in his hands sufficient to satisfy the plaintiff's demands; and issue thereon. At the trial at the last assizes at East-Grinstead, Sussex, a verdict was found for the plaintiff, with £22 18*s.* 6*d.* damages, and 40*s.* costs, subject to the opinion of this court on the following case. William Tempest Mercer in his lifetime, and before the time of the execution of the bill of sale hereinafter mentioned, was indebted to the plaintiff in the sum of £22 18*s.* 6*d.* for goods sold and delivered, which sum still remains due to the plaintiff. William Tempest Mercer, at the time of the execution of the said bill of sale, was likewise indebted to the defendant in the sum of £191 for money lent. On the 27th of March, 1786, Tempest Mercer offered to the defendant a bill of sale of his goods, household furniture, and stock in trade, in his house at Lewes, by way of security for the said debt. The defendant refused to accept of the same, unless he should be at liberty to enter upon the effects and sell them immediately after the expiration of fourteen days from the execution thereof, in case the money should not be sooner paid; to which Tempest Mercer agreed, and accordingly on the same day executed a bill of sale in the common form, by which Mercer bargained and sold to the defendant forever his household furniture, medicines, stock in trade [particularly specifying them], and all and every other the goods, chattels, and effects whatsoever, in and about his dwelling-house and premises at Lewes. Immediately upon the execution of the bill of sale, possession was delivered to the defendant in the manner described therein, viz., by the delivery of one corkscrew in the name of the whole, but in no other manner whatsoever. All the effects described in the bill of sale remained in the possession of William Tempest Mercer until the time of his death, which happened on the 7th of April, 1786. On the 8th of April, 1786, being before the expiration of fourteen days from the execution of the bill of sale, the defendant entered and took possession of the effects contained in the bill of sale, being then in the house of the deceased, and afterwards sold the same for £236 7*s.* 5*d.* William Tempest Mercer died intestate; and no letters of administration were taken out to the deceased by the defendant, or by any other person, before the commencement of this action. The question for the opinion of the court is, Whether the defendant be entitled to retain the produce of the said effects, or at least the value of £191 the consideration of the bill of sale: or whether the bill of sale be void as against the creditors of William Tempest Mercer; and the plaintiff in this action be entitled to recover his debt of £22 18*s.* 6*d.* against the defendant, as executor *de son tort?*

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[1] A portion of the case has been omitted.

Partington, for the plaintiff.

Steele, for the defendant.

Buller, J. This is an action brought by the plaintiff, who is a creditor of Mercer, against the defendant as executor. It does not appear by the case that any other goods than those mentioned in the bill of sale came to the defendant's hands. The bill of sale is dated on the 27th March, 1786, and is a general bill of sale of all the defendant's household furniture and stock-in-trade. This bill of sale is to take effect immediately on the face of it; but there was an agreement between Mercer and the defendant, that the goods should not be sold till the expiration of fourteen days from the date of its execution; and no possession was actually taken till after the death of Mercer, which happened within the fourteen days; but there was a formal delivery of a corkscrew in the name of the whole. On this case two questions arise: first, whether this bill of sale be void or not; and secondly, if void, whether the defendant, by having taken these goods under the bill of sale, made himself liable as an executor *de son tort.* The first question came before the court in the last term in the case of Bamford *v.* Baron, 2 T. R. 594, n., on a motion for a new trial from the Northern Circuit; and after hearing that case argued, we thought it right to take the opinion of all the judges upon it. Accordingly we consulted with all the judges, who are unanimously of opinion that unless possession *accompanies and follows* the deed, it is fraudulent and void; I lay stress upon the words "accompanies and follows," because I shall mention some cases where, though possession was not delivered at the time, the conveyance was not held to be fraudulent. There are many cases on this subject; from which it appears to me that the principle which I have stated never admitted of any serious doubt. So long ago as the case in Bulstrode, the court held that an absolute conveyance or gift of a lease for years, unattended with possession, was fraudulent; but if the deed or conveyance be conditional, there the vendor's continuing in possession does not avoid it, because by the terms of the conveyance the vendee is not to have the possession till he has performed the condition. Now here the bill of sale was on the face of it absolute, and to take place immediately, and the possession was not delivered; and that case makes the distinction between deeds or bills of sale which are to take place immediately, and those which are to take place at some future time. For in the latter case the possession continuing in the vendor till that future time, or till that condition is performed, is consistent with the deed; and such possession comes within the rule, as accompanying and following the deed. That case has been universally followed by all the cases since. One of the strongest is quoted in Bucknal and Others *v.* Roiston (Pr. in Chan. 287); there one Brewer, having shipped a cargo of goods, borrowed of the plaintiff £600 on bottomry, and at the same time made a bill of sale of the goods, and of the produce and advantage thereof, to the plaintiff. There Sir E. Northey cited a case, "where a man took out execution against another; by agreement between them the owner was to keep the possession of them upon certain terms, and afterwards another obtained judgment against the same man, and took the goods in execution; and it was held that he might, and that the first execution was fraudulent and void against any subsequent creditor, because there was no change of the possession, and so no alteration made of the property." And he said it had been ruled forty times in his experience at Guildhall, that, if a man sells goods, and still continue in possession as visible owner of them, such sale is fraudulent and void as to creditors, and that the law has been always so held. The Lord Chancellor held in the principal case that the trust of those goods appeared upon the very face of the bill of sale. That though they were sold to the plaintiffs, yet they trusted Brewer to negotiate and sell them for their advantage, and Brewer's keeping possession of them was not to give a false credit to him as in other cases which had been cited, but for a particular purpose agreed upon at the time of the sale. So that the Chancellor in that case proceeded on the distinction which I have taken; he supported the deed, because the want of possession was consistent with it. This has been argued by the defendant's counsel as being a case in which the want of possession is only evidence of fraud, and that it was not such a circumstance *per se* as makes the transaction fraudulent in point of law; that is the point which we have considered, and we are all of opinion that if there be nothing but the absolute conveyance without the possession, that in point of law is fraudulent. On the other hand there are cases, where the vendor has continued in possession, and the bill of sale has not been adjudged fraudulent, if the want of immediate possession be consistent with the deed. Such was the case of Lord Cadogan *v.* Kennet, Cowp. 432; because there the possession followed the deed. So also the case of Haselinton and Another *v.* Gill, Tr. 24 Geo. 3, B. R. post 3, vol. 620, n., and another, sheriff of Middlesex; there personal property, consisting (*inter alia*) of some cows, was settled on the marriage of the plaintiff's wife on certain trusts; and the court held that only those which were purchased after the marriage could be taken to satisfy the debts of the husband. The second question then is, Whether the defendant's having taken possession of these goods after Mercer's death, though under the bill of sale, will make him an executor *de son tort?* The two cases, which were cited by the plaintiff's counsel, are decisive of this point. In Bac. Abr. (2 Bac. Abr. 605) it is said "if a man make a deed of gift of his goods in his life-time by covin to oust his creditors of their debts, yet after his death the vendee shall be charged for them." There, too, the possession was delivered to the vendee. To support this doctrine, 13 H. 4, 4 *b.* Rol. Abr. 549 are both quoted. Then in what manner shall he be charged? He can only be charged as executor; because any intermeddling with the intestate's effects makes him so. The cases in Cro. Jac. and Yelv. cited at the bar prove it, and state the manner in which he shall be charged. There is also another strong case on this point in Dyer (Dy. 166, b). In short, every intermeddling after the death of the party makes the person so intermeddling an executor *de son tort.*

GROSE, J., observed that it was unnecessary to repeat what had been said from the bench; but said that he was perfectly satisfied that the law was as had been stated. *Postea to the plaintiff.*

MARTINDALE *v.* BOOTH.

IN THE KING'S BENCH, MAY 4, 1832.

[*Reported in 3 Barnewall & Adolphus,* 498.]

TRESPASS for taking away and converting furniture, goods, and chattels of the plaintiffs. Plea, not guilty. At the trial, before Lord Tenterden, C. J., at the Middlesex sittings after Trinity Term, 1829, the jury found a verdict for the plaintiffs for £93 16*s.*, subject to the opinion of this court on the following case: —

Before the 8th of May, 1828, one W. G. Priest, who kept the Peacock Tavern in Maiden Lane, Middlesex, was indebted to the plaintiffs, wine and spirit merchants, in £10 for wine and spirits. Priest having applied to them for a further supply of wine upon credit, and for a loan of money, the plaintiffs refused to give him any further credit, or to lend him any money unless he would give them satisfactory security. Priest then proposed to execute a bill of sale to them of the furniture and fixtures in the Peacock Tavern as such security, and the plaintiffs agreed to give him credit thereupon to the extent of £200. After Priest and the plaintiffs had agreed to give and accept such security, but before the bill of sale was actually executed, the plaintiffs, upon the faith of such agreement, advanced to Priest £30 in money, and to the amount of £60 in wine and spirits, and in two days afterwards, viz., the 8th of May, 1828, in pursuance of the agreement, Priest executed and delivered to the plaintiffs a bill of sale, reciting that he, Priest, was indebted to the plaintiffs in the sum of £100, for money advanced and goods sold and delivered, and stating that, in consideration thereof, he granted, bargained, sold, and assigned unto the plaintiffs all the household goods, furniture, &c., in and about the premises called the Peacock Tavern, to hold to the proper use and behoof of the plaintiffs forever, subject to the condition thereinafter contained: proviso, that if Priest should pay the said sum of £100, with lawful interest thereon by instalments, that is to say, £25 on the 7th of June then next, £25 on the 7th of May next, and £50, the residue thereof, on the 7th of November, 1829, the deed should be void; but in default of payment of all or any of the said sums at the times appointed, then it should be lawful, although no advantage should have been taken of any previous default, for the plaintiffs forthwith to enter upon the premises, and take possession of the goods, furniture, &c., and absolutely sell and dispose of the same. There was a power reserved to the plaintiffs, during the continuance of the deed, to enter upon the premises and take an inventory; and also at any time after default as aforesaid to take and retain possession of the goods until they should deem it expedient to sell. Then followed a proviso, "that until default should be made in payment of all or any of the said sums, it should be lawful for Priest to retain and keep quiet possession of all and singular the said household goods," &c.

Before Priest commenced dealing with the plaintiffs, he had married the widow of one Higman, who formerly kept the Peacock Tavern, and who, at the time of his death, was indebted to Combe, Delafield, and Co., in the sum of £1,100. His widow being executrix of his will, on her marriage with Priest they both became possessed of Higman's effects; and Priest, by way of security for the said £1,100, executed a warrant of attorney to Combe, Delafield, and Co., for that amount in November, 1823. On the 1st of November, 1828, Messrs. Combe, Delafield, and Co. caused judgment to be entered up on the warrant of attorney, and sued out a writ of *fi. fa.* directed to the defendants Booth and Copeland, then sheriff of Middlesex, who thereupon issued their warrant to Wilson, the other defendant, their officer, and he seized and took in execution the goods in question, being the furniture and effects in the Peacock Tavern. While the sheriff remained in possession, the plaintiffs came upon the premises, gave the defendants notice of the bill of sale, and required them to relinquish possession, which was refused, and the sheriff sold the goods. This case was now argued by

Archbold, for the plaintiffs.

Comyn, contra.

LITTLEDALE, J. The cases show that continuance in possession of goods and chattels by a vendor after the execution of a bill of sale is a badge and evidence of fraud; but I think that, under the circumstances of this case, a jury would have negatived fraud. In Jezeph *v.* Ingram, 1 B. Moore, 189, Dallas, J., denies that Edwards *v.* Harben, 2 T. R. 587, lays down a general rule, that in transferring chattels the possession must accompany and follow the deed. There was in Jezeph *v.* Ingram a mixed possession; for the vendee superintended the management of the farm, and was occasionally present. That case, however, shows the opinion of the Court of Common Pleas to have been, that a change of possession is not in all instances necessary.

Parke, J. I am of the same opinion. I think that the want of delivery of possession does not make a deed of sale of chattels absolutely void. The dictum of Buller, J., in Edwards *v.* Harben, 2 T. R. 587, has not been generally considered, in subsequent cases, to have that import. The want of delivery is only evidence that the transfer was colorable. In Benton *v.* Thornhill, 2 Marshall, 427, it was said in argument, that want of possession was not only evidence of fraud, but constituted it; but Gibbs, C. J., dissented; and although the vendor there, after executing a bill of sale, was allowed to remain in possession, Gibbs, C. J., at the trial, left it to the jury to say, whether, under all the circumstances, the bill of sale were fraudulent or not. It is laid down in Sheppard's Touchstone, 224 (7th ed.), "that a bargain and sale may be made of goods and chattels without any delivery of any part of the things sold;" and, afterwards, in page 227, it is said "that the word 'gift' is often applied to movable things, as trees, cattle, household stuff, &c., the property whereof may be altered as well by gift and delivery as by sale and grant, and this is, or may be, either by word or writing;" and in a note to this passage by the editor it is said, "that, by the civil law, a gift of goods is not good without delivery, yet in our law it is otherwise, when there is a deed: also in a *donatio mortis causa*, there must be a delivery." Then it is evident that the bill of sale, in this case, without delivery, conveyed the property in the household goods and chattels to the plaintiffs. It may be a question for a jury, whether, under the circumstances, a bill of sale of goods and chattels be fraudulent or not; and if there were any grounds for thinking that a jury would find fraud here, we might, this being a special case, infer it; but there is no ground whatever for saying that this bill of sale was fraudulent. It was given for a good consideration, for money advanced to Priest to enable him to carry on his trade, and his continuance in possession was in terms provided for.

Judgment for the plaintiffs.[1]

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[1] Tenterden, C. J., and Patteson, J., delivered concurring opinions.

Note. — It is well settled in England that retention of possession by the seller is at most evidence tending to show fraud. See Lindon *v.* Sharp, 6 M. & G. 898; Pennell *v.* Dawson, 18 C. B. 355; Hale *v.* Metropolitan, &c. Co., 28 L. J. Ch. N. S. 777, 779; Alton *v.* Harrison, L. R. 4 Ch. App. 622; Macdona *v.* Swiney, 8 Ir. C. L. R. 73.

The question has been made of much less importance in England than formerly, however, by the Bills of Sales Acts. Those now in force are 41 & 42 Vict. c. 31; 45 & 46 Vict. c. 43; 53 & 54 Vict. c. 53; 54 & 55 Vict. c. 35. These require that bills of sale, whether given in an absolute sale or as security, shall be registered as a condition of their validity against third persons, if possession is not transferred. But transactions effected by parol are not within the scope of the acts.

In this country the prevailing doctrine, in the absence of statutes, is that retention of possession is *prima facie* evidence of fraud, but that the *bona fides* of the transaction may be shown. Crawford *v.* Neal, 144 U. S. 585; Troy Fertilizer Co. *v.* Norman, 107 Ala. 667; Teague *v.* Bass, 131 Ala. 422; Liebes *v.* Sleffy, 32 Pac. Rep. 261 (Ariz.); Smith *v.* Jones, 63 Ark. 232; Justh *v.* Wilson, 19 D. C. 529; Briggs *v.* Weston, 36 Fla. 629; Collins *v.* Taggart, 57 Ga. 355; Ind. Rev. Stat. 1881, § 4911; Seavey *v.* Walker, 108 Ind. 78; Higgins *v.* Spahr, 145 Ind. 167; Kan. Gen. Stat. (1889), § 3163; Locke *v.* Hedrick, 24 Kan. 763; Cochrane *v.* Gilbert, 41 La. Ann. 735; Goodwin *v.* Goodwin, 90 Me. 23; Brooks *v.* Powers, 15 Mass. 44; Allen *v.* Wheeler, 4 Gray, 123; Mich. Comp. Laws (1897), § 9520; Jansen *v.* McQueen, 105 Mich. 199; Minn. Gen. Stat. (1894), § 4219; Cortland Wagon Co. *v.* Sharvy, 52 Minn. 216; Hilliard *v.* Cagle, 46 Miss. 309; Neb. Comp. Stat. 1881, c. 32, § 11; Powell *v.* Yeazel, 46 Neb. 225; Miller *v.* Pancoast, 5 Dutch. 250; N. Y. Laws of 1897, c. 417, § 25; Menken *v.* Baker, 40 N. Y. App. Div. 609, affi'd without opinion, 166 N. Y. 628; Schidlower *v.* McCafferty, 85 N. Y. App. Div. 493; Rea *v.* Alexander, 5 Ired. 644; Cheatham *v.* Hawkins, 80 N. C. 161; N. Dak. Rev. Code, § 5053; Conrad *v.* Smith, 6 N. Dak. 337; Hombeck *v.* Vanmetre, 9 Ohio, 153; Freeman *v.* Rawson, 5 Ohio St. 1; Ore. Code Civ. Proc. § 766, subd. 40; McCully *v.* Swackhammer, 6 Ore. 438; Mead *v.* Gardiner, 13 R. I. 257; Pregnall *v.* Miller, 21 S. C. 385; Grubbs *v.* Greer, 5 Coldw. 160; Edwards *v.* Dixon, 66 Tex. 613; Traders Nat. Bank *v.* Day, 87 Tex. 101; Davis *v.* Turner, 4 Gratt. 422; Benjamin *v.* Madden, 94 Va. 66; Bindley *v.* Martin, 28 W. Va. 773; Poling *v.* Flanagan, 41 W. Va. 191; Wis. Rev. Stat. (1878), § 2310; Densmore Com. Co. *v.* Shong, 98 Wis. 380.

In many jurisdictions, however, it is enacted or judicially decided that retention by the seller of the possession of personal property after a sale is conclusive proof of fraud. Cal. Civ. Code, § 3440; George *v.* Pierce, 123 Cal. 172; Col. 1 Mills Annot. Stats. § 2127; Stanley *v.* Citizens' Coal Co., 24 Col. 103; Hatstal *v.* Blakeslee, 41 Conn. 302; Huebler *v.* Smith, 62 Conn. 186; Del. Code, c. LXIII. § 4; Bowman *v.* Herring, 4 Harr. 458; Id. Rev. Stat. § 3021; Harkness *v.* Smith, 2 Idaho, 952; Hallett *v.* Parrish, 51 Pac. Rep. 109 (Id.); Bass *v.* Pease, 79 Ill. App. 308; Bauman Loan Co. *v.* Hatowsky, 107 Ill. App. 181; Ia. Code, § 1923; Harris *v.* Pence, 91 Ia. 481; Morton *v.* Ragan, 5 Bush, 334 (*conf.* Vanmeter *v.* Estill, 78 Ky. 456); Md. Code, Art. 21, § 40; Franklin *v.* Claflin, 49 Md. 24; Mo. Rev. Stats. 1889, § 5178; State *v.* Goetz, 131 Mo. 675; Revercomb *v.* Duker, 74 Mo. App. 570; Mont. Civ. Code, § 4491; Yank *v.* Bordeaux, 23 Mont. 205; Nev. Comp. Laws, § 292; Estey *v.* Cooke, 12 Nev. 276; Tognini *v.* Kyle, 17 Nev. 209; Coolidge *v.* Melvin, 42 N. H. 510; Parker *v.* Marvell, 60 N. H. 30; Okla. Stats. § 2663; Swartzburg *v.* Dickerson, 73 Pac. Rep. 282 (Okl.); Stephens *v.* Gifford, 137 Pa. 219; Garretson *v.* Hackenburg, 144 Pa. 107; Lehr *v* Brodbeck, 192 Pa. 535 (*conf.* Ditman *v.* Raule, 124 Pa. 225); McCullough *v.* Willey, 192 Pa. 176; S. Dak. Comp. Laws, § 4657; Howard *v.* Dwight, 8 S. Dak. 398; Utah Comp. Laws, 1888, § 2837; White *v.* Pease, 15 Utah, 170; Weeks *v.* Prescott, 53 Vt. 57; Wheeler *v.* Selden, 63 Vt. 429; Wash. Gen. Stats. § 1454; Whiting Mfg. Co. *v.* Gephart, 6 Wash. 615. So in Ontario, Rev. Stat. Ont. c. 119, § 5; McMaster *v.* Garland, 31 Up. Can. C. P. 320. The Federal courts apply the law of the State where the transaction took place. Dooley *v.* Pease, 60 U. S. App. 248.

In these states it is immaterial that retention of possession is consistent with the provisions of the deed of transfer or bill of sale. See statutes cited above and Egan Bank *v.* Rice, 119 Fed. Rep. 107 (C. C. A.); Swift *v.* Thompson, 9 Conn. 63; Coolidge *v.* Melvin, 42 N. H. 510; Stephens *v.* Gifford, 137 Pa. 219; Post Publishing Co. *v.* Insurance Co., 189 Pa. 301. *Contra*, Bass *v.* Pease, 79 Ill. App. 308.

It is immaterial also that the objecting creditor had knowledge of the sale. Bassinger *v.* Spangler, 9 Col. 175, 186; Harkness *v.* Smith, 2 Idaho, 952; Lawrence *v.* Burnham, 4 Nev. 361; Warwick Iron Co. *v.* First Nat. Bank, 13 At. Rep. 79 (Pa.); Hart *v.* Farmers' Bank, 33 Vt. 252, 263; Perrin *v.* Reed, 35 Vt. 28; see also Weill *v.* Zacher, 92 Ill. App. 296. *Contra*, Lowe *v.* Matson, 140 Ill. 108; Sachler Carriage Co. *v.* Dryden, 71 Ill. App. 583; Vanmeter *v.* Estill, 78 Ky. 456. See also Dieckman *v.* Yung, 87 Mo. App. 530. In the case last cited the creditor gave credit after notice, and this was relied on as the ground of decision. (See also McCullough *v.* Willey, 192 Pa. 176.) In the other cases this was not the case, but apparently the time when the claim arose was not regarded as material.

By the statutes of Iowa, Maryland, Washington, and Ontario, if a bill of sale is recorded, the transaction is valid though the vendee retains possession, in analogy to the common provisions in regard to chattel mortgages.

COOKSON *v.* SWIRE.

IN THE HOUSE OF LORDS, MAY 23, 1884.

[*Reported in* 9 *Appeal Cases,* 653.]

APPEAL from an order of the Court of Appeal. The appellants having on the 25th of January, 1883, recovered judgment against Samuel Vaughan for £734, the sheriff of Lancashire the next day seized under a *fi. fa.* certain household furniture at Croydon Villa, Blackpool, where the debtor was residing. A claim having been made by the respondents, an interpleader issue was directed, in which the respondents, as plaintiffs, affirmed, and the appellants, as defendants, denied that the goods seized were at the time of the seizure the property of the respondents as against the appellants. At the trial, before Cave, J., at Manchester, in April, 1883, the following facts were proved: —

On the 10th of May, 1873, Samuel Vaughan being in difficulties, the respondents paid his debts, and he executed a bill of sale whereby he assigned to the respondents the goods in question as security for loans amounting to £698 10*s.*, with a proviso that if the grantor did not upon demand pay principal and interest the grantees might take possession and sell the goods by public auction or private contract upon such conditions and in such manner as they should think fit. This bill was duly registered, but was not re-registered at the end of five years or at all.

On the 23d of December, 1882, the appellants threatened the debtor with the action which they brought on the 8th of January, 1883. At the end of December, 1882, and after this threat, it was agreed between the debtor's son, Charles Vaughan, and the landlord of Croydon Villa that the son should be the tenant instead of his father the debtor. At this time the debtor was paralyzed and incapable. On the 11th of January, 1883, the respondents served a demand for the money due under the bill of 1873, and put a man in possession, and a few days after the respondent, Samuel Swire (brother-in-law of Samuel Vaughan), on behalf of the respondents, agreed with Charles Vaughan to sell the goods in question to him for £250, and (though no money passed) gave him the following receipt: —

£250. MANCHESTER, 19th January, 1883.

Received from Mr. Charles Vaughan the sum of two hundred and fifty pounds, being the purchase-money agreed to be paid by him for the whole of the household furniture and effects now being in, about, or upon the messuage or dwelling-house situate and being Croydon Villa, South Shore, Blackpool, in the county of Lancaster.

S. SWIRE,
For self and co-mortgagees.

Charles Vaughan, not being able to pay, executed a bill of sale dated the 19th of January, 1883, whereby he assigned the goods to the respondents as security for the purchase-money. This bill was duly registered. These proceedings were taken by the respondents to protect the furniture for the benefit of the persons for whom the respondents were trustees.

The jury found that the transaction between the respondents and Charles Vaughan was a *bona fide* one and found a verdict for the plaintiffs, the now respondents, and were then discharged by consent, Cave, J., reserving the case for further consideration, with liberty to him to find any further fact that might be necessary.

Upon further consideration, on the 29th of May, 1883, Cave, J., while adopting and approving the finding of the jury that the transaction with Charles Vaughan was a *bona fide* one, found as a fact that the goods were at the time of the execution in the apparent possession of Samuel Vaughan, and held that the bill of 1873 was under the Bills of Sale Acts, previous to 1882 void as against the execution creditors, it being necessary for the respondents in proving their title to rely on that bill; and the learned judge entered judgment for the defendants, the now appellants.

The Court of Appeal, on the 6th of November, 1883, held that the transaction with Charles being a *bona fide* one, the bill of 1873 was on the 19th of January, 1883, satisfied, so that the Bills of Sale Acts had no application to it; but that if those acts were applicable, then as a matter of fact the goods were not at the time of the execution in the apparent possession of the father Samuel, but were in the actual and apparent possession of the son Charles. The court therefore reversed the judgment of Cave, J., and entered judgment for the respondents.

Sir F. Herschell, S. G., and *Arthur Charles*, Q. C., for the appellants.

Ambrose, Q. C., and *C. H. M. Wharton*, for the respondents, were not heard.

Lord Blackburn. I think that in the judgment of Cave, J., there is only one point (but that is a very important point), on which I am inclined to differ from him. The Court of Appeal indicate what in my mind is the true ground upon which Cave, J., was wrong; but they also indicate a good many other things upon which, as the Lord Chancellor has said, if it were necessary to decide upon them I should certainly at least require to hear the other side in support of them. I need not say more than that. It all turns in my mind upon the construction of a few words in an act of Parliament, but I will first of all point out what I think is the real object of these acts of Parliament, before coming to the interpretation of the words.

At common law a man might take a security upon goods without carrying away the goods or taking possession of them — he might take a sale of them out and out, and he might take the legal property in them subject to the power to redeem them (what is commonly called a mortgage), without taking possession of them. The law on the subject will be found in Twyne's Case, 3 Rep. 80; 1 Sm. L. C. (8th ed.) 1, and the notes upon Twyne's Case, but this rule got established that when the goods were not taken away, but were left in the hands of the man who had had them previously, that which had been thought before to make the transaction void was really no more than evidence to go to the jury of fraud; and if a man came forward suddenly, when there was an execution, for instance, issued against the person in possession of the goods, and said, at an antecedent time I had a security upon these goods, and I left them in the possession of the debtor all that time, the not having taken possession was evidence that the thing was a sham, — it was not conclusive; it was not a matter of law, but it was evidence that the thing was a sham. Upon that two evils arose, and very important ones they were. In the first place it often happened that there was really a sham put up to endeavor to defeat a man, and there was a great quantity of perjury, of fighting and expense, before it was proved to be a sham. That was a great evil. The other was that there were real honest transactions which were asserted to be shams when they were not, and in those cases there was apt to be much perjury and great expense before it was decided. For those reasons it was thought, and reasonably and properly so, that it was desirable to put a stop to this.

That was the beginning of the series of Bills of Sale Acts, the first of which was passed in 1854, and said this: Where there is a bill of sale, or where there is a written agreement in which it appears that you have got a security, or even I suppose a transfer of the whole property, at all events that you have got a security, — a bill of sale, — that shall within a short time be registered, and two things are to follow from it. In the first place its being registered will put an end to any fear that any one should start forward afterwards and say, The transaction being kept secret is a proof that it was a sham transaction, for, it being actually registered as bills of sales are required to be, it could no longer be secret, and there would be no badge of fraud in that respect. The other was, if it be not registered, then so long as the goods are in the apparent possession of the person to whom they originally belonged, so long it shall be void, as against a certain class of persons, namely, execution creditors, and various other persons that were named. The only thing that I would say at the outset upon this with regard to the 1st section is, that the first Bills of Sale Act applied, not only to sales and transfers by the grantor (the man who had the goods) by way of security and otherwise, but also to transfers by the sheriff, when he had seized those goods. Nobody for a moment would suppose that it was a possible thing when the sheriff had seized the goods and sold them, that the sheriff should make out a bill of sale, and that the sheriff should keep possession — that was out of the question. But it was thought, and indeed it was found by experience, that a very common mode in which a sham actually took place, when there was an execution, was this, — that the execution debtor bought back his own goods, getting a man of straw to come forward and pretend this, — It is I who have bought them from the sheriff, and although I have lent money to you, and you have given me security, and I let you have the goods, still it is I who buy them from the sheriff. Consequently the act of Parliament very judiciously said bills of sale shall be registered as well when they are given by the man himself, as when the sheriff has taken them in execution from him. Nothing of that sort applies here, nothing arises here about it, for no sheriff had anything to do with this matter.

Now, coming to apply this act to the present case, we find that in 1873 the Reverend Samuel Vaughan was in debt. Mr. Swire, who seems to have been his brother-in-law and also trustee, I suppose, for Mrs. Vaughan, agreed to advance money to pay off that debt, and for that purpose, — it was a very proper thing to do, — he said I will take the goods from you, I will take a security if you like upon all those goods, and if you pay off that security, well and good; if not, it is evident that the intention of Mr. Swire was, that these goods should be a security to him for the money which he had advanced, whether out of his own pocket, or as trustee for his sister we really do not know, and it is not material — he intended that these goods should be a security for that advance, and it was obviously the intention that they should remain in the Rev. Samuel Vaughan's house and be used by the Rev. Samuel Vaughan and his family — in fact, be to all intents and purposes in the apparent ownership of the Rev. Samuel Vaughan. That bill of sale, as was necessary under the Bills of Sale Act which then existed (this was in 1873), was registered, and it would therefore at the end of five years require to be re-registered, or otherwise it would have the same effect as if it had never been registered, and would consequently be void as against the class of persons who were named in the acts existing at that time. I do not know that it is very material to say anything further about it than that.

This security which was taken by Mr. Swire in 1873 contained at the end a provision that if Mr. Vaughan did not pay the money owed when a demand had been made in writing, then it should be in the power of Mr. Swire or his assigns to sell the goods absolutely by private bargain.

Now it happened that at the time when this transaction took place it became known to people that there was a creditor who was likely to come upon the Rev. Samuel Vaughan and to seize his goods, or rather not his goods but the goods which were in his apparent possession as it was said; and people also became aware that owing to the neglect to re-register the bill of sale, inasmuch as the term of five years had elapsed in 1878, that bill had become an unregistered bill and was consequently void as against those against whom unregistered bills of sale were made void, though not, under the law as it then stood, void as against anybody else. That being so, there is no doubt in my mind that formal notice to Mr. Vaughan to pay off the money was given in order that Mr. Swire should be in a position legally to sell the goods. I have no doubt whatever that that was done for the very purpose and object that by selling those goods they should be able to defeat the creditor who would come against the Rev. Samuel Vaughan and would seize those goods which really and truly belonged to Mr. Swire, — at least for all substantial purposes they belonged to him, because I suppose they were mortgaged to their full value, — but which had been left as I have described in the possession of the Rev. Samuel Vaughan. There is nothing whatever illegal, there is nothing immoral, there is nothing improper in that. It is conceded that it would have been perfectly good, when that notice had been given, if Mr. Swire, acting in his own interest, had come with porters and taken the goods and carried them out of the house, although that had been done only two minutes before the sheriff's officer had turned the corner of the street to come and seize them all. I make no doubt that it was entirely with that object that the transaction took place with Charles Vaughan, the son of the Rev. Samuel Vaughan, who I dare say had not much money of his own, — probably no immediate money; and Mr. Swire, advised I suppose by lawyers that this was the best course to pursue, said, I will sell them to you, Charles, as soon as I have got the right to do it. You cannot pay me I know, you have not got the money, but I will lend you the money. I agree to sell the goods to you and transfer the goods to you, and when they are transferred to you I will lend you the money if you will then give me a new bill of sale upon the goods so as to make them a security for the money I lend you. I have no doubt that that which was done in that way was intended to be done for the very purpose of defeating an execution, and of keeping these goods unsold for the benefit of the dying father and the mother and the children. It would have been very wrong and very improper to *pretend* to do all this, no doubt, but so far from its being wrong or improper to do it, I think it was, as I say, highly moral and right. The question as to whether or no it was a sham, the question whether or no there was really a *bona fide* transaction to the effect which I have described, was left to the jury, and their finding is unimpeached.

Then comes the question of law. Now, says Cave, J., " they prove an agreement between Charles Vaughan and Mr. Swire by which the property in the goods was transferred from Mr. Swire to Charles Vaughan. Now that has been found by the jury to be a *bona fide* agreement, and consequently the effect of that is to give to Charles Vaughan the title which Swire had." Now, had that been so, as at present advised, I should say, subject to what might be said by the other side, if it was necessary to hear them, that there was an apparent ownership in Samuel Vaughan at that time, and I should have said that if Mr. Swire had agreed to transfer the property from himself to Charles Vaughan, Charles Vaughan would be in the same position and no better than Mr. Swire. But instead of thinking that it was an agreement to do that, I think it was intended to be, and was, an agreement not that Mr. Swire would transfer his own right, after having given the due notice by which he was enabled either, as I said before, to come with porters and carry away the goods, and so put an end to the matter, or to sell the property out and out of the Rev. Samuel Vaughan in those goods, — it was not an agreement that he would transfer his own right, but that he would transfer the absolute property in the goods. What Mr. Swire had was the goods subject to an equity of redemption; what he conferred upon Charles Vaughan was very likely not of more value, but it was a different thing. It was the property in the goods without any equity of redemption, and if the transaction was a *bona fide* one (and I do not myself see the slightest ground, when it has been explained as I have explained it, for saying it was not perfectly *bona fide*), I do not see how it comes within the earlier act. The earlier act makes that void as against the holder of a bill of sale and his assigns, and those who claim under him, but it does not make it void as against those who become entitled to the goods by virtue of his exercising the power before ever the person's claim came into existence who had the right to say that the bill of sale was void, and that was not until the time of the execution, when the sheriff's officer came in. in the present case.

It seems to me, therefore, that upon that point, Cave, J., made a mistake — was under a misapprehension. Upon the rest I should be inclined to agree with him. We have not heard the counsel for the respondents, and it may be that on some of the other points the Court of Appeal may be right. I will not say that they are not, but upon that ground I think that this was not a case in which under the acts which had been passed down to 1878 (I do not go further than that), it would have been void as against any one else. It is said that the act of 1882 has the effect of making it void absolutely, or to a greater extent. Whatever effect that act may have on future bills of sale, as far as the present case is concerned, for reasons which I do not repeat, as they have been stated by the Lord Chancellor, and which are satisfactory to my mind, I think that it was not intended to be retrospective so as to bring it into operation in the present case.

For these reasons I agree in the judgment which has been proposed.

Order appealed from affirmed; appeal dismissed with costs.[1]

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[1] The EARL OF SELBORNE, L. C., delivered a concurring opinion, and LORDS WATSON and FITZGERALD also concurred.

INGALLS *v.* HERRICK.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, NOVEMBER TERM, 1871.

[*Reported in* 108 *Massachusetts,* 351.]

TORT against the sheriff of Essex for the conversion of twenty-one bales of flocks of wool, attached on December 17, 1868, by a deputy of the defendant, as property of William H. Lougee, in a suit against Lougee by one of his creditors.

At the trial in the Superior Court, before Lord, J., the plaintiff introduced evidence which tended to show that on December 16, 1868, he bargained with Louis H. Bosworth, Lougee's duly authorized agent, for a purchase of the flocks at an agreed price; that he bought them to sell again; that the bales were numbered and marked, weighed 7,818 pounds, were of about the ordinary size of bales of cotton, and were stored in Lougee's factory; that he told Bosworth that he had no place of his own to store them in, and should wish to have them remain for a while where they were, and would pay storage on them, and Bosworth agreed to this; that he also told Bosworth that he was going to New York the next day, and must have some samples of the flocks to take with him, to resell them by; that on the evening of the same day, at Lougee's counting-room in Lawrence, he received a bill of parcels of the flocks, dated that day and signed by Lougee, specifying the numbers, marks, and weights of the bales, and acknowledging receipt of the agreed price, to wit, $360.64 for six bales, weighing 2,254 pounds, at 16 cents per pound, and $612.04 for fifteen bales, weighing 5,564 pounds, at 11 cents per pound; that at the same time Bosworth gave him parcels of the two kinds of flocks; and that he saw the flocks in the store-room at the factory a week or two before December 16, but did not see them on that day, nor afterwards, until they had been attached by the defendant's deputy.

Bosworth testified, among other things, "that after the bargain was made he went to the factory and examined the bales to get the number and weight of each bale, and wrote the bill of parcels afterwards signed by Lougee, and delivered it to the plaintiff; that he opened two of the bales and took out small quantities of the flocks, which the plaintiff wanted for samples to sell by, and then sewed up the bales; that he met the plaintiff during the afternoon, and told him that the bill and the samples would be ready for him that evening, at Lougee's counting-room; and that he gave these flocks to the plaintiff at the time of the delivery of the bill of sale."

This was all the evidence of a delivery; and the judge ruled that it would not authorize the jury to find a delivery of the goods as against the attaching creditor of the seller, and directed a verdict for the defendants. The plaintiff alleged exceptions.

J. K. Tarbox, for the plaintiff.

S. B. Ives, Jr., and *S. Lincoln, Jr.*, for the defendant.

COLT, J. It was ruled as matter of law, in this case, that the jury would not be authorized upon this evidence to find a delivery of the baled flocks, sufficient to pass a title valid as against creditors of the seller.

There was evidence tending to show that the bargain for the sale was made with one Bosworth, an agent of the seller. A receipted bill of parcels, signed by the seller himself, which contained a description of the bales by number, mark, and weight, was afterwards delivered by the agent to the plaintiff. The subject-matter of the sale was all the baled flocks then stored in the seller's factory. It was thus a completed contract of sale, and as between the parties the title passed to the plaintiff. Was there evidence to go to the jury of a delivery sufficient as to creditors? This is the only question, and in disposing of it we must take the sale to have been made in good faith and for a valuable consideration.

Upon this question, there was evidence tending to show that the flocks were bought for resale; that the bales were large, not easily moved, and requiring room for storage; that the plaintiff, having no convenient place, agreed with Bosworth, at the time of the bargain, to let them remain where they were, and pay storage, and directed him to obtain samples of the flocks, which he, the plaintiff, could take with him to New York to sell by; and that Bosworth accordingly opened the bales, took out samples of two kinds of flocks, sewed up the bales, and gave the samples to the plaintiff at the time he delivered the bill of parcels. The plaintiff bought upon his own previous knowledge of the article, having seen the flocks at the store-room of the factory a week or two before. The samples were not required or used by him in reference to his own purchase, and Bosworth, in taking them from the bales, acted under the directions and as the agent of the plaintiff, and with reference to future sales by him. It was a significant act of ownership and possession on the part of the plaintiff, after the sale was agreed on, through Bosworth, acting in this respect as his agent. There is something more, therefore, here disclosed, than a mere contract of sale without delivery or possession under it. And we are of opinion, under the law heretofore laid down by the court, that the case should have been submitted, with proper instructions, to the jury.

It was early held that the possession of personal chattels by the vendor after an alleged sale is not conclusive evidence of fraud. Upon proof that the sale was made in good faith and for a valuable consideration, and that the possession after the sale was in pursuance of some agreement not inconsistent with honesty in the transaction, the vendee might hold against creditors. Brooks *v.* Powers, 15 Mass. 244. It was declared by Morton, J., in Shurtleff *v.* Willard, 19 Pick. 202, 211, that, whatever the rule upon this point may be in England or elsewhere, it is perfectly well settled in a series of cases here, that the possession of the vendor is only evidence of fraud, which, with the manner of the occupation, the conduct of the parties, and all other evidence bearing upon the question of fraud, is for the consideration of the jury. It is certain that slight evidence of delivery is sufficient; and if the buyer with the consent of the seller obtains possession before any attachment or second sale, the transfer is complete without formal delivery. Shumway *v.* Rutter, 8 Pick. 443. A delivery of a portion in token of the whole is a sufficient constructive delivery as against creditors, although the goods are in the possession of various persons. Legg *v.* Willard, 17 Pick. 140. In Hardy *v.* Potter, 10 Gray, 89, the jury were told that, although the plaintiff only took a bill of sale, yet, if prior to the attachment he had been to the place where the lumber was, and had exercised acts of ownership over it, by virtue of his purchase, that would constitute a delivery of it good against a subsequent attachment. And this instruction was held not open to exception, although the evidence was that the purchaser had only been to Beverly and seen the lumber there. See also Phelps *v.* Cutler, 4 Gray, 137; Tuxworth *v.* Moore, 9 Pick. 347; Bullard *v.* Wait, 16 Gray, 55; Ropes *v.* Lane, 9 Allen, 502, and 11 Allen, 591.

The fact that the possession of the property is retained by the vendor by agreement, and does not follow the bill of sale, is held by this court to be, in most of the cases, evidence of fraud, to go to the jury. In many of the States, the fraud is held to be an inference of law resulting inevitably from the possession. And such was supposed to be the earlier English rule, as laid down in Edwards *v.* Harben, 2 T. R. 587; but the only point there decided was, that an absolute conveyance without possession, if there be nothing but that, is in point of law fraudulent. In the more recent cases, it has been declared that the continued possession by the vendor, of goods sold, is a fact to be considered by the jury, as evidence of fraud, and is not in law a fraud in itself. Martindale *v.* Booth, 3 B. & Ad. 498. Benjamin on Sales, 363.

There was evidence here of delivery, which should have been submitted to the jury. *Exceptions sustained.*

McKIBBIN *v.* MARTIN.

PENNSYLVANIA SUPREME COURT, MARCH 2, 1870.

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[*Reported in* 64 *Pennsylvania State*, 352.]

ERROR to the District Court of Philadelphia: No. 10 and 11, to July Term, 1869.

The cases, the subject of these writs of error, were two feigned issues under the Sheriffs' Interpleader Act, in both of which Chambers Mc-

Kibbin was claimant and plaintiff; Thomas J. Martin was the defendant in one issue, and Charles D. Kline in the other. The issues depended on the same facts, and were tried together January 13, 1869, before Hare, P. J.

The defendants had respectively recovered judgments against Jeremiah and W. C. McKibbin, who composed the firm of J. & W. C. McKibbin, and had been proprietors and conductors of the Merchants' Hotel, a large hotel in the city of Philadelphia. Executions were issued on the judgments, in September, 1868, under which the furniture, &c., in the hotel were levied upon as their property and claimed by the plaintiff. The issues were to try the ownership of these goods.

The plaintiff gave in evidence the following "Articles of agreement made the 11th day of June, 1868, between Jeremiah McKibbin and William C. McKibbin, co-partners as J. & W. C. McKibbin of the one part, and Chambers McKibbin of the other. Whereas, on the first day of February, A. D. 1865, the said Chambers McKibbin, being the owner and proprietor at the time, of the lease and good-will of the Merchants' Hotel, situated on the west side of Fourth Street, south of Arch Street, in the city of Philadelphia, also of its furniture and fixtures of all kinds, &c., and generally of all its arrangements and appurtenances of every nature for the transaction of the business of hotel-keeping, on the said 1st February, 1865, sold the same to the said J. & W. McKibbin, for the sum of $30,000, of which $5,000 were to be paid in twenty days, and $5,000 in each of five other payments, respectively, in 6, 12, 18, 24, and 30 months, with interest for deferred time, from February 1st, 1865, for each of which payments the said J. & W. McKibbin gave to the said Chambers McKibbin their promissory note; and whereas the whole of said purchase-money remains due and unpaid, the parties of the first part having wholly failed to pay any of said notes or any interest thereon; and whereas in the event of default in their payment, it was agreed that upon request of said Chambers McKibbin, said premises should be reconveyed:

"Now, therefore, these presents testify that for and in consideration of the surrender and cancellation of the said promissory notes, and of the debt they represent, &c., and in pursuance of the aforesaid agreement and understanding at the time of the original purchase, the said parties of the first part have sold, &c., unto the said party of the second part, the lease of the said the Merchants' Hotel premises, together with the good-will, fixtures, and appurtenances of the business now transacted in said hotel, and all and singular the furniture, &c., and generally all things for the transaction of the business of hotel-keeping, to them the parties of the first part belonging, and now to said premises and the business there transacted pertaining."

Jeremiah McKibbin, a son of Chambers, and one of the defendants in the executions, testified amongst other things: "Upon sale, the property, in June, 1868, passed into the hands of my father, — the property described in bill of sale. The 'Press' advertisement of dissolution, — also in 'Age,' — are authorized advertisements of the change. From 11th of June, 1868, C. McKibbin carried on the business of the hotel. Have had no interest in business since sale. Father has lived in the hotel since 1865. He has received the income, paid the bills, and conducted the business since sale. I and my brother remained as before, and I was superintendent. I have received nothing but compensation for services, at the rate of $3,500 a year, but there was no express bargain. Bills of hotel were made out in name of C. McKibbin as soon as could be printed. Bills are made out every day more or less. The sign 'Merchants' Hotel,' in front of hotel. No sign put up of C. McKibbin. My father boarded with me and paid no board. My mother had general charge of house and no board was charged. He assumed general charge of business as soon as sale. No express contract has been made with me. He directed the payment of bills and business generally. He has since sale received proceeds of hotel and paid money out when necessary. Journal was of J. & W. C. McKibbin up to sale, and journal of C. McKibbin after sale in same book. I do not reside in hotel. The hotel deals with many people — probably 200 — and with all, bills are made in name of father since sale. Boarders to firm, who are indebted, had to pay boarding in full to C. McKibbin."

George Jacoby testified: "I was bookkeeper for two years, to middle December last. We were ordered on 16th of June to open new set of books, and did so in name of C. McKibbin. From that time he conducted the business. 'Merchants' Hotel' is the only sign that was on the hotel for two years; was no sign of J. & W. C. McKibbin. Business was transacted, bills printed, and receipted and rendered in name of C. McKibbin. Several were rendered in name of old firm and were sent back for correction. Cash-notes, checks, &c., were signed by C. McKibbin.

The advertisements referred to in the testimony of Jeremiah McKibbin are as follows: —

The co-partnership heretofore existing between the subscribers in the business of conducting the Merchants' Hotel of Philadelphia is dissolved, they having disposed of their interest therein to Chambers McKibbin.

JEREMIAH McKIBBIN,
W. C. McKIBBIN.

The undersigned has again become owner of the Merchants' Hotel, and will hereafter conduct and continue the business. He invites a continuance of its former patronage.

CHAMBERS McKIBBIN.

The court submitted the question of good faith to the jury, and reserved the following point: "Whether under all the evidence there was such actual, visible, notorious delivery and change of possession from the sons to the father of the furniture as would be valid in law against the creditor of the vendor."

The jury found for the plaintiff. The court afterwards entered judgment for defendant in the feigned issue, on the point reserved.

The plaintiff took out a writ of error in each case, and assigned the entering of judgment for the defendant on the reserved point, for error.

A. McClure and *T. Cuyler*, for plaintiff in error.

T. J. Diehl and *P. Archer, Jr.* (with whom was *L. C. Cassidy*), for defendants in error.

The opinion of the court was delivered by

SHARSWOOD, J. There are probably no more difficult and embarrassing questions than those which relate to the respective provinces of the court and of the jury to determine what is law and what is fact. It would require a volume to consider the subject in all its bearings, and deduce accurate and intelligible principles from the great mass of the decided cases, and a philosophical treatise on this important head is still I think a *desideratum* of our legal literature. There are undoubtedly some rules clearly established — these are plain lines of demarcation, but there is a border-land of controversy in which the opposing principles seem to be in continual conflict, the victory sometimes inclining to one side and sometimes to the other. This conflict often has ended in a reasonable compromise by which the question has become what is termed a mixed question of law and fact, to be submitted to the decision of the jury under proper instructions from the court.

One of the questions upon which difficulty has often arisen is fraud in the sale or transfer of chattels under the Statute of 13 Eliz. c. 5, Roberts's Dig. 295. Such fraud may be either actual or legal. Actual fraud or fraud in fact consists in the intention to prevent creditors from recovering their just debts by an act which withdraws the property of a debtor from their reach. Fraud in law consists in acts which, though not fraudulently intended, yet as their tendency is to defraud creditors if they vest the property of the debtor in his grantee, are void for legal fraud, which is deemed tantamount to actual fraud, full evidence of fraud, and fraudulent in themselves, the policy of the law making the acts illegal: Baldwin, J., in Hanson *v.* Eustace, 2 How. 688. Actual fraud is always a question for the jury; legal fraud, where the facts are undisputed or are ascertained, is for the court. Dornick *v.* Reichenback, 10 S. & R. 90. "As remarked by an eloquent writer," says Chief Justice Gibson, "these statutes of Elizabeth produce the most beneficial effects by placing parties under a disability to commit fraud in requiring for the characteristics of an honest act such circumstances as none but an honest intention can assume; and they seem to have been expressed in general terms purposely to leave room for a large interpretation by the judges, who, in accordance with the spirit rather than the words, have engrafted on them such artificial presumptions and legal intendments as are ordinarily subjects of judicial construction. In fact they act exclusively by presumptions, not always inflexible indeed, but sometimes amounting to legal conclusions." Avery *v.* Street, 6 Watts, 247.

In Twyne's Case, which came up in the Star Chamber in 44 Eliz., and is reported 3 Rep. 80 b, Moore 638, one of the badges of fraud was declared to be that "the donor continued in possession, and used the goods sold or given as his own; and by reason thereof he traded and trafficked with others, and defrauded and deceived them." No distinction was attempted between actual and legal fraud, and the tribunal forbade any question as to law and fact. It is unnecessary to trace the decisions in England. Clow *v.* Woods, 5 S. & R. 275, decided by this court in 1819, is the Magna Charta of our law upon this subject. The principles settled in that case have been recognized and affirmed by a bead-roll of subsequent decisions, which it would be a mere affectation of learning to cite. Without adverting to other points, it established that retention of possession was fraud in law wherever the subject of the transfer was capable of delivery and no honest and fair reason could be assigned for the vendor not giving up and the vendee taking possession. Since then the courts have been principally occupied in determining when the evidence of change of possession was such as to present a question of law for the court or of fact for the jury.

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No point as to actual fraud arises on this record. That was submitted to the jury, and decided by them in favor of the plaintiff. The whole question of legal fraud, however, was reserved and judgment entered on the reservation for the defendant. If there was evidence from which a jury would have been justified in inferring, under instructions from the court, that there had been in point of fact an actual and exclusive change of possession, it ought, as we think, to have been submitted to them.

The reserved point comprehends two questions, which, in the consideration of the case, it will be best to keep distinct. First, was there evidence from which the jury would be permitted to find such a delivery, actual or constructive, as the law requires to make the sale valid as against creditors? Second, was the possession taken by the vendee exclusive of the vendors or concurrent with them, in point of law?

1. Whenever the subject of the sale is capable of an actual delivery, such delivery must accompany and follow the sale to render it valid against creditors. The court is the tribunal to judge whether there is sufficient evidence to justify the inference of such a delivery. If there is any question upon the evidence as to the facts, or resting upon the credibility of witnesses, the determination of that must be referred of course to the jury. But if not, it is incumbent upon the court to decide it, either by a judgment of nonsuit or a binding direction in the charge. Young *v.* McClure, 2 W. & S. 147; McBride *v.* McClelland, 6 *id.* 94; Milne *v.* Henry, 4 Wright, 352; Dewart *v.* Clement, 12 *id.* 413. But it often happens that the subject of the sale is not reasonably capable of an actual delivery, and then a constructive delivery will be sufficient. As in the case of a vessel at sea, of goods in a warehouse, of a kiln of bricks, of a pile of squared timber in the woods, of goods in the possession of a factor or bailee, of a raft of lumber, of articles in the process

of manufacture, where it would be not indeed impossible, but injurious and unusual to remove the property from where it happens to be at the time of the transfer. Clow *v.* Woods, 5 S. & R. 275; Cadbury *v.* Nolen, 5 Barr, 320; Linton *v.* Butz, 7 *id.* 89; Hayes *v.* Hunsicker, 2 Casey, 58; Chase *v.* Ralston, 6 *id.* 539; Barr *v.* Reitz, 3 P. F. Smith, 256; Benford *v.* Schell, 5 *id.* 393. In such cases it is only necessary that the vendee should assume the control of the subject so as reasonably to indicate to all concerned the fact of the change of ownership. Where nothing of the kind has taken place, it is the duty of the court to pronounce a mere symbolical delivery to be insufficient; but where there is evidence of such assumption of control, it is for the jury to say whether it was *bona fide* or merely colorable, and whether it was enough to give notice to the world. The question in such case is, did the vendee do all that he might reasonably be expected to do in the case of a real and honest sale? In Barr *v.* Reitz, 3 P. F. Smith, 256, the rule was clearly expressed in the opinion of the court by Mr. Justice Agnew. "In considering the question what is an actual delivery, the nature of the property and circumstances attending the sale must be taken into the account. We are not, in carrying out a mere rule of policy, to confound all distinctions between that which is capable of easy delivery and that which is not. Squared timber lying in the woods, or piles of boards in a yard, are incapable of the same treatment as a piece of a cloth, or a horse. So there are many cases which allow the force of those circumstances, which take away any false color or appearance of ownership remaining in the seller." Then, after citing a number of decisions, it is added: "But without affirming these doctrines to the extent these cases might seem to warrant, it is sufficient to say they are illustrations of the principle we have stated, that the circumstances may prevent the court from pronouncing it a fraud, *per se*, and carry the case to the jury on the facts with proper instruction from the court on the law, if the jury find the delivery of possession merely formal or constructive." The distinction founded upon the principle here stated between a question of law and one of fact, may be illustrated by a familiar example. Upon the sale of a single board, or of a cartload of boards, it would not do to set up a constructive delivery by marking, and letting it remain where it was until it was convenient to remove it. The court would be bound to hold as matter of law, that such articles were capable of actual delivery. But it would be different with a board-yard, filled with many piles of lumber. There the circumstances are such as to render an actual delivery and removal impracticable, or at least injurious and expensive. The vendee must assume the control, and do all that an honest man would reasonably be expected to do to advertise the public of the sale.

This seems to be just the difference between the case of Steelwagon *v.* Jeffries, 8 Wright, 407, upon which the court below relied, and the evidence as it appears on this record. That was the sale of the furniture of a dwelling-house. Nothing is easier than to remove it to another house, or if that be not necessary, for the vendor to leave the house and the vendee to take possession with all the ordinary *indicia* of ownership. That is the ground upon which the present Chief Justice placed that determination. "Why," says he, "is not the transfer of household property to be actual and exclusive like that of any other personal property? It is as capable of manual occupancy and removal as almost any other kind. If the sale be actual it usually is removed: if it be only for the purpose of securing it against creditors, why shall it not stand on the same platform with other property, capable of delivery and change of possession?" But the circumstances of a large establishment like the "Merchants' Hotel" are entirely different. Here are many hundred lodging-rooms, parlors, and sitting-rooms, besides the culinary department with its necessary offices, all fully furnished. To what other building can the vendee remove them, or at least without great deterioration and expense? They are valuable mainly for the purpose for which they are used and in the place where they are situated. It is enough that the vendee assume the direction and control of them, and in such an open, notorious manner as usually accompanies an honest transaction. Whether all was done that ought to have been done in this instance, and whether the change of possession was real and *bona fide* — not merely colorable and deceptive — leaving the actual possession and control in the vendors, were questions of fact which ought to have been submitted to the jury.

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2. But the law undoubtedly is, that not only must possession be taken by the vendee, but that possession must be exclusive of the vendor. A concurrent possession will not do. "There cannot in such case," said Mr. Justice Duncan, "be a concurrent possession; it must be exclusive, or it would by the policy of the law be deemed colorable." Clow *v.* Woods, 5 S. & R. 287. And again, in Babb *v.* Clemson, 10 *id.* 428: "There cannot be a concurrent possession in the assignor and assignees; it must be exclusive, or it is deemed colorable and fraudulent. To defeat the execution, there must have been a *bona fide* substantial change of possession. It is mere mockery to put in another person to keep possession jointly with the former owner. A concurrent possession with the assignor is colorable." But what is the concurrent possession which will be deemed such as matter of law? Evidently as owner, or accompanied with the ordinary *indicia* of ownership — such as will lead any person not in the secret to infer that there has been no actual change. The vendor must appear to occupy the same relation to the property as he did before. In such a case the court must pronounce it fraudulent and colorable *per se.* We have been referred to three cases only in our books which were determined on this ground. These were all of the character I have stated. Hoffner *v.* Clark, 5 Whart. 545; Brawn *v.* Keller, 7 Wright, 104; Steelwagon *v.* Jeffries, 8 *id.* 407. Certainly it may be considered as settled by abundant authority in this court that where there has been a sufficient actual or constructive delivery to the vendee, and he is in possession, the fact that the vendor is employed as

a clerk or a servant about the establishment, in a capacity which holds out no *indicium* of ownership, does not constitute such a concurrent possession as the law condemns. In such cases it is a question for the jury whether the change of possession has been actual and *bona fide* — not pretended, deceptive, and collusive. If there are facts tending to show that he had a beneficial interest in the business; that the proceeds of it went to him beyond a reasonable compensation for his services; that he had an unlimited power to draw upon the till; or that with the knowledge of the vendee he took money to pay his own debts — these are facts for the jury. I will refer to a few of the cases which sustain this view. Thus in McVicker *v.* May, 3 Barr, 224, a sale by a father to a son; when the son had removed to another tavern-stand the father continued to live with him, and was employed about the house as a servant. "When the son opened the new tavern," say the court, "his mother and sister kept house for him, and his father did jobs; but the son's possession and use of the goods were exclusive. But if mere cohabitation were a badge of fraud, a father's sale to his unmarried son would seldom be sustained. It certainly was not necessary for the son to turn his father out of doors." Forsyth *v.* Matthews, 2 Harris, 100, as explained by Mr. Justice Lowrie, before whom the case had been tried below, 2 Casey, 74, was a sale by a son to his father, and though the business continued to be conducted in the same place and with the assistance of the son, yet there being evidence of an actual transfer of the possession and control of the property, the sale was sustained. Childs *v.* Simmons, an unreported case, cited 2 Casey, 74; the transfer was by a storekeeper to his clerk, the vendor continued to aid in the store, but the sign was changed, and the sale was upheld. Hugus *v.* Robinson, 12 Harris, 9; the subject was a drugstore. The vendee bought it for his son, who had been a clerk and apprentice of the vendor, and put him in possession. The vendor attended the store very much as before, and the signs were not changed. It was left as a question of fact, to the jury, and the judgment was affirmed. In Dunlap *v.* Bournonville, 2 Casey, 72, two brothers transferred a coachmaker's establishment to a third, and the vendors remained in the capacity of foremen. It was held that it ought to have been submitted to the jury. Chief Justice Thompson has said that this case stands on the very outer verge of settled principles, but on its facts is still within them: 8 Wright, 412. In Billingsley *v.* White, 9 P. F. Smith, 464, two partners sold out a store of goods to the brother of one of them. One of the vendors continued in the store as a hired hand. "If," said Mr. Justice Williams, "Billingsley's acts and declarations as a salesman had been such as to leave it doubtful whether he was acting as owner or agent, then his presence and connection with the goods would have been such evidence of retained possession as to render the sale fraudulent. But if his acts and declarations were professedly and apparently those of a mere agent, and were so understood by the parties with whom he dealt, as all the evidence tends to show, then they constituted no such badge of fraud or evidence of retained possession as would justify the court in declaring the sale fraudulent."

I frankly confess that I have not regarded this line of decisions with favor. Dunlap *v.* Bournonville was tried before me in the District Court, and I entered the judgment of nonsuit, which was there reversed. I dissented from the determination in Billingsley *v.* White, because I was afraid that it went a step further than any of the preceding cases in recognizing the right of the vendee to employ the vendor as his agent to conduct the business. Perhaps it does not go that far. But I have been too long on the bench — now nearly twenty-five years — not to have learned this lesson, that a judge has no right to adhere to his own favorite opinions, after they have been reversed or overruled. It is his duty to administer justice according to the law as it is settled — not according to his own notions of what it ought to be. *Neminem oportet esse sapientiorem legibus:* no man out of his own private reason ought to be wiser than the law, which is the perfection of reason, says Lord Coke, 1 Inst. 97, b.

Judgment reversed, and venire facias de novo *awarded.*[1]

SECTION III.

How Far Delivery is Essential to the Transfer of Title.

AMBROSE LANFEAR *v.* CHARLES P. SUMNER.

Supreme Judicial Court of Massachusetts, March Term, 1821.

[*Reported in* 17 *Massachusetts,* 110.]

Trover for the conversion of one hundred chests of young hyson and fifty chests of hyson tea, averred to be the property of the plaintiff. Trial on the general issue, before the Chief Justice, November term, 1819.

The plaintiff, to prove his property, produced in evidence the following paper: "For value received, I hereby assign and set over to Ambrose Lanfear, and to his assigns, one hundred chests of young hyson tea, and fifty chests of hyson tea, shipped at Canton, by Benjamin C. Wilcocks, on board of the ship 'Osprey,' Captain Brown, bound to Boston, being my property and consigned to me. Philadelphia, July 2d, 1819. William Waln."

The plaintiff was the agent of the house of Thomas Wilson & Co., merchants in England, to whom the said Waln was indebted in a much larger sum than the value of the teas. By the testimony of the said Waln, and other testimony in the case, it appeared that the above-recited paper was executed and delivered to the plaintiff before two o'clock P. M. of the said 2d of July. No money was paid by the plaintiff, nor any discharge executed of the debt due to said Wilson & Co., or of any part thereof.

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[1] For a concise statement of the law in the several States as to fraudulent retention of possession by the seller, see Benjamin on Sales (Bennett's ed., 1899), p. 489.

The action was defended under the said Sumner, who, as a deputy sheriff of Suffolk, had attached the same teas at the suit of James & Thomas H. Perkins & Co., merchants in Boston, and creditors to Waln to a large amount, upon bills of exchange drawn upon him and by him accepted. The attachment by the defendant was made on the same second of July, at half an hour past five o'clock in the afternoon; and possession of the teas was taken by him.

It appeared that the paper aforesaid, purporting to be an assignment of the teas in question to the plaintiff, was by him transmitted to John Dorr, merchant in Boston, as soon as the course of the mail would admit, and was received by Dorr on the 5th of July, who, within an hour after the receipt of the same, made demand of the teas, by virtue of an authority given by the plaintiff on the back of the paper; but he did not obtain possession.

It appeared that the teas arrived at Boston, in the ship "Osprey," a day or two before the said 2d of July, consigned by the said Wilcocks to the said J. & T. H. Perkins & Co., on the account and risk, and for the use of the said Waln; and the said Perkins & Co. had entered them in the custom-house, and had given bonds for the duties thereon. An offer was made by Dorr, in behalf of the plaintiff, to indemnify them against their said bonds, and to pay all further charges thereon.

A verdict was taken for the plaintiff by consent, to be set aside if the action could not be maintained on the foregoing facts, and a nonsuit entered; otherwise judgment was to be rendered on the verdict, with additional interest.

Prescott and *Webster*, for the plaintiff.

Hubbard, for the defendant.

JACKSON, J., delivered the opinion of the court.

Considering this case in the most favorable view for the plaintiff, it is the case of two creditors, each endeavoring to secure his debt out of the same fund. Neither party had notice of the measures adopted by the other; but each was using his diligence fairly, for the purpose of obtaining payment of a just debt. The question is, Which acquired the best legal title? In this statement of the case, we consider Messrs. Wilson & Co., for whom the plaintiff was agent, as the real plaintiffs, and the Messrs. Perkins & Co., who caused the attachment to be made, as the real defendants.

The conveyance, relied on by the plaintiff, was intended as a payment, to the amount of what the goods should produce; or as security of a debt due from Waln to Wilson & Co.

But it is objected that this consideration of the conveyance does not appear in the instrument; that there was no discharge of the debt; no receipt for the goods, with an obligation to account for the proceeds; and no writing whatever showing the agreement which is said to have been made between the parties; but that the instrument purports to be an absolute conveyance by Waln, for a full price received, which must have operated as a fraud upon all the other creditors of Waln.

These objections are certainly entitled to much consideration; but there is another defect in the plaintiff's title, which we think fatal, and that is the want of a delivery to him, in pursuance of the supposed conveyance.

A few hours after this conveyance was made in Philadelphia, the defendant attached the goods in Boston. The attaching creditors are to be considered as purchasers for a valuable consideration, and, in the present case, as purchasers *bona fide*, and without notice of the prior conveyance to the plaintiff. The defendant took possession under their title; and the plaintiff never acquired possession.

The general rule is perfectly well established, that the delivery of possession is necessary in a conveyance of personal chattels, as against every one but the vendor. When the same goods are sold to two different persons, by conveyances equally valid, he who first lawfully acquires the possession, will hold them against the other. This principle is recognized in the case of Lamb *et al. v.* Durant, 12 Mass. Rep. 54, and in Caldwell *et al. v.* Ball, 1 D. & E. 205. The latter indeed was a case, not of actual delivery of goods to either party, but of delivery of the bill of lading. There were two bills of lading, signed at different times by the master of the ship; and the party who first obtained one of them by a legal title from the owner of the goods, was held to have the best right, although the bill of lading, under which he claimed, was made the last. The indorsement and delivery of the bill of lading, in such a case, is equivalent to the actual delivery of the goods.

This is also the rule of the civil law. When the same thing is sold to two different persons, "Manifesti juris est, eum, cui priori traditum est, in detinendo dominio esse potiorem." Cod. 3, 32, 15. So Voet ad Pand. lib. 6, tit. 1, § 20, "Ad vindicationem rei duobus separatim diverso tempore distractæ, non is cui priori vendita, sed cui (pretio soluto, vel fide de eo habita) prius est tradita, admittendus est." And Pothier, in the place cited in the argument, Vente, No. 318, 320, states the same principle; and puts the case of a sale without delivery, and a subsequent attachment by the creditors of the vendor, who, he says, would hold the goods against such a purchaser.

There are, indeed, in the civil law, various modes of taking or delivering possession; that is, different acts, which are equivalent to actual possession; resembling, in our law, the acknowledgment and registry of a deed conveying land; receiving the keys of the warehouse, in which goods are deposited; and the case before mentioned of receiving the bill of lading of goods at sea. But it is still necessary to every conveyance of goods, that there should be an actual or legal delivery of them to the vendee.

Upon these principles, it is obvious that the defendant must prevail in this case; unless there was a legal delivery to the plaintiff, or something equivalent to an actual delivery, before the attachment made by the defendant. We can see nothing of that kind in the evidence reported. The plaintiff and Waln, it is true, supposed at the time of their negotiation, that the goods were at sea. But if they had been so, Waln had no bill of lading, and no other document or evidence of his title, to deliver to the plaintiff. The case, therefore, does not come within the rule applicable to the indorsement and delivery of a bill of lading; nor can we perceive that it comes within any other exception to the general rule, which requires an actual delivery to the vendee.

Suppose that these goods had been consigned to Waln himself, and that the bill of lading had come to his hands after this negotiation with the plaintiff. If, in that case, a third person had purchased the goods of Waln for a valuable consideration, and without notice of any prior conveyance, and had taken the bill of lading indorsed by Waln; it would not, we think, be doubted that he would hold the goods against the plaintiff. If so, it shows that the property was not absolutely and entirely transferred from Waln to the plaintiff. It might be so, as between themselves; but not with regard to a subsequent *bona fide* purchaser, for a valuable consideration; and this is the relation in which the defendant now stands.

In the case of Lempriere *et al.*, Assignees of Syeds, a bankrupt, *v.* Pasley, 2 D. & E. 485, Syeds before his bankruptcy had covenanted, for a valuable consideration, to assign and deliver to the defendant some goods, which he expected on board a certain ship; and he also covenanted that he would indorse and deliver to the defendant the bill of lading, as soon as he should receive it; and at the same time he did deliver the policy and letters of advice of the expected shipment, which were all the documents he then had. After he became bankrupt, the bill of lading arrived, and he immediately indorsed it to the defendant, who thereupon received the goods. It was decided that the defendant should hold them against the assignees of the bankrupt, on the ground that the assignees stood in the place of the bankrupt, and took his property subject to all equitable liens, to which it was subject in his hands. It was not contended, in the argument for the defendant, that there was a complete transfer of the property, before the bankruptcy; but only an equitable lien or interest in the defendant.

A commission of bankruptcy has been sometimes called a statute execution; but the assignees have not, in all respects under the commission, the same rights as a creditor by execution, or in our law an attaching creditor. Such a creditor, as before observed, is to be considered as a purchaser for a valuable consideration. And in the argument for the defendant, in the case last cited, it was thought material to distinguish between the rights of the assignees, and those which would have been acquired by a creditor under an execution, or a *bona fide* purchaser under the bill of lading; it being admitted that the latter persons, if they had first got possession, without notice of Pasley's claim, would have held the goods against him. In the opinion of the court, also, the same distinction is noticed; and it is admitted that such a purchaser, having obtained possession, would hold against Pasley, although the assignees could not. The point decided in that case depended on the English bankrupt laws, and therefore does not affect the question now before us; but the course of reasoning, and the opinions expressed in it, tend strongly to confirm the opinion which we have adopted in the present case.

Plaintiff nonsuit.

EDWARD C. DEMPSEY *v.* WILLIAM T. GARDNER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH 14 — SEPTEMBER 4, 1879.

[*Reported in* 127 *Massachusetts,* 381.]

TORT, for the conversion of a horse. The defendant, a constable, justified under a writ against Margaret C. Dempsey, the plaintiff's mother, by virtue of which he attached and sold the horse as her property.

At the trial in the Superior Court, before Pitman, J., the plaintiff contended that he was the owner of the horse at the time of the attachment; and offered evidence tending to show that, about three months before the attachment, having previously advanced to his mother considerable sums of money, equal to or greater than the value of the horse, he received from her, upon payment of $15 in addition, a bill of sale of the horse for $260; which bill of sale he produced and proved, and testified that he bought the horse at that time from his mother. His mother also testified that she sold the horse to the plaintiff at that time. It further appeared that the horse had been always used in the family: that the mother lived in her own house, and the horse was kept in her barn, and continued to be kept there after the bill of sale was delivered to the plaintiff; and that the latter did not live with his mother, but frequently went to see her; and he testified that, at such times, he saw the horse, as he also testified he did before the sale.

The plaintiff's counsel, in reply to a question by the judge, admitting that there was no evidence of delivery for the consideration of the jury, except such as might be implied from the execution and delivery of the bill of sale, the judge ruled that the plaintiff had not shown a title good as against a subsequent attaching creditor; and ordered a verdict for the defendant. The plaintiff alleged exceptions.

J. P. Treadwell, for the plaintiff.

C. Robinson, Jr., for the defendant.

GRAY, C. J. If the testimony at the trial was believed, the title in the horse passed as between the parties to the sale. Pratt *v.* Parkman, 24 Pick. 42, 46; Morse *v.* Sherman, 106 Mass. 430; Dugan *v.* Nichols, 125 Mass. 43.

But by the law as established in this Commonwealth, it was necessary, as against subsequent purchasers or attaching creditors, that there should be a delivery of the property. No such delivery, actual or symbolical, was proved. The buyer did no act by way of taking possession or exercising ownership, and the seller did not agree to hold or keep the horse for him. The plaintiff's counsel, as he states in his bill of exceptions, in reply to a question from the judge presiding at the trial, expressly admitted that there was no evidence of delivery for the consideration of the jury, except such as might be implied from the execution and delivery of the bill of sale. That was not enough. Carter *v.* Willard, 19 Pick. 1; Shumway *v.* Rutter, 7 Pick. 56, 58, and 8 Pick. 443, 447; Packard *v.* Wood, 4 Gray, 307; Rourke *v.* Bullens, 8 Gray, 549; Veazie *v.* Somerby, 5 Allen, 280, 289.

The cases cited for the plaintiff are quite distinguishable from this. In Tuxworth *v.* Moore, 9 Pick. 347, and in Bullard *v.* Wait, 16 Gray, 55, the horse was in the possession of a third person, to whom notice of the sale was given. In Chapman *v.* Searle, 3 Pick. 38, and in Ingalls *v.* Herrick, 108 Mass. 351, there was an express agreement that the seller should hold the property on storage for the buyer. In Thorndike *v.* Bath, 114 Mass. 116, the article was by express agreement left after the sale with the seller to be finished for the buyer. In Dugan *v.* Nichols, 125 Mass. 43, the question arose between the buyer and the assignee in bankruptcy of the seller, who had no greater rights than the seller himself; and the decision was put upon that ground.

The case of Hardy *v.* Potter, 10 Gray, 89, was an action of trover against a deputy-sheriff for attaching a quantity of lumber on mesne process against one Adams in January, 1856. At the trial the plaintiff testified that he bought the lumber from Adams in the State of Maine in October, 1855, took bills of sale of it, and paid for it by his promissory notes; that the lumber was then lying upon certain wharves in Beverly in this Commonwealth, in the custody of one Cross, an agent of Adams and to whom Adams promised to write; that nothing more was to be done between the plaintiff and Adams in relation to the sale; and that in the fall of 1855 the plaintiff saw the lumber in Beverly. Upon that evidence the plaintiff rested his case. But the report as published is imperfect, as we find by referring to the original bill of exceptions, in not stating that Cross, being afterwards called as a witness for the defendant, testified, among other things, "that he was informed in the latter part of October, 1855, by Adams by letter that he had sold all the lumber, but was not informed to whom the sale was made; that he learned for the first time in December, 1855, that the property had been sold to the plaintiff." This fact, though not particularly noticed in the very brief opinion upon the point of delivery, may well have had an important influence upon the decision; for where property sold is at the time in the custody of a third person, notice to him of the sale is sufficient to constitute a delivery as against subsequent attaching creditors. Tuxworth *v.* Moore, 9 Pick. 347; Carter *v.* Willard, 19 Pick. 1; Russell *v.* O'Brien, 127 Mass. 349.

Exceptions overruled.

JULIUS HALLGARTEN *v.* JONATHAN OLDHAM.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY 12 — APRIL 3, 1883.

[*Reported in* 135 *Massachusetts*, 1.]

REPLEVIN of 497 slabs of tin. Writ dated September 29, 1880. The case was submitted to this court on agreed facts, in substance as follows: —

The plaintiffs at the times hereinafter mentioned were bankers, and one Lissberger was a dealer in metals, all doing business and domiciled in the State of New York. Lissberger was largely indebted to the plaintiffs for advances of money made in New York; and, as security therefor, the plaintiffs held merchandise, warehouse receipts, and other property, deposited with them in New York by Lissberger.

On or about May 3, 1880, Lissberger applied to the plaintiffs, in New York, for a release of security to the amount of $11,000, so held by them, and offered to substitute therefor a warehouse receipt and weigher's certificate for certain tin of the same value, then, and until service of the writ in this action, stored in a warehouse belonging to one Damon, on Damon's Wharf, in the control of Gardner Prouty, in Boston, the receipt and property to be held as security in like manner with the securities for which it was substituted. The receipt, signed "Gardner Prouty, wharfinger," was as follows: "No. 919. Boston, April 26, 1880. Received on storage, at Damon's Wharf in store No. 8, for H. Lissberger, the following described merchandise from bark 'Mohican,' which we promise to deliver to him upon the payment of charges. Marks: Four hundred and ninety-seven (497) slabs tin." Prouty had received the tin at Boston, and there signed the receipt, and delivered it and the weigher's certificate. The plaintiffs assented to Lissberger's proposition, received, in the usual course of business from Lissberger, the weigher's certificate and receipt duly indorsed in blank by Lissberger, and delivered to him the property for which he had applied. This transaction took place in New York. No record of this transaction, or of any part of it, was made on the records of the city of Boston, and the tin was not delivered to the plaintiffs, except so far as what is above stated constituted a delivery. The warehouse in which the tin was stored had been largely and exclusively used for the storage of property belonging to others than the owners of the warehouse for more than twenty years preceding this transaction, and the form of warehouse receipts given during that period by Prouty was like the one in this case, with this qualification, that, about eleven years before this transaction, there was introduced into the receipt, after the word "deliver," the word "to" followed by a blank space for the insertion of the word "him" or "them," this addition not having previously formed a part of the receipt.

The warehouseman who issued the receipt in this case was not a public warehouseman, appointed under the provisions of the St. of 1860, c. 206, and the acts amendatory thereof. The debt of Lissberger for said advances is still unpaid, and exceeds the value of all the securities. The plaintiffs retained the receipt and certificate without action until August 7, 1880, when they gave notice to the warehouseman that they held the receipt, having first learned on the previous day of the issuing of the attachment hereinafter mentioned.

On June 15, 1880, the defendant, a deputy sheriff for Suffolk County, attached the tin as the property of Lissberger, upon a writ sued out of the Superior Court by Cyrus Wakefield and others against Lissberger, to recover a debt. The writ was returnable at July term, 1880, and was entered at that term; and at April term, 1881, judgment thereon was rendered for Wakefield and others in the sum of $27,000 and upwards, which judgment is in no part satisfied.

The tin was held by the defendant under the attachment until the service of the writ in this action. There is no fraud or bad faith imputed to the plaintiffs in any of their dealings, or in their omission to give notice as aforesaid; and neither of the plaintiffs in the action of Wakefield and others against Lissberger, nor the defendant in this action, had, until after August 7, 1880, any notice or knowledge of the transaction between Lissberger and the plaintiffs, or of any interest or claim of the plaintiffs in or to the tin, unless they are affected with notice by reason of the matters hereinbefore stated.

The plaintiffs made due demand on the defendant for the amount of their debt, and otherwise complied with the provisions of the Gen. Sts. c. 123, § 63, and the debt was not paid or tendered; and, after the expiration of ten days from the demand, they brought this action.

The law of New York, if material, is as stated in the judgments of its courts in the cases of Wilkes *v.* Ferris, 5 Johns. 335, and Yenni *v.* McNamee, 45 N. Y. 614, which cases may be referred to.

If the plaintiffs were entitled to recover, judgment was to be entered for them, with damages in the sum of one dollar, and costs; otherwise, for the defendant, for a return, damages to be assessed, and costs.

S. Bartlett and *S. Lincoln*, for the plaintiffs.

F. E. Parker, for the defendant.

HOLMES, J. Two questions only are raised: the main one, whether enough had been done to give the plaintiffs a good title as against the attaching creditor; the other, a preliminary inquiry whether the sufficiency for that purpose of what was done is to be determined by the law of New York or of Massachusetts.

To dispose first of the preliminary matter. This case must be governed by the ordinary rules applicable to similar transactions taking place wholly within this State. When a sale, mortgage, or pledge of goods within the jurisdiction of a certain State is made elsewhere, it is not only competent, but reasonable, for the State which has the goods within its power to require them to be dealt with in the same way as would be necessary in a domestic transaction, in order to pass a title which it will recognize as against domestic creditors of the vendor or pledgor. This requirement is not peculiar to Massachusetts, but has the sanction of the highest courts of the United States and of other States. Lanfear *v.* Sumner, 17 Mass. 110; May *v.* Wannemacher, 111 Mass. 202, 208, 209; Green *v.* Van Buskirk, 5 Wall. 307, 212; s. c. 7 Wall. 139, 150, 151; Guillander *v.* Howell, 35 N. Y. 657; Olivier *v.* Townes, 2 Mart. N. S. La. 93; Clark *v.* Tarbell, 58 N. H. 88; Rice *v.* Courtis, 32 Vt. 460; Martin *v.* Potter, 34 Vt. 87, 88. See also Dicey on Domicil, 262, rule 57. It is not necessary for the purposes of this case to consider whether it should be dealt with as an exception to general rules, as it is regarded in Rhode Island Central Bank *v.* Danforth, 14 Gray, 123, cited for the plaintiffs, or as an illustration of a sound and fundamental principle.

We pass to the question whether enough had been done to give the plaintiffs a good title as against the defendant. As this is to be decided by the same rules as if the whole transaction had taken place in Massachusetts, it is immaterial whether the indorsement of the warehouse receipt, if effectual, created a pledge, a mortgage, or, as has been suggested, a transfer of the absolute title in trust to accomplish the purposes of the transfer. Farmers' & Mechanics' National Bank *v.* Logan, 74 N. Y. 568, 582, 583. See also De Wolf *v.* Gardner, 12 Cush. 19, 26; Gibson *v.* Stevens, 8 How. 384, 400; The Thames, 14 Wall. 98, 108; Dows *v.* National Exchange Bank, 91 U. S. 618, 632; Casey *v.* Cavaroc, 96 U. S. 467, 477; Glyn *v.* East & West India Dock Co., 7 App. Cas. 591, 606; s. c. 6 Q. B. D. 475, 480, 490, 499, and 5 Q. B. D. 129, 130. For, as against attaching creditors, the law of Massachusetts has always required a delivery, as well in the case of an absolute transfer, even a sale, as in that of a chattel mortgage or pledge, from the time of Lanfear *v.* Sumner, *ubi supra,* down to the latest volumes of reports. Burge *v.* Cone, 6 Allen, 112; Dempsey *v.* Gardner, 127 Mass. 381. Cf. Harlow *v.* Hall, 132 Mass. 232.

Lanfear *v.* Sumner has been criticised in England, where the law appears to be otherwise; Blackburn on Sales, 327, 328; Meyerstein *v.* Barber, L. R. 2 C. P. 38, 51; a fact to be remembered in dealing with the English cases. But the plaintiffs do not attempt to overthrow the long-established rule of this State; they say that they have satisfied it. And their argument is that the warehouse receipt, being the key to the property, has become a symbol representing it by a commercial usage of which the court will take notice, and that therefore an indorsement and delivery of the receipt, under circumstances in which they carry an interest in the goods, amount also, by construction of law, to a delivery of the goods within the requirements of the rule. It is said that, in adopting this view, we should only be extending the principles already applied to bills of lading to other documents which are dealt with by merchants on the same footing.

The difficulty in dealing with this argument arises largely from the very great ambiguity attaching to the word "delivery," in both American and English cases. It has been used often when it is evident that the true question was only whether the property had passed. The simplest explanation even of Gibson *v.* Stevens, *supra*, would be that delivery was not necessary to pass property as against third persons by the law of Indiana. See Pierce *v.* Gibson, 2 Ind. 408, 412.

But the delivery required by the rule in Lanfear *v.* Sumner is delivery in its natural sense; that is, a change of possession. And it cannot be borne in mind too carefully that the only matter now under discussion is whether there has been a delivery in this sense, or dealings having the legal effect of such delivery, of the goods referred to in the warehouse receipt. Cases which turn on a question of property only, or in which delivery or its equivalent was not essential, whether because the question arose between the parties to the sale or mortgage, or because delivery was not necessary in that jurisdiction to complete the transaction as against third persons, or for any other reason, are not precedents in point. Many such cases will be found which speak of documents as symbols of the goods. But that expression will not help us, unless it means that a transfer of the documents has the effect of a delivery of the goods as against an attaching creditor, who would be preferred unless the goods had changed hands.

The question is, then, how the transfer of any document can have that effect. The goods are in the hands of a middleman, and they remain there. A true change of possession could only be brought to pass by his becoming the servant of the purchaser for the purpose of holding the goods, so that his custody should become the possession of his master. But this is not what happens, and it has been held that less would satisfy the law. A carrier, or the warehouseman in this case, is not the servant of either party *quoad* the possession, but a bailee holding in his own name, and asserting a lien for his charges against all parties. He alone has possession of the goods, whether the document is transferred or not.

But it has been held that the principle of the rule requiring a delivery is satisfied, although the letter of it is not, if the possessor of the goods becomes the purchaser's bailee. Tuxworth *v.* Moore, 9 Pick. 347; Russell *v.* O'Brien, 127 Mass. 349, 354; Dempsey *v.* Gardner, 127 Mass. 383. Now, it is obvious that a custodian cannot become the servant of another in respect of his custody except by his own agreement. And, *a fortiori*, when that custodian does not yield, but maintains his own possession, it is clear that his custody cannot enure to the benefit of another, as if it were the possession of that other, unless the bailee consents to hold for him subject to his own rights. The only way, therefore, in which a document can be a symbol of goods in a bailee's hands, for the purposes of delivery to a purchaser, is by showing his consent to become the purchaser's bailee.

It may or may not be true that, if a warehouse receipt contains an undertaking to deliver to order, that undertaking is to be regarded as an offer by the warehouseman to any one who will take the receipt on the faith of it, and that it will make him warehouseman for the indorsee, without more, on ordinary principles of contract. That is the argument of Benjamin on Sales (2d ed.), 676 *et seq.*, criticising Farina *v.* Home, 16 M. & W. 119, and Blackburn on Sales, 297. But the criticism and the case agree in the assumption, that the only way in which the indorsement of a document of title can have the effect of a delivery is by making the custodian bailee for the holder of the document, and that he cannot be made so otherwise than by his consent. The necessity for notice, in those cases where notice is necessary, stands on the same ground. If the custodian has not assented in advance, he must assent subsequently; and the principle is the same whether an express acceptance of a delivery order be required, or it is held sufficient if he does not dissent when notified. Boardman *v.* Spooner, 13 Allen, 353, 357. Cf. instructions of Shaw, C. J., to the jury in Carter *v.* Willard, 19 Pick. 1, 3; Bentall *v.* Burn, 3 B. & C. 423.

It is true that there are one or two decisions of this court which it is somewhat hard to reconcile with the foregoing principles. The strongest of these is Green Bay National Bank *v.* Dearborn, 115 Mass. 219. In that case the plaintiff discounted Parks & Co.'s draft on Harvey Scudder & Co. against a railroad receipt, of which the following were the material words: "Received from R. G. Parks & Co. one hundred barrels of flour consigned to Harvey Scudder & Co., Boston." This was delivered to the plaintiff in Wisconsin, on the understanding that the property was thereby transferred as security for the advance. Scudder & Co. declined to accept the draft, and the goods were attached by the defendant. The plaintiff brought replevin and was held entitled to recover. It will be observed that the document did not run to order, and was not indorsed, so that it could not be argued that the railroad company had attorned in advance; and there was no notice to the company, so that it had not made itself the plaintiff's bailee subsequently, if ordinary principles were to be applied. It was said, however, that the carrier became the plaintiff's bailee from the time its receipt was delivered. A carrier does stand differently from other bailees in one respect. He has no *delectus personarum*, but is bound to carry for any one who takes proper steps to make him do so. There is, too, the further circumstance, that the usual mode of shipping grain is to draw against it, and to get a bank to discount the draft. But it may be doubted whether the suggestion was warranted that a carrier would not ordinarily give up the goods except upon a production and surrender of the receipt. Forbes *v.* Boston & Lowell Railroad, 133 Mass. 154, 158. And, so far as the language might seem to imply that the mere passing of the property, as between the parties, made the carrier bailee for the plaintiff by the general law of bailment, it seems to us too broad. Cf. Henderson *v.* Comptoir d'Escompte de Paris, L. R. 5 P. C. 253.

But whatever the scope of Green Bay National Bank *v.* Dearborn, we cannot apply it as a precedent in the present case, so long as Lanfear *v.* Sumner stands. When a private warehouseman, who has an unfettered right to choose the persons for whom he will hold, gives a receipt containing only an undertaking to his bailor personally, without the words "or order," or any other form of offer or assent to hold for any one else, it is impossible to say that a mere indorsement over of that receipt will make him bailee for a stranger. He has not consented to become so, even under the principles argued for by Mr. Benjamin. And, until he has consented to hold for some one else, he remains the bailee of the party who entrusted him with the goods. There was, therefore, nothing done in this case to satisfy the rule of Lanfear *v.* Sumner.

If it be suggested that the rule would not help a party chargeable with notice, and that the fact that the receipt had been indorsed over amounted to constructive notice to the defendant, the answer is that, supposing notice would have put an end to his right to attach, when there had not been a delivery or its equivalent, the defendant was not bound to inquire for the receipt. To call such an instrument a key to the goods is a *petitio principii*. For it assumes that the receipt must be produced in order to obtain them, or that a transfer of it without the bailee's knowledge will affect his rights. But the bailor is not bound to produce the receipt as a condition precedent to his right to get back the goods on payment of charges, and the bailee can safely deliver the goods without it.

The appeal to commercial usage cannot help the plaintiffs' case. If there be any usage to treat such documents as this as symbols of property, in the sense of the argument for the plaintiffs, it is simply a usage to disregard well-settled rules of law affecting the rights of third persons. But we doubt if a prudent merchant would advance on the indorsement of a private warehouse receipt not running to order, before he had made sure of the warehouseman's assent. We are confirmed in the view which we take, by observing that the Legislature, in dealing with public warehousemen, and providing that "the title to goods stored . . . shall pass to a purchaser or pledgee by the indorsement and delivery to him of the warehouseman's receipt" (Pub. Sts. c. 72, § 6), as a preliminary to that result, expressly requires, in § 5, that the receipt "shall be negotiable in form."

Judgment for the defendant.[1]

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MEADE *v.* SMITH AND OTHERS.

CONNECTICUT SUPREME COURT OF ERRORS, JUNE, 1844.

[*Reported in* 16 *Connecticut,* 346.]

THIS was an action of trover for certain cows, oxen, carts, and other articles of personal property, against Ebenezer Smith, Jacob Dayton, jr., and David D. Husted.

The cause was tried, on the general issue, pleaded by the defendants severally, at Fairfield, April adjourned term, 1844, before Storrs, J.

The plaintiff claimed title to the property described in the declaration, by virtue of a bill of sale thereof, made and delivered to him, in the city of New York, on the 3d of November, 1842, at half past 9 o'clock, A. M., by Esbon Husted, of Greenwich, in this State. The plaintiff claimed to have proved, that the property was then in the actual possession of Husted, in Greenwich; and that he, the plaintiff, immediately on receiving the bill of sale, proceeded from the city of New York to Greenwich, for the purpose of taking possession of the property, and arrived there at about 4 o'clock P. M.; that the consideration of the bill of sale consisted of the indebtedness of Husted to the plaintiff for about 750 dollars, and the verbal promise of the plaintiff then made to Husted, that he, the plaintiff, would assume upon himself the payment of a certain promissory note, which Husted owed to the Mechanics and Traders' Bank in the city of New York, which had not then arrived at maturity, and which was indorsed by the plaintiff, for Husted's accommodation; also two other notes, which Husted then owed to Elizabeth Griggs, and another which he owed to E. Fish & Co. It was not claimed by the plaintiff, that he had assumed the payment of these notes, by any agreement or arrangement with the creditors, or that they had ever been consulted at all on the subject, or had any knowledge thereof; or that there had been any assumption of said debts, by the plaintiff, otherwise than by said verbal agreement with Husted, nor was it claimed by the plaintiff, that Husted was in any way discharged from said debts, or either of them.

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[1] Gill *v.* Frank, 12 Ore. 507, *acc.* See also Freiberg *v.* Steenbock, 54 Minn. 509; Whitney *v.* Lynde, 16 Vt. 579; Hildreth *v.* Fitt, 53 Vt. 684. *Conf.* Gibson *v.* Stevens, 8 How. 384. In Huschle *v.* Morris, 131 Ill. 587, 593, Mr. Justice Bailey, in delivering the opinion of the court, said: "In case of an unconditional sale of specific chattels, delivery is not essential to complete the sale and pass the title as between the parties, where, by the agreement, nothing remains to be done but for the purchaser to take possession. But as to creditors and *bona fide* purchasers the rule is different, as a delivery is indispensable to complete the sale so as to render it valid as against them." See to similar effect, Pollard *v.* Reardon, 65 Fed. Rep. 848 (C. C. A.); Fairfield Bridge Co. *v.* Nye, 60 Me. 372; Jones *v.* Hodgkins, 61 Me. 480; Reed *v.* Reed, 70 Me. 504; Crawford *v.* Forristall, 58 N. H. 114; Kirven *v.* Pinckney, 47 S. C. 229; English Sale of Goods Act, § 25 (1). *Conf.* Meyerstein *v.* Barber, L. R. 2 C. P. 38, 51; Hamilton *v.* National Bank, 3 Dill. 230, 235; Smith *v.* Jones, 63 Ark. 232, 238; Meade *v.* Smith, *supra*; Ricker *v.* Cross, 5 N. H. 570; Hooben *v.* Bidwell, 16 Ohio, 510.

The plaintiff, after having given this evidence of his title to the property in question, in order to prove a conversion thereof, by the defendants, first introduced Caleb Husted, as a witness, who testified, that the plaintiff, on the 3d of November, 1842, after his arrival at Greenwich, found the cows, oxen, and carts, mentioned in the declaration, and them only in the possession of the defendant Husted, which the plaintiff demanded of him, and he refused to deliver them to the plaintiff, and said, they had been put into his possession, by the defendant Dayton. John Henderson, another witness introduced by the plaintiff, testified to the same facts.

The plaintiff next introduced two writs of attachment, in favor of the Seventh Ward Bank, against Esbon Husted, with the returns of the defendant Smith thereon, he being the officer who served them, by which it appeared, that he, as a deputy sheriff, attached the property in question on said writs on the 3d of November, 1842, at 12 o'clock at noon of that day.

The plaintiff then introduced Samuel Close, as a witness, who testified, that on the 3d of November, 1842, or the day following, the plaintiff demanded of the defendants Smith and Dayton, all the property mentioned in the bill of sale, which they had in their possession, but that none of such property was by them delivered to the plaintiff, to the witness's knowledge: and that he did not hear their answer in reply to the demand. Nathaniel S. Husted, another witness introduced by the plaintiff, testified, that the plaintiff on the 4th of November, 1842, at Greenwich, demanded said cows, oxen, and carts of the defendants Smith and Dayton, informing them that he the plaintiff had a bill of sale of them from Esbon Husted; and that neither Smith nor Dayton made any reply to the demand, nor delivered the property to the plaintiff. On cross-examination by the defendants, this witness testified, that said cows, oxen, and carts were in the possession of the defendant Husted, in whose possession they had been put, on the 3d of November, 1842; that the defendant Smith had nothing to do with putting them into Husted's possession; that he, the defendant Smith, had put them into the hands of the witness, as keeper thereof; and that Dayton, who was a constable, afterwards took them, against the prohibition of the witness, from his possession, and put them into the possession of the defendant Husted.

It did not appear, that said cows, oxen, and carts, or either of them, when the demand was made, as testified to by this witness, were in the possession of the defendant Smith.

The plaintiff did not show, or claim to have shown, any connection between the defendant Smith and the defendants Dayton and Husted, in relation to this property. The evidence thus introduced by the plaintiff, was, when offered, objected to, by the defendants' counsel, and was received subject to such objection.

The defendant Smith justified his acts, on the ground that he was, on the 3d of November, 1842, a deputy-sheriff; that at noon of that day, and some hours before the plaintiff's arrival at Greenwich, he, as such deputy-sheriff, attached and took into his possession the property described in the declaration, as the property of Esbon Husted, by virtue of two writs of attachment in favor of the Seventh Ward Bank in the city of New York, against him, brought for the recovery of debts then justly due from him to said bank; that when the defendant Smith so attached and took into his possession said property, it was all in the possession of Husted, on his farm in Greenwich, the plaintiff not having then taken possession of it under his bill of sale; and that neither he, Smith, nor the Seventh Ward Bank had then any knowledge that said bill of sale had been given; nor was this fact, at that time, known, by any person in Greenwich; nor was it known at Greenwich, until after the plaintiff's arrival there. This was admitted by the plaintiff.

It was agreed, that Husted owned all said property, at the time he gave the bill of sale to the plaintiff; and that he had not ceased to be the owner thereof, at the time it was so attached by Smith, otherwise than by the giving of such bill of sale; that Husted was, at this time, a bankrupt unable to pay all his debts; and that at the term of the Superior Court in February, 1843, the Seventh Ward Bank recovered judgment in said suits against him, in one for 570 dollars 14 cents damages, and 88 dollars 86 cents costs; in the other, for 959 dollars 44 cents damages, and 25 dollars 88 cents costs.

The plaintiff claimed to have proved, that he attempted to take possession of said property within a reasonable time after the delivery of the bill of sale, and used reasonable diligence for that purpose; but that, before he could obtain possession thereof, it had been attached and taken away, by Smith; and he insisted, that under those circumstances, he became the owner of said property, by force of the bill of sale, from the time it was delivered to him; that he was entitled to hold said property, as against Smith, and the attaching creditors; and that the mere attachment of the property by Smith, at the time and under the circumstances before mentioned, was in itself a conversion thereof; and that for such conversion, without any other act done by Smith, or any demand on him by the plaintiff for the property, he was entitled to recover against Smith.

These claims were resisted, by the defendant, Smith, who claimed the reverse thereof. He also claimed, on the argument of the cause, that the plaintiff, by introducing the testimony of Caleb Husted and

John Henderson, had elected to go against the defendant, Husted, and had precluded himself from recovering against the defendant, Smith; and that the writs and returns thereon, and the testimony of Samuel Close and Nathaniel S. Husted, as to a demand and refusal of said property, or any part thereof, should be excluded as evidence of a conversion thereof; and that the attachment of the property by Smith was not in itself a conversion thereof; but that a demand thereof by the plaintiff, and a refusal by Smith, was necessary.

The plaintiff resisted these claims, and claimed the reverse thereof; and each party requested the court to charge the jury in conformity with the claims so by him made.

The court did not charge the jury in conformity to the claims of the defendant. Smith, or either of them; but did charge the jury in conformity with all the claims of the plaintiff.

The jury thereupon returned a verdict for the plaintiff, against the defendant Smith; and he thereupon moved for a new trial for a misdirection, and also filed a motion in arrest of judgment.

The whole case was reserved for the consideration and advice of this court.

Hawley and *Dutton*, in support of the motions.

Bissell and *Ferris*, contra.

STORRS, J. The next and most prominent question,[1] made in this case, arises from the circumstance that the plaintiff had not acquired the actual possession of the property in question, under his conveyance from Husted, before the attachment of it, by the defendant, Smith; the defendant claiming, that, for want of such possession, he, by his attachment, obtained a prior title to the plaintiff under his assignment. The defendant having attached the property on behalf of a creditor of Husted, the question as to the title may be considered as one between the plaintiff and said creditors; and both of them stand in the situation of *bona fide* purchasers. It being found by the jury, that there was no want of diligence on the part of the plaintiff, in taking possession of the property, and that a reasonable time had not elapsed for that purpose, when it was attached by the defendant, the question is, whether, as between two *bona fide* purchasers of personal property from the owner, the last, by first obtaining possession of it, acquires a preferable title over the other. We consider not only that the general principles applicable to this question are well settled, but that the very question itself has been most deliberately decided by the courts of this State, against the claim of the defendant; and, as we believe, in entire accordance with the principles of the common law. Whatever therefore we might think of the doctrines which prevail on this subject under the civil law, or other systems of jurisprudence than our own, we are not at liberty to adopt them.

It is a most ancient and well-established principle of the common law.

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[1] A portion of the case irrelevant to this section has been omitted.

that on a sale of a specific chattel, the bargain or contract between the vendor and vendee passes the property in it to the latter, without delivery. Glanv. b. 10, ch. 14; Clayt. 135; Perkins, tit. Grant, § 92; Noy's Max. 87, 88; Com. Dig. tit. Biens, D. 3; Shep. Touchs. 224; p 382 Martindale *v.* Booth, 3 Barn. & Ad. 498 (23 E. C. L. 130); Dixon *v.* Yates, 5 Barn. & Ad. 313 (27 E. C. L. 86); Barret *v.* Pritchard, 2 Pick. 512; Putnam *v.* Dutch, 8 Mass. R. 287; 2 Kent's Com. lect. 39; 2 Steph. Com. 120. Certain exceptions are introduced, by the Statute of Frauds, which, as they have no application to this case (here being a written assignment of the property, and the contract of sale therefore not being obnoxious to any objection under that statute), need not be noticed. Hence it follows, that the title of the purchaser is not, as is claimed by the defendant, merely inchoate and imperfect before a delivery, and that such delivery is necessary in order to perfect it, but that there is a perfect and complete transmutation of the property, by the mere agreement between the parties. It will be seen hereafter, that there is an essential difference, in this respect, between the common and civil law. No length of possession by the vendor, after the sale, will divest the vendee of the property. It may furnish evidence between them, in certain cases, of a non-acceptance by the vendee, or of an abandonment or re-transfer of the property to the vendor, or the like; but those cases have no relevancy to the present inquiry, as they stand on grounds not applicable to the case before us. There being, as to the parties, a perfect transfer of the property, and a complete transmutation of the title of it to the vendee, by the mere agreement, without a delivery, that title will be respected and prevail, as against all other persons claiming under the vendor, unless it is impeached on other grounds than the want of legal effect of such agreement.

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We come now to the claim of the defendant; which is, that although, as between the parties to the sale, the property is altered by the bargain, it is not altered as to subsequent *bona fide* purchasers and creditors of the vendor, unless there is a delivery of the possession, and consequently, without such delivery, remains, as to them, in the vendor. This claim, it will be observed, proceeds on the ground, not that the want of a change of possession furnishes evidence of fraud in the sale, and that but for such fraud the property would pass to the vendee, as against such purchasers and creditors; but that, as to them, there is no transfer of the property, notwithstanding there be no fraud by reason of such want of possession; in other words, that as to them, before such change of possession, the title of the vendee is merely inchoate and incomplete. It is, therefore, necessary to ascertain the precise light in which a want of change of possession is viewed, and what consequences are attached to it in our courts.

It is obvious, that all the questions which arise on this subject must be between the first vendee and a creditor or subsequent purchaser of the vendor; and all of the numerous cases on this subject were accordingly between such parties. We look in vain for any such case, in which the want of possession by the vendee was, either by the counsel or the court, placed on the ground that such possession was necessary in order to alter the property, or that the title of the vendee was merely inchoate without it, and could be consummated only by it. But the want of delivery to, or of the continuance of possession by, the vendee, which are placed on the same ground, is in no case considered in any other light than as furnishing evidence of fraud in the sale; and where, for the want of such delivery or continuance of possession, the sale has been pronounced void, it was only on the ground of such fraud. It is accordingly uniformly decided, that a retention of the possession by the vendee, either where there was no possession taken by him, or where, after a formal delivery to him, the property has gone back into the possession of the vendor, furnishes, in all cases, presumptive evidence that the sale was fraudulent, open however to explanation. This is the plain and intelligible view of the subject taken by our courts, and is also the light in which it is considered elsewhere, where the common law prevails. So far there is an entire uniformity in the decisions and in the elementary writers. 2 Kent's Com. lect. 39: 1 Sw. Dig. 266, *et seq.;* Burge's Com. pt. 2, ch. 3, 14; Lady Arundel *v.* Phipps, 10 Ves. jr. 145; Latimer *v.* Batson, 4 Barn. & Cres. 652 (10 E. C. L. 432); Martindale *v.* Booth, 3 Barn. & Ad. 498 (23 E. C. L. 130); Osborne *v.* Tuller, 14 Conn. R. 529; Bissell *v.* Hopkins, 3 Cowen, 166; Randall *v.* Cook, 17 Wend. 53.

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The language of the courts in this State, on this subject, is usually guarded and precise; and they speak of a non-delivery, or retention of possession by a vendor, only as creating a presumption of fraud, conclusive when unexplained, and never as a circumstance which renders the sale merely inchoate, either as to the vendor or a subsequent purchaser or creditor. Patten *v.* Smith, 4 Conn. R. 450; s. c. 5 Conn. R. 196; Burrows *v.* Stoddard, 3 Conn. R. 160, 431; Toby *v.* Reed, 9 Conn. R. 216; Osborne *v.* Tuller, 14 Conn. R. 529.

But as to what shall be considered a sufficient explanation to rebut such presumption, there has been a great contrariety of opinion; and it is here that the difficulty has existed; it being held, in some places, that it would be rebutted, by showing the good faith of the transaction, and in others (including this State), that the explanation must go further, and be such as the law approves. 2 Kent's Com. lect. 39; Osborne *v.* Tuller, 14 Conn. R. 529, and cases cited. It would be foreign from our present inquiry to enumerate all those cases in which it has been held, by our courts, that the explanation furnished by the vendee for a want of possession by him, was sufficient to rebut the presumption of fraud. Such explanation, however, has, in all of them, been deemed sufficient for that purpose, because the circumstances constituting it repel the legal inference of fraud, which would otherwise prevail; and it thus gets rid of that objection, which is the only one growing out of the want of possession. In one class of those cases, a

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change of possession was practicable; as, for instance, where the property was exempt from attachment or execution, or where the assignment was in trust for creditors under the Act of 1828, and the trustee had furnished the security required by that act. 4 Conn. R. 450; 14 Conn. R. 529. No inference, under these circumstances, could fairly be drawn, that a fraud on the creditors of the vendor was designed. But there is another class where it was not practicable for the purchaser to take immediate possession of the property; and that is the case now before us; in such cases, it is held, that a sufficient legal explanation of such want of possession is thereby furnished, and that it is sufficient if possession is taken in a reasonable time. In other words, the presumption of fraud is repelled, by the fact that it was not practicable for the vendee to take possession immediately, but that he did so in a reasonable time, which is considered due diligence on his part; as, for instance, in the case of a ship at sea, or other property afloat, where it is sufficient that possession of them be taken as soon as reasonably practicable after their arrival. This principle was directly established in Ingraham v. Wheeler, 6 Conn. R. 277. That was a case between a *bona fide* purchaser of goods on land and an attaching creditor of the vendor, who had possession of the goods as bailiff of the vendor, at the time of the attachment of them by him, but who then had no notice of the assignment; which would have constituted him the bailee of the purchaser, and be equivalent to taking possession by the latter; and the jury found, that there had been no unreasonable delay, on the part of the purchaser, in claiming the property. The court decided in favor of the purchaser. They say: "A purchaser is bound, in every instance where it is practicable, to take immediate possession of the property; and when he does not, there is a badge of fraud, open however to explanation. Where it is not practicable to take immediate possession, he is bound to do it, or that which is equivalent, in a reasonable time; he is bound to use due diligence. After the execution of the said deed of assignment, the plaintiffs were entitled to reasonable time, either to give notice of the fact to the bailiff, or to take possession of the property. And whether they did use this diligence, or whether they were so remiss that fraud ought to be inferred, were questions of fact very properly left by the judge to the jury." This case, being in point, is decisive of this question. See also 4 Mass. R. 183, 535; 1 Pet. 449; 4 Mass. R. 661; 6 Mass. R. 422; 1 Gallis. 419; 8 Mass. R. 287; 5 N. Hamp. R. 570.

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The case of Lanfear v. Sumner, 17 Mass. R. 110, has been relied on, by the defendant, and is in point in his favor. Respecting that case, it may be first remarked, that it passed under the consideration of this court in Ingraham *et al.* v. Wheeler, and was pronounced not to be in accordance with the doctrine that had prevailed in this State. That case was also disapproved, in Ricker v. Cross, 5 N. Hamp. R. 570. In the next place, it is clearly unsupported by the case of Caldwell *et al.* v. Ball, 1 T. R. 205, which is the only common-law authority relied on

By a reference to that case, it appears that the question was as to the legal title of the property in dispute, irrespective of the fact of possession, it not being in the actual possession of either of the claimants; and the only point decided was, that where there were several bills of lading for goods, signed at different times, by the captain of a ship, which were subsequently indorsed and delivered, by the shipper, to different persons, no reference was to be had to the time when the bills of lading were signed by the captain, but that the person who first gets one of them, by a legal title, from the shipper, had a right to the property consigned; that an indorsement of a bill of lading, created such legal title; and therefore, that the claimant under the one first indorsed, though last signed, should hold the property in preference to the other. That case turned merely on the operation of an indorsement of a bill of lading, which was held to constitute a transfer of the property. In the last place, all the other citations in Lanfear *v.* Sumner are from the civil law; and they undoubtedly support that case. It is however very clear, that on the subject of a sale and transfer of personal property, there is a fundamental difference between the common and civil law as to the necessity of a delivery of the thing sold. By the latter, the contract of sale, although perfect and complete, had not the effect of transferring to the purchaser the property or *dominium* in the thing sold, without a delivery of it to him. (1) It did not effect a transmutation of the property, nor give to the purchaser the thing itself, nor a right in it, *jus in re*, but only a right to it, *jus ad rem*, that is, the right of demanding it, by action against the vendor. It was the delivery only, which operated a transfer of the *dominium*, or the right of property. Hence the property, when the sale of it was perfected, by the contract or consent of the parties, was not said to be alienated. (2) For the purpose of compelling a delivery of it, the *actio empti* is given to the vendee. (3) The principle that the property or *dominium* could only be transferred by delivery, and not by contract, was steadily and rigorously adhered to, in the *Roman* law. It is the nature of contracts or obligations, says Paul, to bind the person, but not to operate a transfer of property. This principle was adopted in the law of Holland, (4) of Spain, (5) and of Scotland; (6) and also in the law of France, before the establishment of the Code Civil. (7) As a necessary consequence of that principle, it was held, where it prevailed, that the vendor may, while he retains possession, sell the thing to a second purchaser, and if this sale is followed by the delivery, it gives the latter a complete and indefeasible title to the property; (8) or the creditors of the vendor may seize the thing in the possession of the vendor, before delivery to the vendee, although the price has been paid, and the vendee, not having acquired any property or interest in the thing by his contract, cannot pursue it in his hands, but is left solely to his action for damages against the vendor. (9) So strictly was this principle adhered to, that if the vendor died before a delivery of the thing to the purchaser, having bequeathed it as a legacy, the legatee was entitled to receive it, and the only remedy of the purchaser was an action against the heir of the vendor for the recovery of damages. (10) By the Code Civil, however, the Roman law is so far altered, that the contract of sale has the effect of transferring to the purchaser the property in the thing sold, as between the parties to the contract, and the sale is perfected by the consent of the parties, as evinced by that contract; although it still leaves the rights of the creditors to be protected by the old rule. (11) (1) Cod. 2, 3, 20; Dig. 44, 7, 3. (2) Dig. 50, 16, 67. (3) Dig. 19, 1. (4) Matth. de Auct. 1, 18, 15; Voet, 6, 1, 20. (5) Gomez, Res. c. 2, n. 32, l. 29, 30; tit. 5, pt. 5, Feb. 2, 4, 2, 32. (6) Stair, b. 1, tit. 14, § 2; Ersk. b. 1, tit. 3, § 2. (7) Poth. Tr. de Vente, n. 319. (8) Dig. 6, 2, 9; Cod. 3, 32, 15. (9) Matth. 1, 18, 15. (10) Dig. 19, 2, 32. (11) Art. 1583, 711, 1583, 2279; Toull. liv. 3, t. 3, n. 36.

We are of opinion, that under the peculiar circumstances of this case, it was not the duty of the court below to exclude the evidence offered by the plaintiff, to prove a conversion by the defendant, Smith. After an ineffectual attempt to show such a connection between him and the other original defendants as would affect him, by the demand and refusal proved, it was competent for the plaintiff to waive it and proceed against Smith alone, which he did, on the first opportunity. The rule relied on by the defendant is mainly one of practice, and in order to do perfect justice, must be applied under the discretion of the court. While, on the one hand, the plaintiff should not be allowed to vary his proof capriciously, in order to speculate on the evidence, he should not, on the other, be too strictly held, by a sudden and unexpected failure in his proof, to support the whole of his claim. Without detailing the facts on this part of the case, we think, that the ends of justice were promoted by the course taken on the trial.

For these reasons, a new trial ought not to be granted.

In this opinion the other Judges concurred.

New trial not to be granted

SECTION IV.

FACTORS AND FACTORS ACTS.

PATERSON v. TASH.

IN THE KING'S BENCH, HILARY TERM, 1743.

[*Reported in 2 Strange*, 1178.]

IT was held by C. J. LEE, that though a factor has power to sell, and thereby bind his principal, yet he cannot bind or affect the property of the goods by pledging them as a security for his own debt, though there is the formality of a bill of parcels and a receipt.

And the jury found accordingly

WILKINSON *v.* KING.

read

AT NISI PRIUS, DECEMBER 21, 1809.

[*Reported in* 2 *Campbell*, 335.]

TROVER for a quantity of lead.

The plaintiff had sent the lead in question to the wharf of one Ellil in the Borough of Southwark, there to remain till it should be sold. Ellil was accustomed to sell lead from this wharf; but had no authority whatever to sell the lead in question, and never had sold any for the plaintiff before. However, he sold this lead to the defendants, who bought it *bona fide* as his property, and paid him for it by a bill of exchange.

Lord ELLENBOROUGH held that the sale by Ellil did not change the property in the lead, and observed that the doctrine contended for would give wharfingers the dominion over all the goods intrusted to them; but that a wharf could not be considered, even in London, as a market overt for the articles brought there. Ellil had no color of authority to sell the lead, and no one could derive a good title to it under such a tortious conversion.

Verdict for the plaintiff.

The *Attorney-General*, *Park*, and *Richardson*, for the plaintiff.

Garrow, *Gaselee*, and *Barnewall*, for the defendants.

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read

PICKERING *v.* BUSK.

IN THE KING'S BENCH, JANUARY 27, 1812.

[*Reported in* 15 *East*, 38.]

TROVER for hemp. At the trial before Lord ELLENBOROUGH, C. J., at the sittings after Trinity Term in London, it appeared that Swallow, a broker in London, engaged in the hemp trade, had purchased for the plaintiff, a merchant at Hull, a parcel of hemp then lying at Symonds' wharf in Southwark. The hemp was delivered to Swallow, at the desire of the plaintiff, by a transfer in the books of the wharfinger from the name of the seller to that of Swallow. Shortly afterwards Swallow purchased for the plaintiff another parcel of hemp, lying at Brown's quay, Wapping, which latter parcel was transferred into the names of Pickering (the plaintiff), or Swallow. Both these parcels of hemp were duly paid for by the plaintiff. Swallow, however, whilst the hemp remained thus in his name, having contracted with Hayward & Co., as the broker of Blackburn & Co., for the sale of hemp, and having none of his own to deliver, transferred into the names of Hayward & Co., the above parcels in satisfaction of that contract, for which they paid him the value. Hayward & Co. shortly after became bankrupts; and the plaintiff, discovering these circumstances, demanded the hemp of the defendants their assignees, and upon their refusal to deliver it the present action was brought. His Lordship was of opinion upon this evidence, that the transfer of the hemp, by direction of the plaintiff, into Swallow's name, authorized him to deal with it as owner, with respect to third persons; and that the plaintiff, who had thus enabled him to assume the appearance of ownership to the world, must abide the consequence of his own act. A verdict was thereupon found for the defendants, with liberty to the plaintiff to move to set it aside.

Garrow, *Topping*, and *Taddy*, now showed cause.

The *Attorney-General*, *Park*, and *Abbott*, contra.

Lord ELLENBOROUGH, C. J. It cannot fairly be questioned in this case but that Swallow had an implied authority to sell. Strangers can only look to the acts of the parties, and to the external indicia of property, and not to the private communications which may pass between a principal and his broker; and if a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. I cannot subscribe to the doctrine, that a broker's engagements are necessarily and in all cases limited to his actual authority, the reality of which is afterwards to be tried by the fact. It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by the principal in respect of the subject-matter; and there would be no safety in mercantile transactions if he could not. If the principal send his commodity to a place, where it is the ordinary business of the person to whom it is confided to sell, it must be intended that the commodity was sent thither for the purpose of sale. If the owner of a horse send it to a repository of sale, can it be implied that he sent it thither for any other purpose than that of sale? Or if one send goods to an auction-room, can it be supposed that he sent them thither merely for safe custody? Where the commodity is sent in such a way and to such a place as to exhibit an apparent purpose of sale, the principal will be bound, and the purchaser safe. The case of a factor not being able to pledge the goods of his principal confided to him for sale, though clothed with an apparent ownership, has been pressed upon us in the argument, and considerably distressed our decision. The court, however, will decide that question when it arises, consistently with the principle on which the present decision is founded. It was a hard doctrine when the pawnee was told that the pledger of the goods had no authority to pledge them, being a mere factor for sale; and yet since the case of Paterson *v.* Tash, that doctrine has never been overturned. I remember Mr. Wallace arguing in Campbell *v.* Wright, 4 Burr. 2046, that the bills of lading ought to designate the consignee as factor, otherwise it was but just that the consignors should abide by the consequence of having misled the pawnees. The present case, however, is not the case of a pawn, but that of a sale by a broker having the possession for the purpose of sale. The sale was made by a person who had all the indicia of property; the hemp could only have been transferred into his name for the purpose of sale; and the party who has so transferred it cannot now rescind the contract. If the plaintiff had intended to retain the dominion over the hemp, he should have placed it in the wharfinger's books in his own name.

Grose, J. The question, whether the plaintiff is bound by the act of Swallow, depends upon the authority which Swallow had. This being a mercantile transaction, the jury were most competent to decide it; and if I had entertained any doubt, I should rather have referred the question to them for their determination; but I am perfectly satisfied: I think Swallow had a power to sell.

Le Blanc, J. The law is clearly laid down, that the mere possession of personal property does not convey a title to dispose of it; and, which is equally clear, that the possession of a factor or broker does not authorize him to pledge. But this is a case of sale. The question then is whether Swallow had an authority to sell. To decide this, let us look at the situation of the parties. Swallow was a general seller of hemp; the hemp in question was left in the custody of the wharfingers, part in the name of Swallow, and part in the name of the plaintiff or Swallow, which is the same thing. Now for what purpose could the plaintiff leave it in the name of Swallow, but that Swallow might dispose of it in his ordinary business as broker; if so, the broker having sold the hemp, the principal is bound. This is distinguishable from all the cases where goods are left in the custody of persons whose proper business it is not to sell.

Bayley, J. It may be admitted that the plaintiff did not give Swallow any express authority to sell; but an implied authority may be given; and if a person put goods into the custody of another, whose common business it is to sell, without limiting his authority, he thereby confers an implied authority upon him to sell them. Swallow was in the habit of buying and selling hemp for others, concealing their names. And now the plaintiff claims a liberty to rescind the contract, because no express authority was given to Swallow to sell. But is it competent to him so to do? If the servant of a horse-dealer with express directions not to warrant, do warrant, the master is bound; because the servant, having a general authority to sell, is in a condition to warrant, and the master has not notified to the world that the general authority is circumscribed. This case does not proceed on the ground of a sale in market overt, but it proceeds on the principle that, the plaintiff having given Swallow an authority to sell, he is not at liberty afterwards, when there has been a sale, to deny the authority.

Rule discharged.

HENDERSON & CO. v. WILLIAMS.

In the Court of Appeal, December 14, 19, 1894.

[*Reported in* [1895] 1 *Queen's Bench*, 521.]

In this case appeals were brought by the plaintiffs and the defendant against a judgment of Cave, J., without a jury. The action was for damages for the wrongful detention or conversion of 150 bags of sugar. The defendant by his defence denied that the sugar was the property of the plaintiffs. The facts were as follows. The plaintiffs were sugar merchants of Hull. The defendant was a warehouseman carrying on business at Hull and Goole. On June 3, 1894, one Fletcher, by pretending that he was Robinson, negotiated a purchase of 150 bags R. A. V. sugar from Messrs. Grey & Co., sugar merchants, of Liverpool, they believing that they were dealing with Robinson, a well-known customer of theirs, through Fletcher as his agent. On June 6 Grey & Co. sent to the defendant, who then held the 150 bags of sugar in a warehouse at Goole, the following telegram: "Transfer to order of Fletcher, Leeds, 150 R. A. V." The defendant replied on the same day by a letter, in which, after referring to some other sugar, he proceeded: "I have your telegram to transfer the balance (150 bags) to Mr. W. Fletcher, of Leeds, at whose disposal I have placed the sugar. Please note."

On the same day, and before the receipt of this letter, Grey & Co. wrote to the defendant, with reference to these 150 bags of sugar, as follows: "Please hold these to the order of Mr. W. Fletcher, Leeds, and accept his instructions for delivery. Freight and landing charges to our account." Fletcher, having committed this fraud upon Grey & Co., then negotiated with the plaintiffs to sell the sugar to them, together with some other sugar which was in the defendant's warehouse, for cash. At this time Fletcher was indebted to the plaintiffs in the sum of 131*l*., for which he had given a cheque which had been dishonored; and, as Fletcher required to be paid for the sugar in cash, the plaintiffs, before concluding any contract with him, sent down to the defendant to ascertain if the sugar proposed to be sold to them by Fletcher was in his warehouse to Fletcher's order. The defendant sent back to the plaintiffs the following document, signed by him: "Memorandum. J. L. Williams to Messrs. Henderson & Co., Hull. June 7, 1894. R. A. V. 150 bags of sugar. G. R. 36 bags of sugar. Star 50 bags of sugar, lying at Goole. I hold the above on account of W. W. Fletcher, Leeds, and will deliver same to your order on receipt of his transfer in your favor." The plaintiffs were not satisfied with this document, and again communicated with the defendant, who then wrote across the above-mentioned memorandum as follows: "I hold the within at your order and disposal." Thereupon the plaintiffs purchased the sugar mentioned in the memorandum from Fletcher at the price of 301*l.* 7*s.* 5*d.*

The plaintiffs deducted from the price of the sugar the sum of 131*l.* 16*s.* for returned cheque and expenses, and also a further small sum of 1*l.* 15*s.* 6*d.* (as to which no question arose), in respect of some previous transaction, and handed to Fletcher a cheque for the balance, 167*l.* 15*s.* 11*d.*, which he cashed in due course. Grey & Co. having discovered Fletcher's fraud upon them, induced the defendant to detain the 150 bags, and indemnified him for so doing. The defendant accordingly refused to deliver these 150 bags to the plaintiffs, but he delivered to them the 36 and the 50 bags (which were of the value of 100*l.*), to which Grey & Co. made no claim.

Cave, J., held that the defendant could not set up the title of Grey & Co. against the plaintiffs; but with regard to the measure of damages, he held that the plaintiffs were only entitled to the money which they had in their pockets before the sale — namely, 167*l.*, less 100*l.* the value of the sugar which was not in dispute, treating Fletcher's indebtedness for this purpose as of no value, and he accordingly gave judgment for the plaintiffs for 67*l.* The plaintiffs appealed against the latter part of this judgment, and asked for judgment for the market value of the goods, which was agreed at 216*l.* 12*s.* 6*d.*

The defendant appealed against the whole of the judgment.

Forbes, Q. C., and *Lacey Smith* (*Scott Fox* with them), for the plaintiffs.

Pickford, Q. C., and *T. Willes Chitty*, for the defendant.

Lindley, L. J. In this case a Liverpool sugar merchant named Grey had 150 bags of sugar belonging to him warehoused in his name in the defendant's warehouse at Goole. On June 6, 1894, Grey was induced by the fraud of one Fletcher to authorize the defendant to hold these bags of sugar according to Fletcher's order. On the same day Fletcher agreed to sell them to the plaintiffs; but before the plaintiffs paid him for them they insisted on having them transferred into their own name. This was done on June 7, and the defendant informed the plaintiffs that he held the sugar at the plaintiffs' order and disposal. Thereupon the plaintiffs paid Fletcher for the goods. Grey afterwards discovered that he had been defrauded, and he gave notice to the defendant not to part with the bags of sugar. The defendant, being indemnified by Grey, has refused to deliver them to the plaintiffs, whereupon they bring this action to recover their value. The defendant defends this action for and on behalf of Grey. Cave, J., has decided that the plaintiffs are entitled to recover damages for the non-delivery of the sugar. For reasons, however, which he gave he refused to allow the plaintiffs the market value of the sugar. Hence the plaintiffs have appealed, and they contend that they are entitled to the market value of the sugar. The defendant has also appealed, upon the ground that the plaintiffs were not entitled to the sugar. It will be convenient to dispose of the defendant's appeal first. He contends — (1.) that he is not estopped from setting up Grey's title; and (2.) that his title is better than that of the plaintiffs. I am of opinion that the defendant is wrong upon the first point, even if he is right on the second. The distinct attornment by the defendant to the plaintiffs on June 7, 1894, clearly, in my opinion, estopped the defendant from denying the plaintiffs' title. The cases cited by Mr. Forbes, beginning with Stonard *v.* Dunkin [1] and ending with Knights *v.* Wiffen,[2] are conclusive on this point, and any other decision would be most mischievous in a business point of view. Mr. Pickford, in his very able argument for the defendant, urged that Attenborough *v.* London and St. Katharine's Dock Co.[3] was an authority to show that there was no estoppel in this case. But there the defendants had not attorned to the plaintiffs, and the attornment makes all the difference. With respect to the second point there is more difficulty. If there were no estoppel, and the Court had to decide whether Grey or the plaintiffs had the better title to these 150 bags of sugar, my judgment would be in favor of the plaintiffs, if it were not for the case of Kingsford *v.* Merry.[4] The case stands thus: Grey authorized the defendant, his agent, to hold the sugar to Fletcher's order, and, before that authority was revoked, the defendant acted upon it, and transferred the sugar to the plaintiffs, who are *bona fide* purchasers of it for value from Fletcher, without notice of anything wrong. It seems to me that, whether Fletcher was the owner of the goods or not, still, as he was expressly authorized to dispose of them, it would be contrary to principle to hold that Grey could recover the sugar from the plaintiffs. But Mr. Pickford cited Kingsford *v.* Merry [5] to show that Grey could do so. I have looked carefully through the report of that case. An order was there given by the plaintiffs to their warehouseman in substance like the order given by Grey to the defendant on June 6 in this case. I understand that this order comprised the goods sued for. I also understand that this order was acted upon by the warehouseman before it was revoked, just as was the case here. He had transferred the goods into the name of the defendant, who was a *bona fide* pledgee for value from the person whose orders were to be obeyed. The decision of the Court was, nevertheless, in the plaintiffs' favor, on the ground that no property passed from the plaintiffs to the person to whom they gave the delivery order, and that, no property having passed to him, he could confer none on the defendant. The case was treated as if it were the case of a sale of goods by a person who had obtained possession of them by false pretences. Such a person, having no title, can confer none, except by sale in market overt: see Cundy *v.* Lindsay.[6] I confess I find great difficulty in distinguishing the facts of Kingsford *v.* Merry [7] from the facts of this case, although I think too little attention was paid to the authority given and acted upon before it was revoked. But perhaps the order to which I have referred did not include the goods sued for. On the ground, however, of estoppel by attornment the defendant's appeal must be dismissed with costs. As regards the damages, I am unable to adopt the view taken by Cave, J. The value of the 150 bags of sugar was 215*l.* Fletcher sold to the plaintiffs other sugars, and the price of the whole came to a little over 300*l.* Fletcher was indebted to the plaintiffs on other transactions, and they held a dishonored cheque of his. Instead, therefore, of paying Fletcher 300*l.* odd, the plaintiffs deducted the amount of the dishonored cheque and paid Fletcher the balance — 167*l.* odd. Cave, J., has deducted the price of the other sugars from this sum, and has given the plaintiffs only 67*l.* But, if he went into these calculations at all, he should have deducted the price of the other sugars from the 300*l.* odd, and not from the 167*l.* odd. If this had been done the judgment would have been for 200*l.* odd, and the plaintiffs would, no doubt, have been satisfied. In my opinion, however, the defendant being estopped from denying the plaintiffs' title, this action ought to be treated as an action to recover the value of goods belonging to the plaintiffs. The ordinary rule ought, therefore, to be adopted, and the proper measure of damages is the market value of the 150 bags of sugar at the time of their wrongful conversion by the defendant. This value is 215*l.*, and the judgment ought to be for this sum, and the plaintiffs must have the costs of their appeal.

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[1] 2 Camp. 344.
[2] Law Rep. 5 Q. B. 660.
[3] 3 C. P. D. 450.
[4] 1 H. & N. 503.
[5] 1 H. & N. 503.
[6] 3 App. Cas. 459.
[7] 1 H. & N. 503.

Defendant's appeal dismissed; plaintiffs' cross-appeal allowed.[1]

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[1] Lord HALSBURY and A. L. SMITH, L. J., delivered concurring opinions. *Conf.* Anderson *v.* Read, 106 N. Y. 333; Hollins *v.* Hubbard, 165 N. Y. 534.

FARQUHARSON BROTHERS & CO., APPELLANTS, v. C. KING & CO., RESPONDENTS.

IN THE HOUSE OF LORDS, JUNE 17, 1902.

[*Reported in* [1902] *Appeal Cases*, 325.]

THE appellants were timber merchants and warehoused in the Surrey Commercial Docks the timber which they imported. In 1895 they wrote to the secretary of the dock company: "We have made arrangements whereby in future Mr. Capon will sign delivery orders on behalf of and in addition to the other members of the firm, and inclose our written authority for same." The inclosed authority ran thus: "We hereby authorize you to accept all transfer or delivery orders which shall be signed on our behalf by Mr. H. J. Capon, whose signature is subjoined, the company acting also on our signature as before. This authority is to remain in force until expressly revoked in writing by us." Capon was a confidential clerk of the appellants who had authority to sell to certain recognized customers of the appellants timber at prices and up to limits fixed by the appellants, and occasionally to make other sales.

In 1896 Capon began a series of frauds. He obtained an address at Battersea under the name of Brown, and from that address and under that name offered to sell and sold to the respondents, who were packing-case manufacturers, parcels of the appellants' timber and appropriated the proceeds. In these sales he represented himself as a commission agent acting on behalf of Messrs. Bayley, fire-escape makers. He carried out the sales by signing orders in his own name to the dock company to transfer or deliver timber to the order of Brown, the timber being transferred in the dock company's books into the name of Brown. Then in the name of Brown he signed orders to the dock company to transfer or deliver the timber to the order of the respondents. In the appellants' stock-books Capon made alterations and false entries of fictitious sales so as to account for the diminution of stock. The respondents knew nothing of the appellants, and nothing of Capon except under the name of Brown. They bought in good faith in ignorance of the frauds. The frauds having been discovered in 1900, the appellants brought an action against the respondents claiming delivery of the timber or its value. The action was tried before Mathew, J., who left to the jury the question, Did the plaintiffs so act as to hold Capon out to the defendants as their agent to sell goods to the defendants? The jury answered, No. The learned judge refused to put to the jury a question pressed upon him by the defendants' counsel, namely, whether the plaintiffs had by their conduct enabled Capon to hold himself out as owner of the goods or as entitled to sell them. Upon the finding of the jury Mathew, J., entered judgment for the plaintiffs for 1200*l*. The Court of Appeal (A. L. Smith, M. R., and Vaughan Williams, L. J., Stirling, L. J., dissenting) reversed that decision and entered judgment for the defendants.[1] Against this decision the present appeal was brought.

Asquith, K. C., and *Danckwerts*, K. C. (*W. Whately* with them), for the appellants.

Lawson Walton, K. C., and *Cababé*, for the respondents.

Lord Lindley. My Lords, I also think this case is extremely plain when it is understood.

Capon sold the plaintiffs' timber without their authority, and sold it to the defendants. The defendants honestly bought the timber, and they had no notice that Capon had no right to sell it; but there was no sale in market overt, and the Factors Acts do not apply. The mere fact, therefore, that the defendants acted honestly does not confer upon them a good title as against the plaintiffs, the real owners of the timber. The plaintiffs are entitled to recover the timber or its value, unless they are precluded by their conduct from denying Capon's authority to sell. (Sale of Goods Act, 1893, s. 21, and see s. 61.) Capon sold under the name of Brown, representing himself to be an agent of some persons named Bayley, who were well known in the timber trade. The defendants bought on the faith of his being what he pretended to be. What have the plaintiffs done which precludes them from denying, as against the defendants, Capon's right to do what he pretended he was entitled to do? Putting the question in another form: What have the plaintiffs done to preclude them from denying, as against the defendants, Capon's right to sell to them? To answer those questions it is necessary to consider what the plaintiffs did.

Capon was the plaintiffs' confidential clerk; they gave him a limited power of sale to certain customers, and a general written authority to sign delivery orders on their behalf; and the plaintiffs sent that written authority to the dock company which stored the plaintiffs' timber. This authority would, of course, protect the dock company in delivering timber as ordered by Capon, however fraudulently he might be acting, if the dock company had no notice of anything wrong. By abusing his authority Capon made timber belonging to the plaintiffs deliverable by the dock company to himself under the name of Brown. In that name he sold it, and procured it to be delivered to the defendants. What is there here which precludes the plaintiffs from denying Capon's right to sell to the defendants?

What have the plaintiffs done to mislead the defendants and to induce them to trust Capon? Absolutely nothing. The question for decision ought to be narrowed in this way, for it is in my opinion clear that, when s. 21 of the Sale of Goods Act has to be applied to a particular case, the inquiry which has to be made is not a general inquiry as to the authority to sell, apart from all reference to the particular case, but an inquiry into the real or apparent authority of the seller to do that which the defendants say induced them to buy.

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[1] [1901] 2 K. B. 697.

It was pointed out by Parke, J., afterwards Lord Wensleydale, in Dickinson *v.* Valpy,[1] that "holding out to the world" is a loose expression; the "holding out" must be to the particular individual who says he relied on it, or under such circumstances of publicity as to justify the inference that he knew of it and acted upon it. The same principle must be borne in mind in dealing with cases like the present. I do not myself see upon what ground a person can be precluded from denying as against another an authority which has never been given in fact, and which the other has never supposed to exist.

It was urged that the dock company were led by the plaintiffs to obey Capon's orders and to deliver to Brown, and that the defendants were induced by the dock company to deal with Brown, or at all events to pay him on the faith of his being entitled to the timber; so that in fact the plaintiffs, through the dock company, misled the defendants. This is ingenious, but unsound. Except that delivery orders were sent in the name of Brown to the defendants, and were acted on by the dock company, there is no evidence connecting the dock company with the defendants in these transactions; and the answer to the contention is that the defendants were misled, not by what the plaintiffs did, nor by what the plaintiffs authorized the dock company to do, but by Capon's frauds.

It is, of course, true that by employing Capon and trusting him as they did the plaintiffs enabled him to transfer the timber to any one; in other words, the plaintiffs in one sense enabled him to cheat both themselves and others. In that sense, every one who has a servant enables him to steal whatever is within his reach. But if the word "enable" is used in this wide sense, it is clearly untrue to say, as
566 Ashhurst, J., said in Lickbarrow *v.* Mason,[2] "that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." Such a doctrine is far too wide; and the cases referred to in the argument and commented on by Vaughan Williams, L. J., show that it cannot be relied upon without considerable qualification.

Lamb *v.* Attenborough,[3] which is very like this, is a good illustration of the unsoundness of the doctrine in question if taken literally. Johnson *v.* Crédit Lyonnais Co.[4] is another illustration to the like effect. So far as I know, the doctrine has never been judicially applied where nothing has been done by one of the innocent parties which has in fact misled the other: see Story on Agency, s. 133.

In Vickers *v.* Hertz[5] the defendant acted on the faith of a document signed by the plaintiff. So in Babcock *v.* Lawson.[1] In Brocklesby p 34 *v.* Temperance Building Society[2] the bank advanced money on the faith of the document signed by the plaintiff, and the defendants who had paid off the bank were entitled to the benefit of the bank's security. In Henderson *v.* Williams[3] the defendant acted on orders given by the owner of the goods; the action was defended on his behalf, and he had intrusted the goods to Fletcher, to whom the defendant had attorned. These cases do not really assist the defendants. Nor does Dyer *v.* Pearson.[4]

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[1] (1829) 10 B. & C. at p. 140; 34 R. R. 355.

[2] (1787) 2 T. R. 63; 1 R. R. 425.

[3] 1 B. & S. 831.

[4] 3 C. P. D. 32.

[5] L. R. 2 H. L. Sc. 113.

In the present case, in my view of it, Capon simply stole the plaintiffs' goods and sold them to the defendants, and the defendants' title is not improved by the circumstance that the theft was the result of an ingenious fraud on the plaintiffs and on the defendants alike. The defendants were not in any way misled by any act of the plaintiffs on which they placed reliance; and the plaintiffs are not, therefore, precluded from denying Capon's authority to sell.

The question which the defendants pressed Mathew, J., to leave to the jury, and which the late Master of the Rolls and Vaughan Williams, L. J., thought ought to have been left to them, — namely, "Did the plaintiffs by their conduct enable Capon to hold himself out as the owner of the goods or as having the power to dispose of them?" — would, in my opinion, have been seriously misleading unless accompanied by explanations which would have taken out of it the element of error introduced by the word "enable." I feel very strongly the observation that if the defendants are right the Factors Acts would never have been wanted.

In my opinion, Mathew, J., was quite right in leaving to the jury the question as he framed it: "Did the plaintiffs so act as to hold Capon out to the defendants as their agent to sell goods to the defendants?" The verdict is unimpeachable, and it is fatal to the defendants.

The appeal ought to be allowed with costs both here and below.

Order of the Court of Appeal reversed and judgment of Mathew, J., restored with costs here and below.[5]

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[1] 4 Q. B. D. 394.

[2] [1895] A. C. 173.

[3] [1895] 1 Q. B. 521.

[4] 3 B. & C. 38; 27 R. R. 286.

[5] The Earl of HALSBURY and Lords MACNAGHTEN, SHAND, and ROBERTSON delivered concurring opinions.

4 GEORGE IV., CAP. 83.

An Act for the better Protection of the Property of Merchants and others, who may hereafter enter into Contracts or Agreements in relation to Goods, Wares or Merchandizes intrusted to Factors or Agents.

"Whereas it has been found that the Law, as it now stands, relating to Goods shipped in the Names of Persons who are not the actual Proprietors thereof, and to the Deposit or Pledge of Goods, affords great Facility to Fraud, produces frequent Litigation, and proves, in its Effects, highly injurious to the Interests of Commerce in general"; Be it therefore enacted . . . That from and after the passing of this Act, any Person or Persons intrusted, for the Purpose of Sale, with any Goods, Ware or Merchandize, and by whom such Goods, Wares or Merchandize shall be shipped, in his, her or their own Name or Names, or in whose Name or Names any Goods, Wares or Merchandize shall be shipped by any other Person or Persons, shall be deemed and taken to be the true Owner or Owners thereof, so far as to entitle the Consignee or Consignees of such Goods, Wares and Merchandize to a Lien thereon, in respect of any Money or negociable Security or Securities advanced or given by such Consignee or Consignees to or for the Use of the Person or Persons in whose Name or Names such Goods, Wares or Merchandize shall be shipped, or in respect of any Money or negociable Security or Securities received by him, her or them to the Use of such Consignee or Consignees, in the like Manner to all Intents and Purposes as if such Person or Persons was or were the true Owner or Owners of such Goods, Wares and Merchandize; provided such Consignee or Consignees shall not have Notice, by the Bill of Lading for the Delivery of such Goods, Wares or Merchandize or otherwise, at or before the Time of any Advance of such Money or negociable Security, or of such Receipt of Money or negociable Security, in respect of which such Lien is claimed, that such Person or Persons so shipping in his, her or their own Name or Names, or in whose Name or Names any Goods, Wares or Merchandize shall be shipped by any Person or Persons, is or are not the actual and *bona fide* Owner or Owners, Proprietor or Proprietors of such Goods, Wares and Merchandize so shipped as aforesaid, any Law, Usage or Custom to the contrary thereof in any wise notwithstanding Provided also, that the Person or Persons in whose Name or Names any such Goods, Wares or Merchandize are so shipped as aforesaid, shall be taken for the Purposes of this Act to have been intrusted therewith, unless the contrary thereof shall appear or be shown in Evidence by any Person disputing such Fact.

II. And be it further enacted, That it shall be lawful to and for any Person or Persons, Body or Bodies Politic or Corporate, to accept and take any Goods, Wares or Merchandize, or the Bill or Bills of Lading for the Delivery thereof, in Deposit or Pledge, from any Consignee or Consignees thereof; but then and in that Case such Person or Persons, Body or Bodies Politic or Corporate, shall acquire no further or other Right, Title or Interest, in or upon or to the said Goods, Wares or Merchandize, or any Bill of Lading for the Delivery thereof, than was possessed, or could or might have been enforced by the said Consignee or Consignees at the Time of such Deposit or Pledge as a Security as aforesaid; but such Person or Persons, Body or Bodies Politic or Corporate, shall and may acquire, possess and enforce such Right, Title or Interest, as was possessed, and might have been enforced, by such Consignee or Consignees, at the Time of such Deposit or Pledge as aforesaid; any Rule of Law, Usage or Custom to the contrary notwithstanding.

III. Provided always, That nothing herein contained shall be deemed, construed or taken to deprive or prevent the true Owner or Owners, Proprietor or Proprietors of such Goods, Wares or Merchandize, from demanding and recovering the same from his, her or their Factor or Factors, Agent or Agents, before the same shall have been so deposited or pledged, or from the Assignee or Assignees of such Factor or Factors. Agent or Agents, in the Event of his, her or their Bankruptcy; nor to prevent any such Owner or Owners, Proprietor or Proprietors, from demanding or recovering of and from any Person or Persons, or of or from the Assignees of any Person or Persons in case of his or her Bankruptcy, or of or from any Body or Bodies Politic or Corporate, such Goods, Wares or Merchandize, so consigned, deposited or pledged, upon Repayment of the Money, or on Restoration of the negociable Security or Securities, or on Payment of a Sum of Money equal to the Amount of such Security or Securities, for which Money or negociable Security or Securities such Person or Persons, his, her or their Assignee or Assignees, or such Body or Bodies Politic or Corporate, may be entitled to any Lien upon such Goods, Wares or Merchandize; nor to prevent the said Owner or Owners, Proprietor or Proprietors, from recovering of and from such Person or Persons, Body or Bodies Politic or Corporate, any Balance or Sum of Money remaining in his, her or their Hands, as the Produce of the Sale of such Goods, Wares or Merchandize, after deducting thereout the Amount of the Money or negociable Security or Securities so advanced or given upon the Security thereof as aforesaid: Provided always, that in case of the Bankruptcy of such Factor or Agent, the Owner of the Goods so pledged and redeemed as aforesaid shall be held to have discharged *pro tanto* the Debt due by him to the Bankrupt's Estate.

6 GEORGE IV., CAP. 94.

An Act to alter and amend an Act for the better Protection of the Property of Merchants and others, who may hereafter enter into Contracts or Agreements in relation to Goods, Wares or Merchandize intrusted to Factors or Agents.

"Whereas an Act passed in the Fourth Year of the Reign of His present Majesty, intituled *An Act for the better Protection of the Property of Merchants and others, who may hereafter enter into Contracts or Agreements in relation to Goods, Wares or Merchandize intrusted to Factors or Agents:* And Whereas it is expedient to alter and amend the said Act, and to make further Provisions in relation to such Contracts or Agreements, as hereinafter provided": Be it therefore enacted . . . That from and after the passing of this Act, any Person or Persons intrusted, for the Purpose of Consignment or of Sale, with any Goods, Wares or Merchandize, and who shall have shipped such Goods, Wares or Merchandize in his, her or their own Name or Names, and any Person or Persons in whose Name or Names any Goods, Wares or Merchandize shall be shipped by any other Person or Persons, shall be deemed and taken to be the true Owner or Owners thereof, so far as to entitle the Consignee or Consignees of such Goods, Wares and Merchandize to a Lien thereon, in respect of any Money or negotiable Security or Securities advanced or given by such Consignee or Consignees to or for the Use of the Person or Persons in whose Name or Names such Goods, Wares or Merchandize shall be shipped, or in respect of any Money or negotiable Security or Securities received by him, her or them, to the Use of such Consignee or Consignees, in the like Manner to all Intents and Purposes as if such Person or Persons was or were the true Owner or Owners of such Goods, Wares and Merchandize: Provided such Consignee or Consignees shall not have Notice by the Bill of Lading for the Delivery of such Goods, Wares or Merchandize or otherwise, at or before the Time of any Advance of such Money or negotiable Security, or of such Receipt of Money or negotiable Security in respect of which such Lien is claimed, that such Person or Persons so shipping in his, her or their own Name or Names, or in whose Name or Names any Goods, Wares or Merchandize shall be shipped by any Person or Persons, is or are not the actual and *bona fide* Owner or Owners, Proprietor or Proprietors of such Goods, Wares and Merchandize so shipped as aforesaid, any Law, Usage or Custom to the contrary thereof in any wise notwithstanding: Provided also, that the Person or Persons in whose Name or Names any such Goods, Wares or Merchandize are so shipped as aforesaid, shall be taken, for the Purposes of this Act, to have been intrusted therewith for the Purpose of Consignment or of Sale, unless the contrary thereof shall be made to appear by Bill of Discovery or otherwise, or be made to appear, or be shown in Evidence by any Person disputing such Fact.

II. And be it further enacted, That from and after the First Day of *October* One thousand eight hundred and twenty six, any Person or Persons intrusted with and in Possession of any Bill of Lading, *India* Warrant, Dock Warrant, Warehouse Keepers' Certificate, Wharfinger's Certificate, Warrant or Order for Delivery of Goods, shall be deemed and taken to be the true Owner or Owners of the Goods, Wares and Merchandize described and mentioned in the said several Documents hereinbefore stated respectively, or either of them, so far as to give Validity to any Contract or Agreement thereafter to be made or entered into by such Person or Persons so intrusted and in Possession as aforesaid, with any Person or Persons, Body or Bodies Politic or Corporate, for the Sale or Disposition of the said Goods, Wares and Merchandize, or any Part thereof, or for the Deposit or Pledge thereof or any Part thereof, as a Security for any Money or negotiable Instrument or Instruments advanced or given by such Person or Persons, Body or Bodies Politic or Corporate, upon the Faith of such several Documents or either of them: Provided such Person or Persons, Body or Bodies Politic or Corporate, shall not have Notice by such Documents or either of them or otherwise, that such Person or Persons so intrusted as aforesaid is or are not the actual and *bona fide* Owner or Owners, Proprietor or Proprietors of such Goods, Wares or Merchandize so sold or deposited or pledged as aforesaid; any Law, Usage or Custom to the contrary thereof in any wise notwithstanding.

III. Provided always, and be it further enacted, That in case any Person or Persons, Body or Bodies Politic or Corporate, shall, after the passing of this Act, accept and take any such Goods, Wares, or Merchandize in Deposit or Pledge from any such Person or Persons so in Possession and intrusted as aforesaid, without Notice as aforesaid, as a Security for any Debt or Demand due and owing from such Person or Persons so intrusted and in Possession as aforesaid, to such Person or Persons, Body or Bodies Politic or Corporate, before the Time of such Deposit or Pledge, then and in that Case such Person or Persons, Body or Bodies Politic or Corporate, so accepting or taking such Goods, Wares or Merchandize in Deposit or Pledge, shall acquire no further or other Right, Title or Interest in or upon, or to the said Goods, Wares or Merchandize, or any such Document as aforesaid, than was possessed or could or might have been enforced by the said Person or Persons so possessed and intrusted as aforesaid, at the Time of such Deposit or Pledge as a Security as last aforesaid; but such Person or Persons, Body or Bodies Politic or Corporate, so accepting or taking such Goods, Wares or Merchandize in Deposit or Pledge, shall and may acquire, possess and enforce such Right, Title or Interest as was possessed and might have been enforced by such Person or Persons so possessed and intrusted as aforesaid; any Rule of Law, Usage or Custom to the contrary notwithstanding.

IV. And be it further enacted, That from and after the First Day of *October* One thousand eight hundred and twenty six, it shall be lawful to and for any Person or Persons, Body or Bodies Politic or Corporate, to contract with any Agent or Agents, intrusted with any Goods, Wares or Merchandize, or to whom the same may be consigned, for the Purchase of any such Goods, Wares and Merchandize, and to receive the same of and pay for the same to such Agent or Agents; and such Contract and Payment shall be binding upon and good against the Owner of such Goods, Wares and Merchandize, notwithstanding such Person or Persons, Body or Bodies Politic or Corporate, shall have Notice that the Person or Persons making and entering into such Contract, or on whose Behalf such Contract is made or entered into, is an Agent or Agents: Provided such Contract and Payment be made in the usual and ordinary Course of business, and that such Person or Persons, Body or Bodies Politic or Corporate, shall not, when such Contract is entered into or Payment made, have Notice that such Agent or Agents is or are not authorized to sell the said Goods, Wares and Merchandize, or to receive the said Purchase Money.

V. And be it further enacted, That from and after the passing of this Act, it shall be lawful to and for any Person or Persons, Body or Bodies Politic or Corporate, to accept and take any such Goods, Wares or Merchandize, or any such Document as aforesaid, in Deposit or Pledge from any such Factor or Factors, Agent or Agents, notwithstanding such Person or Persons, Body or Bodies Politic or Corporate, shall have such Notice as aforesaid, that the Person or Persons making such Deposit or

Pledge is or are a Factor or Factors, Agent or Agents; but then and in that Case such Person or Persons, Body or Bodies Politic or Corporate, shall acquire no further or other Right, Title or Interest in or upon or to the said Goods, Wares or Merchandize, or any such Document as aforesaid, for the delivery thereof, than was possessed or could or might have been enforced by the said Factor or Factors, Agent or Agents, at the Time of such Deposit or Pledge as a Security as last aforesaid; but such Person or Persons, Body or Bodies Politic or Corporate, shall and may acquire, possess and enforce such Right, Title or Interest as was possessed and might have been enforced by such Factor or Factors, Agent or Agents, at the Time of such Deposit or Pledge as aforesaid; any Rule or Law, Usage or Custom to the contrary notwithstanding

VI. Provided always, and be it enacted, That nothing herein contained shall be deemed, construed or taken to deprive or prevent the true Owner or Owners, or Proprietor or Proprietors, of such Goods, Wares or Merchandize, from demanding and recovering the same from his, her or their Factor or Factors. Agent or Agents, before the same shall have been so sold, deposited or pledged, or from the Assignee or Assignees of such Factor or Factors, Agent or Agents, in the Event of his, her or their Bankruptcy; nor to prevent such Owner or Owners, Proprietor or Proprietors, from demanding or recovering of and from any Person or Persons, Body or Bodies Politic or Corporate, the Price or Sum agreed to be paid for the Purchase of such Goods, Wares or Merchandize, subject to the Right of Setoff on the Part of such Person or Persons, Body or Bodies Politic or Corporate, against such Factor or Factors, Agent or Agents; nor to prevent such Owner or Owners, Proprietor or Proprietors, from demanding or recovering of and from such Person or Persons, Body or Bodies Politic or Corporate, such Goods, Wares or Merchandize so deposited or pledged, upon Repayment of the Money, or on Restoration of the negotiable Instrument or Instruments so advanced or given on the Security of such Goods, Wares or Merchandize as aforesaid, by such Person or Persons, Body or Bodies Politic or Corporate, to such Factor or Factors, Agent or Agents; and upon Payment of such further Sum of Money, or on Restoration of such other negotiable Instrument or Instruments (if any) as may have been advanced or given by such Factor or Factors, Agent or Agents, to such Owner or Owners, Proprietor or Proprietors, or on Payment of a Sum of Money equal to the Amount of such Instrument or Instruments; nor to prevent the said Owner or Owners, Proprietor or Proprietors, from recovering of and from such Person or Persons, Body or Bodies Politic or Corporate, any Balance or Sum of Money remaining in his, her or their Hands, as the Produce of the Sale of such Goods, Wares or Merchandize, after deducting thereout the Amount of the Money or negotiable Instrument or Instruments so advanced or given upon the Security thereof as aforesaid: Provided always, that in case of the Bankruptcy of any such Factor or Agent, the Owner or Owners, Proprietor or Proprietors of the Goods, Wares and Merchandize so pledged and redeemed as aforesaid, shall be held to have discharged *pro tanto* the Debt due by him, her or them to the Estate of such Bankrupt.

VII. [*This section provides the penalty for the misdemeanor of agents fraudulently pledging goods of their principals.*]

VIII. Provided always, and be it further enacted, That nothing herein contained shall extend or be construed to extend to subject any Person or Persons to Prosecution, for having deposited or pledged any Goods, Wares or Merchandize so intrusted or consigned to him, her or them, provided the same shall not be made a Security for or subject to the Payment of any greater Sum or Sums of money than at the Time of such Deposit or Pledge was justly due and owing to such Person or Persons from his, her or their Principal or Principals: Provided nevertheless, that the Acceptance of Bills of Exchange by such Person or Persons drawn by or on account of such Principal or Principals, shall not be considered as constituting any Part of such Debt so due and owing from such Principal or Principals within the true Intent and Meaning of this Act, so as to excuse the Consequence of such a Deposit or Pledge, unless such Bills shall be paid when the same shall respectively become due.

IX. Provided also, and be it further enacted, That the Penalty by this Act annexed to the Commission of any Offence intended to be guarded against by this Act shall not extend or be construed to extend to any Partner or Partners, or other Person or Persons of or belonging to any Partnership, Society or Firm, except only such Partner or Partners, Person or Persons, as shall be accessary or privy to the Commission of such Offence; any Thing herein contained to the contrary in any wise notwithstanding.

X. [*This section provides for remedies at law or equity.*]

5 AND 6 VICTORIA, CAP. 39.

An Act to amend the Law relating to Advances bona fide *made to Agents intrusted with Goods.*

Whereas . . . . Be it therefore enacted . . . . That from and after the passing of this Act any Agent who shall thereafter be intrusted with the Possession of Goods, or of the Documents of Title to Goods, shall be deemed and taken to be the Owner of such Goods and Documents, so far as to give Validity to any Contract or Agreement by way of Pledge, Lien, or Security *bona fide* made by any Person with such Agent so intrusted as aforesaid, as well for any original Loan, Advance, or Payment made upon the Security of such Goods or Documents, as also for any further or continuing Advance in respect thereof, and such Contract or Agreement shall be binding upon and good against the Owner of such Goods, and all other Persons interested therein, notwithstanding the Person claiming such Pledge or Lien may have had Notice that the Person with whom such Contract or Agreement is made is only an Agent.

II. And be it enacted, That where any such Contract or Agreement for Pledge, Lien, or Security shall be made in consideration of the Delivery or Transfer to such Agent of any other Goods or Merchandize, or Document of Title, negotiable Security upon which the Person so delivering up the same had at the Time a valid and available Lien and Security for or in respect of a previous Advance by virtue of some Contract or Agreement made with such Agent, such Contract and Agreement, if *bona fide* on the Part of the Person with whom the same may be made, shall be deemed to be a Contract made in consideration of an Advance within the true Intent and Meaning of this Act, and shall be as valid and effectual, to all Intents and Purposes, and to the same Extent, as if the Consideration for the same had been a *bona fide* present Advance of Money: Provided always, that the Lien acquired under such last-mentioned Contract or Agreement upon the Goods or Documents deposited in exchange shall not exceed the Value at the Time of the Goods and Merchandize which, or the Documents of Title to which, or the negotiable Security which shall be delivered up and exchanged.

III Provided always, and be it enacted, That this Act, and every Matter and Thing herein contained, shall be deemed and construed to give Validity to such Contracts and Agreements only, and to protect only such Loans, Advances, and Exchanges, as shall be made *bona fide*, and without Notice that the Agent making such Contracts or Agreements as aforesaid has not Authority to make the same, or is acting *mala fide* in respect thereof against the Owner of such Goods and Merchandize; and nothing herein contained shall be construed to extend to or protect any Lien or Pledge for or in respect of any antecedent Debt, owing from any Agent to any Person with or to whom such Lien or Pledge shall be given, nor to authorize any Agent intrusted as aforesaid in deviating from any express Orders or Authority received from the Owner; but that, for the Purpose and to the Intent of protecting all such *bona fide* Loans, Advances, and Exchanges as aforesaid (though made with Notice of such Agent not being the Owner, but without Notice of the Agent's acting without Authority), and to no further or other Intent or Purpose, such Contract or Agreement as aforesaid shall be binding on the Owner and all other Persons interested in such Goods.

IV. And be it enacted, That any Bill of Lading, *India* Warrant, Dock Warrant, Warehouse Keeper's Certificate, Warrant, or Order for Delivery of Goods, or any other Document used in the ordinary Course of Business as Proof of the Possession or

Control of Goods, or authorizing or purporting to authorize, either by Indorsement or by Delivery, the Possessor of such Document to transfer or receive Goods thereby represented, shall be deemed and taken to be a Document of Title within the Meaning of this Act; and any Agent intrusted as aforesaid, and possessed of any such Document of Title, whether derived immediately from the Owner of such Goods, or obtained by reason of such Agent's having been intrusted with the Possession of the Goods, or of any other Document of Title thereto, shall be deemed and taken to have been intrusted with the Possession of the Goods represented by such Document of Title as aforesaid, and all Contracts pledging or giving a Lien upon such Document of Title as aforesaid shall be deemed and taken to be respectively Pledges of and Liens upon the Goods to which the same relates; and such Agent shall be deemed to be possessed of such Goods or Documents, whether the same shall be in his actual Custody, or shall be held by any other Person subject to his Control or for him or on his Behalf; and where any Loan or Advance shall be *bona fide* made to any Agent intrusted with and in possession of any such Goods or Documents of Title as aforesaid, on the Faith of any Contract or Agreement in writing to consign, deposit, transfer, or deliver such Goods or Documents of Title as aforesaid, and such Goods or Documents of Title shall actually be received by the Person making such Loan or Advance, without Notice that such Agent was not authorized to make such Pledge or Security, every such Loan or Advance shall be deemed and taken to be a Loan or Advance on the Security of such Goods or Documents of Title within the Meaning of this Act, though such Goods or Documents of Title shall not actually be received by the Person making such Loan or Advance till the Period subsequent thereto; and any Contract or Agreement, whether made direct with such Agent as aforesaid, or with any Clerk or other Person on his Behalf, shall be deemed a Contract or Agreement with such Agent; and any Payment made, whether by Money or Bills of Exchange, or other negotiable Security, shall be deemed and taken to be an Advance within the Meaning of this Act; and an Agent in possession as aforesaid of such Goods or Documents shall be taken, for the Purpose of this Act. to have been intrusted therewith by the Owner thereof, unless the contrary can be shown in Evidence.

V. Provided always, and be it enacted, That nothing herein contained shall lessen, vary, alter, or affect the civil Responsibility of an Agent for any Breach of Duty or Contract, or Nonfulfilment of his Orders or Authority in respect of any such Contract, Agreement, Lien, or Pledge as aforesaid.

VI. [*This section declares an agent making consignments contrary to instruction of principal, guilty of misdemeanor.*]

VII. Provided also, and be it enacted, That nothing herein contained shall prevent such Owner as aforesaid from having the Right to redeem such Goods or Documents of Title pledged as aforesaid, at any Time before such Goods shall have been sold, upon Repayment of the Amount of the Lien thereon, or Restoration of the Securities in respect of which such Lien may exist, and upon Payment or Satisfaction to such Agent, if by him required, of any Sum of Money for or in respect of which such Agent would by Law be entitled to retain the same Goods or Documents, or any of them, by way of Lien as against such Owner, or to prevent the said Owner from recovering of and from such Person with whom any such Goods or Documents may have been pledged, or who shall have any such Lien thereon as aforesaid, any Balance or Sum of Money remaining in his Hands as the Produce of the Sale of such Goods, after deducting the Amount of the Lien of such Person under such Contract or Agreement as aforesaid. Provided always, that in case of the Bankruptcy of any such Agent the Owner of the Goods which shall have been so redeemed by such Owner as aforesaid shall, in respect of the Sum paid by him on account of such Agent for such Redemption, be held to have paid such Sum for the Use of such Agent before his Bankruptcy, or in case the Goods shall not be so redeemed the Owner shall be deemed a Creditor of such Agent for the Value of Goods so pledged at the Time of the Pledge, and shall, if he shall think fit, be entitled in either of such Cases to prove for or set off the Sum so paid, or the Value of such Goods as the Case may be.

FUENTES *v.* MONTIS.

In the Common Pleas, February 10, 1868.

[*Reported in Law Reports,* 3 *Common Pleas,* 268.]

Willes, J. In this case, the plaintiffs, Messrs. Fuentes, had consigned a quantity of wine to a person named De Ponte, for sale. When he received the wines, De Ponte was, no doubt, and for some time afterwards continued to be, an agent in possession of and intrusted with the wines, so as to come within the provisions of the Factors Acts. Messrs. Fuentes became dissatisfied with his conduct as agent, appointed Messrs. Collier to act for them in that capacity, and gave De Ponte to understand that his agency was at an end, and required him to hand over the wines remaining in his hands to Messrs. Collier. De Ponte refused to comply with this request, and refused without any good reason, because he appears to have had no claim against Messrs. Fuentes by way of lien or otherwise. It was his duty as agent to give up the wines; and, in retaining the documents of title (which for the purposes of the Factors Acts are the same as the goods themselves), he was guilty of a wrong. That state of wrongful possession by De Ponte continued for some time after the revocation of his authority and the demand of the wines and the documents of title on behalf of Messrs. Fuentes; and during that wrongful possession, and after the revocation of his authority as agent, De Ponte obtained an advance on the security of the documents of title, which advance would have been protected by the Factors Acts, and effectual to give the lenders, Messrs. Montis, a valid pledge of the documents of title to the wines, supposing there had been no revocation of De Ponte's authority. The question, therefore, is neatly raised, whether an agent who has once been intrusted with and remains in possession of goods or the documents or title thereto, continues to have authority *quoad* third persons who *bona fide* make an advance, so as to give them a title as against his principal, notwithstanding that before the right of the lender arises the authority which the agent had has been revoked, so that, as between himself and his principal, he has ceased to be an agent, and has become a person occupying the relation simply of a wrongdoer in detaining the goods or the documents of title. That question has been argued before us with great acumen, and we are much indebted to the learned counsel on both sides for the assistance we have received from them. The question is one of considerable nicety. But, as we have had an opportunity of thinking it over, we consider it right to pronounce our opinion upon it at once. It is a question of nicety, not only as depending on the construction of the Acts of Parliament relating to factors, but also because it belongs to a class of questions upon which great differences of opinion have existed amongst mercantile men, though not amongst lawyers; that is, the class of questions which relate to how far a person who is not the real owner of goods, but who appears to the world, or rather to those who deal with him, as owner, and who deal with him on the faith of his apparent ownership, should be allowed to confer upon a third person a greater title than he himself has. With respect to certain sorts of property, everybody is agreed that there is no restriction of the power of the apparent owner to transfer a right to any person who takes it from him *bona fide;* as in the case of the ordinary currency of the country, or that which has for mercantile convenience been put upon the same footing, viz., bills of exchange and other negotiable instruments, including bills of lading, as against stoppage *in transitu* only. Every one is agreed that, with respect to the ordinary currency, and bills of exchange whilst running, a person who receives them *bona fide* and for value is entitled to hold them notwithstanding any infirmity of title in the person from whom he obtains them. That, however, is far from being so as to ordinary merchandise. The only cases which at the moment occur to my mind in which a man may give to another a better title to goods than he himself has, are, the case of a sale in market overt, in which case the buyer acquires a title to the goods whatever may have been the right of the seller, — probably because of the publicity of the transaction and the inconvenience which would result from the adoption of any other rule. And even to this there are exceptions, arising out of the statute of restitution. A second case which may be put is the case of a man selling goods under circumstances in which he might rescind the contract on the ground of fraud in the buyer: if the buyer has obtained possession, that possession as against the seller is wrongful; but if the buyer, before the seller has exercised his option of rescinding the contract, has sold the goods to a *bona fide* purchaser, such *bona fide* purchaser would be entitled to retain them as against the seller, notwithstanding the latter has been defrauded. A third case in which a man may convey a better title to goods than he himself had, and one which is more apposite to the present, is, where an agent who carries on a public business deals with the goods in the ordinary course of it, though he has received secret instructions from his principal to deal with them contrary to the ordinary course of that trade. In that case he has what has been sometimes called an apparent authority, or, as my brother Byles more accurately calls it, an ostensible authority, to deal in such a way with the goods as agents ordinarily deal with them; and, if he deals with them in the ordinary way of the trade, he binds his principal. These instances, however, are exceptional to the rule that no man can give a better title to goods than he has himself, and that the real owner is not bound except to the extent of an interest which he has parted with or an authority which he has given. Now, the result of that state of the law with respect to agents employed to sell, led to the course of legislation which is known by the general description of the Factors Acts; because it was held by the courts of law that the case of a pledge of goods by a factor intrusted with the possession of goods, and authorized to sell them, fell within the general rule to which the instances above enumerated are exceptions, and that it did not fail within the exceptions by reason of a pledge being an ordinary and accustomed transaction to be entered into by a person intrusted as agent to sell, or perhaps more properly by reason of the courts of law having treated a pledge as being out of the scope of an authority to sell.

The legislature seem to have considered that to be too narrow a view of the proper scope of the authority of an agent to sell; and they were no doubt induced to think so by reason of the altered mode of conducting mercantile transactions in modern times, and because it had become a usual and accustomed course for factors intrusted with goods for sale, to make advances to their principals either in money or by the acceptance of bills against their consignments, and to keep themselves in funds by repledging the documents of title with bankers or other money dealers. But, whatever may have been the reason, it is clear that that was the particular evil which the legislature sought to remedy by the Factors Acts. And if it be proper, in construing a statute, to look at the mischief intended to be remedied, — which Lord Coke says is one of the rules for construction of acts of Parliament, — one would construe such a statute with the expectation of finding that the legislature would deal with the class to which persons who in the usual course of business advance money on goods coming to them for sale belong, and who previously could not pledge beyond their own advances, because the authority of the agent, as between himself and his principal, was limited to contracts of sale, and not capable of being extended by construction to contracts of pledge. That anticipation of what the legislature intended by the Factors Acts, if we are to rely upon a series of decisions upon them, to some of which reference has been made, and all of which are in harmony, would turn out to be correct, because it has from time to time been held that, notwithstanding general terms used here and there throughout those acts, which, taken by themselves, might be held to include all agents or persons intrusted, those general expressions are to be construed with reference to the general scope and object of the acts as well as to the particular language used, so as to limit their operation to the case, first, of persons intrusted as agents. Take the case which it was sought at one time to bring within the operation of the acts, of a seller handing to the buyer a document of title, — it might be said that the buyer was a person intrusted with and in possession of the document of title, and, if he dealt with it in the ordinary course of business under the first or second of the Factors Acts he ought to give a complete title as against the seller. But one of the earliest decisions upon the construction of the 6 Geo. 4, c. 94, and a decision which has never been quarrelled with, is Jenkins *v.* Usborne, 7 M. & G. 678, where it was held that the buyer in such a case is not a person "intrusted" or "in possession" within the meaning of the act, because he was not intrusted as an agent, and therefore a person who buys from him a dock-warrant or other document of title, is, as against the seller, in no better position than the buyer himself, and so the right to stop *in transitu* is not excluded. Next it was held that, not only must the person be intrusted as agent, but he must be intrusted as agent in a mercantile transaction; and therefore a mere servant intrusted with a document of title, though an agent in one sense, is not so in the sense of the act, and therefore cannot, as against his master, give to another a right which he himself had not. Next, it appears that not only must the person intrusted be an agent, but he must be an agent for sale; and that would exclude the case of a carrier or warehouseman, who is in some sense an agent and intrusted with the possession of goods. The agents contemplated by the Factors Acts are agents intrusted for sale. I do not mean to limit the operation of the statute to agents intrusted with goods for future sale, either generally or in the particular instance. It is necessary to guard oneself in that respect, because every one is aware of the case of the commission-agent who informed the owners of goods that he had an opportunity of selling them, and, having got samples, represented that he had sold the goods to a person who it was afterwards discovered had no existence, and, having by that fraud got possession of the goods, pledged them to a third person, who made an advance *bona fide* and without notice of the fraud; and it was held that the latter acquired a good title to the goods under the Factors Acts. I allude to the case of Baines *v.* Swainson, 4 B. & S. 270; 32 L. J. (Q. B.) 281, which Mr. Channell evidently had in his mind when he made a very pertinent observation, which I shall refer to by-and-by. The court in that case labored hard to show that the person was intrusted with and in the possession of the goods as agent, and as agent for sale, though he was not when first intrusted an agent for the future sale of the goods, was still within the operation of the Factors Acts, because he was an agent for sale, and his employment was connected with the sale, as was put by Crompton, J. The court took pains to show that the judge who tried the cause, and who at first thought that, as the intrusting was not for sale generally, it did not come within the Factors Acts, was wrong. That case, however, is strong to show the extreme limit to which the Factors Acts have been pushed; and it was properly referred to for that purpose. But it is necessary not only to show that the person intrusted is an agent and an agent for sale, but it is necessary also, as Mr. Channell pointed out, that he was intrusted with the particular goods as an agent for sale or for an object connected with the sale, — to avoid coming into collision with the case of Baines *v.* Swainson, 4 B. & S. 270; 32 L. J. (Q. B.) 281, to which I entirely assent.

Here it is necessary to consider the state of the law as to an agent intrusted with goods, but not for the purpose of sale, because it differs from that which relates to other agents. In the case of an agent whose general business it is to sell, being intrusted with goods for a purpose other than that of sale, as upon a pledge for an advance of money, with instructions not to sell; or, if he happen to have a warehouse, though his general business is that of a factor and not of a warehouse-keeper, and goods are placed in his warehouse at a rent: in either of these cases he would be a person who *prima facie* would appear to be justified in dealing with the goods as factor: and yet there is an express provision as to such a person (for one cannot doubt that the judges in Baines *v.* Swainson, *supra*, were right in so expounding the section), that he shall be only *prima facie* in a position to deal with his principal's goods more largely than as agent he could do, and that his principal may repel the presumption of his more enlarged authority under the Factors Acts, and show the real nature of the transaction between them. That provision is (5 & 6 Vict. c. 39, § 4), "an agent in possession of such goods or documents shall be taken, for the purposes of this act, to have been intrusted therewith by the owner thereof, unless the contrary can be shown in evidence." That provision in the 4th section of the 5 & 6 Vict. c. 39, has been applied to the extreme by Blackburn, J., in his judgment in Baines *v.* Swainson, 4 B. & S. 270, 285; 32 L. J. (Q. B.) 281, 288, where he says: "I do not agree with the counsel for the defendants, that the mere fact of an agent being found in possession of goods, although they have been handed to him by the owner knowing that he carries on such a business, amounts to an 'intrusting' him as agent; though I think that, under that part of § 4 of Statute 5 & 6 Vict. c. 39, to which I have referred, the fact of a person being put into possession of goods calls upon the person who gave him possession to explain and show that it was not an intrusting." But for that guidance, I might rather have inclined to read that last clause of the 4th section as applicable to the cases provided for in the previous part of it, and to be satisfied with the case in which the factor has been held to be intrusted with the possession of documents of title which he has been enabled to obtain by reason of his having been intrusted with other documents which led to the acquisition of the former. But I will not criticise the opinion there thrown out, but will adopt it for the purpose of the present case. Here is the case of an agent whose general business brings him within the scope of the act, who, being in possession of goods belonging to a principal, has pledged them. What is the result? Is it that a person who has innocently dealt with the agent by reason of his general character and employment, is to take advantage of the apparent ownership of the agent, as a buyer in market overt would? or is he to be subject to some afterclap, some proof by the owner that he was not so intrusted as to bring him within the acts? Let the statute speak for itself. Its words are: "an agent in possession as aforesaid of such goods or documents shall be taken, for the purposes of this act, to have been intrusted therewith by the owner thereof, unless the contrary shall be proved in evidence." The inevitable conclusion is, that, if the contrary can be proved in evidence, "an agent in possession as aforesaid of such goods or documents," is not to be taken to be "intrusted therewith by the owner thereof."

That introduces the argument which was urged on the part of the plaintiffs, and well illustrated by the case put by Mr. Channell, in which the claim of a person *bona fide* making an advance to the factor may be defeated. That is the case of goods pledged with a factor, but not intrusted to him in his business of a factor. I draw two conclusions from the state of the law of which I have endeavored to give a summary, not dwelling for the present upon the precise language of the acts, but upon the construction which has been put upon them, with a view to see whether that construction enables us to come to a decision upon this case. The conclusion to which the course of the decisions compels me to come is that which is expressed by Blackburn, J., in Baines *v.* Swainson, *supra*, viz., that the authority given by the Factors Acts *quoad* third persons is an authority superadded and accessory to the ordinary authority given by a principal to his agent. It was not intended by those acts to provide a remedy for all the hardships which may occur to innocent persons by dealing with one in the apparent ownership of goods as if he were the real owner; but only with cases where the agent is intrusted with and in possession of the goods with the assent of the true owner of them.

Much argument has been urged upon the words "intrusted and in possession." But it appears to me that, before you can deal with the state of being intrusted or in possession, you must get your substantive, viz., agent. The person who is to give a title as against the principal or owner of the goods must be an agent. If he has no right to the possession as agent, the provisions of the Factors Acts as to pledging do not apply to him.

I might desire that it was in the power of the judges to amend the law from time to time with reference to mercantile convenience. And, if there were a large preponderance of opinion amongst mercantile men that there ought to be a free power of transfer of goods by persons having the apparent ownership, I might feel disposed to exercise that power, if it had existed, in favor of the opinion of such majority. But, were I to do this, I should be doing an unconstitutional act. And I cannot help taking warning against interfering with the intentions of the legislature from any notions of expediency, when I recollect what took place in Kingsford *v.* Merry, 11 Exch. 577; 25 L. J. (Ex.) 166. There one Anderson falsely and fraudulently represented to the plaintiffs that he was authorized by and acting on behalf of Van Nottin & Co. in procuring certain goods, and the plaintiffs, in consequence of such false and fraudulent representation, delivered the goods to Anderson with intent to transfer to him the property in them, and Anderson pledged the goods with the defendant for a *bona fide* advance; and the Court of Exchequer held that the plaintiffs could not maintain an action for the goods without tendering or paying the defendant his advance, upon the principle that, "when a vendee obtains possession of a chattel with the intention by the vendor to transfer both the property and possession, although the vendee has committed a false and fraudulent misrepresentation in order to effect the contract or obtain the possession, the property vests in the vendee until the vendor has done some act to disaffirm the transaction." But, when the case came before the Exchequer Chamber, the facts as they were stated for the opinion of the Court of Error not sustaining the conclusion of fact upon which the court below relied, the judgment was reversed. The ground of the decision in the Exchequer Chamber was, that "the plaintiffs and Anderson never did stand in the relation of vendor and vendee of the goods, and that there was no contract between them which the plaintiffs might either affirm or disaffirm." Thus, the man who innocently advanced his money upon the faith of the apparent ownership of the goods in Anderson was held to have no title to the goods. Everybody is aware of the great attention which that case excited amongst mercantile men, and what a large amount of consideration and discussion ensued by men of great ability and reflection, especially as to the expediency of expanding the principle of the Factors Acts so as to meet the case of apparent ownership; and one cannot but remember that all that consideration and discussion failed to lead to any practical result; the law remaining as it was before. I am at all times anxious to give full effect to the intention of the legislature as expressed in the language they have used. But I do not feel myself at liberty, from any notions of expediency which I may entertain, to go beyond that which I find written. I therefore feel compelled to deal with the acts of Parliament in question according to the expressions I find there, always bearing in mind that the substantive thing that is being dealt with is an agent. I take the 1st section of the 5th and 6th of the Queen, — "From and after the passing of this act, any agent who shall thereafter be intrusted with the possession of goods, or of the documents of title to goods, shall be deemed and taken to be the owner of such goods and documents, so as to give validity to any contract or agreement by way of pledge, lien, or security, *bona fide* made by any person with such agent so intrusted as aforesaid, as well for any original loan, advance, or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof; and such contract or agreement shall be binding upon and good against the owner of the goods and all other persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract or agreement is made is only an agent." Where the word "agent" is not repeated, I assume that it must be read down. I therefore come to the conclusion that the person who is to create a valid pledge of his principal's goods must be an agent who is intrusted at the time of doing the act which is to have that effect. That being so, it appears to me that an agent whose authority has been revoked, and who wrongfully retains possession of goods which he is bound to give up, at the time when he purports to make a pledge, is not an agent at all, but a wrongdoer, and is not within the acts, nor is the pledge a transaction within their protection. It appears to me that the Factors Acts will be fully satisfied by holding the effect of them to be, that a man who places goods, or the documents of title to goods, in the hands of an agent for sale, or for a purpose connected with sale, shall be taken to have given the agent authority to pledge, and such authority continues so long as the agency continues; and that the authority given to the agent *quoad* third persons is an authority *juris et de jure*, superadded and accessory to the agency, and ceases when his possession as agent ceases. And I can no more come to the conclusion that a person who is "in possession," but who has ceased to be "intrusted," and ceased to be agent, can have a right to pledge so as to confer upon the pledgee the rights created by the Factors Acts, than I can come to the conclusion that a person who was "intrusted," but who has ceased to be "in possession," can have such right, which he clearly could not.

For these reasons, I am of opinion that Messrs. Montis had no right to hold the wines in question as against Messrs. Fuentes; and, having considered the case with all the anxiety which its novelty and nicety and the worth of the arguments which have been addressed to us demanded, I feel compelled to come to the conclusion that the verdict for the plaintiffs ought to stand, and that the rule should be discharged.

Rule discharged.[1]

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COLE *v.* NORTHWESTERN BANK.

In the Exchequer Chamber, February 12, 1875.

[*Reported in Law Reports,* 10 *Common Pleas,* 354.]

Blackburn, J. This is a special case on which the Court of Common Pleas gave judgment for the plaintiffs for the sum of £6,661 1*s.* 7*d.* The defendants brought error on that judgment, and the case was argued in the Exchequer Chamber on the 4th and 5th of February last, by Mr. Benjamin for the defendants (the plaintiffs in error) and Mr. Herschell for the plaintiffs (the defendants in error), before my brothers Bramwell, Mellor, Lush, Cleasby, Pollock, and Amphlett, and myself, when we took time to consider.

The case was stated without pleadings. It did not as originally drawn give express power to the court to draw inferences of fact: but, on that being pointed out during the argument, it was agreed that it was so intended, and that, if necessary, an amendment should be made, to give that power.

The plaintiffs, merchants in London, were the owners of two parcels of sheep's wool, and two parcels of mohair of goats' wool. All four parcels were received for the plaintiffs by one Slee, a warehouseman and sheep's wool-broker at Liverpool, and were by him deposited in his warehouse at Liverpool. From thence they were taken on the 13th of April, 1872, by the defendants, who claimed right so to do under a contract made by Slee on the 5th of April, 1872, by which he pledged, or agreed to pledge, the whole four parcels to the defendants for £7,000 then advanced to him by the defendants on that security.

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[1] Keating and Montague Smith, J.J., delivered brief concurring opinions.

At the time when this contract was made, the two parcels of goats' wool and one of the parcels of sheep's wool were in Slee's warehouse. The other parcel of sheep's wool was still on board the vessel (the "Grecian") by which it had come: but Slee held the bill of lading, which had been sent to him by the plaintiffs to enable him to land and deposit the wool in his warehouse; and (after the making of the contract of the 5th of April) on the 9th of April this sheep's wool also was actually deposited in the warehouse.

Slee absconded with the £7,000 thus obtained, and then the defendants, having notice that Slee had committed this act of bankruptcy, but not having any further notice that he had not been so intrusted with the possession of the goods as to be able to pledge them, took forcible possession of the whole goods against the will of Slee's clerks.

The great question was whether Slee was, under the circumstances, so intrusted with the possession of the goods as to have been able on the 5th of April (supposing he had then delivered actual possession to the defendants) to make a pledge to the defendants good against the plaintiffs. As to this, there is a distinction between the sheep's wool and the goats' wool; for Slee never sold goats' wool at all, and was clearly intrusted with the goats' wool as warehouseman, and as warehouseman only. But he did sell sheep's wool as a broker.

A broker, who, without being intrusted with the goods, makes a contract between two principals, has no opportunity to pledge the goods at all. But we know (though it is not stated in the case) that brokers often are capitalists who make advances on the goods and have them transferred into their names as a security for such advances. And sometimes, especially where the principal is resident at a distance, the goods are transferred into the broker's name for the purpose of facilitating a sale by him, although there has been no advance made by him upon them. The agent thus intrusted is something more than a mere broker.

A pledge by a person thus intrusted with the possession of goods as broker would no doubt be good. And if, as is sometimes the case, the broker had warehouses of his own in which the goods so intrusted to him were stored, they would be equally in his possession as broker as if they had been stored in the warehouse of another in his name. But we are all agreed that we must understand from the statement in the case that Slee had not warehouses as merely ancillary to his business as broker, but that he carried on two distinct and independent businesses, the one being that of a warehouseman, the other that of a sheep's wool-broker: and this raises the first question of fact, viz. whether the goods in question were intrusted to him merely as warehouseman, or also as broker.

It is stated in the case that the bills of lading of the plaintiffs' wool (whether goats' wool or sheep's wool) were in the ordinary course of business sent down to Slee for the purpose of his receiving the wool from the ship and warehousing it. Slee, after the wool had been so received and warehoused, sent up a report and valuation thereon, and then awaited the plaintiffs' further instructions as to disposal. Two sample letters are set out in the appendix, one relating to goats' wool, the other to sheep's wool; and they bear out the statement in the case that both kinds of wool were treated in exactly the same way.

But there is the further statement that, "as to the sheep's wool, Slee had no general authority from the plaintiffs to sell, but always awaited instructions, and acted only under specific authority given to him from time to time in each case; and when such last-mentioned sales were effected, Slee received the proceeds.

We draw the inference of fact that, as between the plaintiffs and Slee, Slee was intrusted with the sheep's wool and goats' wool alike, solely for the purpose of warehousing them. But as it appears that he was sometimes authorized by the plaintiffs to sell and receive payment for sheep's wool deposited in his warehouse, the question arises whether he could make to the defendants a good pledge of any wool (either goats' wool and sheep's wool, or of sheep's wool only, or of neither), deposited by the plaintiffs in his warehouse, though not intended to be sold.

The Court of Common Pleas decided that the pledge (even supposing it to have been executed by delivery on the 5th of April) would not have been good either as to the sheep's wool or the goats' wool: and we are of opinion that they were right, and that their judgment should be affirmed.

This renders it unnecessary for us to express any opinion on two subsidiary points raised by Mr. Herschell, — first, that the taking forcible and (as he argued) wrongful possession on the 13th of April could not better the defendants' position, who therefore remained in the position (provided for in the 4th section of 5 & 6 Vict. c. 39) of a person who has made a contract for a pledge with an agent, but has not actually received the goods contracted to be pledged, — and, secondly, as to the parcel per "Grecian," that Slee on the 5th of April, when the contract was made, was not in possession of these wools, though he had the bill of lading under which he subsequently obtained them. We merely mention these two points, to show that we have not overlooked them; but express no opinion on either.

The decision of this case depends, in our opinion, entirely on the true construction of the last of the Factors Acts, 5 & 6 Vict. c. 39, which was passed to amend and extend the earlier Factors Acts, 4 Geo. 4, c. 83, and 6 Geo. 4, c. 94. We think, however, that, in order to understand 5 & 6 Vict. c. 39, it is necessary to consider what was the common law before any legislation on the subject, what were the provisions of the two earlier acts, and what had been the judicial decisions upon them.

The amount at stake in the present action is large, and renders our decision of importance to the parties. But the general importance of the question as regards the commerce of this country is even greater. It was for this reason, and not from any doubt as to what the decision should be, that the court took time to consider their judgment. And for the same reason we now proceed to give our reasons at some length.

The 4th edit. of Abbott on Shipping was published before the passing of either of the Factors Acts. The 5th edit., the last published in the lifetime of the author, was published before the passing of 5 & 6 Vict. c. 39; but it contains a valuable abstract of the two earlier Factors Acts, indicating what Lord Tenterden thought was their effect. The passage containing his opinion has been suppressed in the sixth and subsequent editions of Abbott on Shipping. The 5th edition, in which alone it is to be found, is now out of print: it is worth while, therefore, to quote the whole passage at length; it will be found in part 3, ch. 9, s. 16, p. 381: —

"Lastly we are to consider by what acts the right of the consignor may be taken away before the end of the transit. Since the publication of the former editions of this book, this subject has received the attention of the Legislature, and Acts of Parliament have passed by which the matter will in many cases be governed in future. The legislative enactments are in part confirmatory of the common law, and in part important alterations of it. The following abstract of them will, it is hoped, be found correct and useful.

"The person in whose name goods are shipped is to be deemed the true owner thereof, so far as to entitle the consignee to a lien thereon in respect of any money or negotiable security advanced by him to such person, or received by such person to his use, if he has not notice by the bill of lading or otherwise, at or before the advance or receipt, that such person is not the actual and *bona fide* owner of the goods; and such person shall be taken for the purposes of the act to have been intrusted with the goods for the purpose of consignment or of sale, unless the contrary be made to appear. So, also, a person intrusted with and in possession of a bill of lading, or of any of the warrants, certificates, or orders mentioned in the act, is to be deemed the true owner of the goods described therein, so far as to give validity to any contract or agreement made by him for the sale or disposition of the goods or the deposit or pledge thereof, if the buyer, disponer, or pawnee has not notice, by the document or otherwise, that such person is not the actual and *bona fide* owner of the goods. But, if such person deposit or pledge the goods as security for a pre-existing debt or demand, he who so takes the deposit or pledge without notice shall acquire such right, title, or interest, and no further or other, than was possessed by the person making the deposit or pledge. And, further, any person may contract for the purchase of goods with any agent intrusted with the goods, or to whom they may be consigned, and receive and pay for the same to the agent, notwithstanding he shall have notice that the party with whom he contracts is an agent, if such contract and payment be made in the ordinary and usual course of business, and he has not at the time of the contract or payment notice that the agent is not authorized to sell or to receive the price. Also, any person may accept any goods, or any such document as aforesaid, on deposit or pledge from any factor or agent, notwithstanding he shall have notice that the party is a factor or agent; but, in such case, he shall acquire such right, title, or interest, and no further or other than was possessed by the factor or agent at the time of the deposit or pledge.

"It is, however, provided that the act shall not prevent the true owner of the goods from recovering them from his factor or agent before a sale, deposit, or pledge, or from the assignees of such factor or agent, in the event of his bankruptcy; nor from the buyer the price of the goods, subject to any right of set-off on the part of the buyer against the factor or agent; nor from recovering the goods deposited or pledged, upon repayment of the money or restoration of the negotiable instrument advanced on the security thereof to the factor or agent; and upon payment of such further money or restoration of such other negotiable instrument (if any) as may have been advanced by the factor or agent to the owner, or on payment of money equal to the amount of such instrument; nor from recovering from any person any balance remaining in his hands as the produce of a sale of the goods after deducting the money or negotiable instrument advanced on the security thereof. And, in the case of the bankruptcy of the factor or agent, the owner of the goods so pledged and redeemed shall be held to have discharged *pro tanto* his debt to the estate of the bankrupt.

"I am not aware that any case has hitherto been decided upon the construction of these enactments. They appear, as I have before observed, to be partly a confirmation and partly an alteration of the law; and, as a knowledge of the former state of the law is often very useful, even after an alteration has been made, it has been thought advisable to retain the contents of the last edition on this subject, with a reference to some subsequent decisions."

We agree with Lord Tenterden in thinking that these acts were partly a confirmation and partly an alteration of the law, and that, to understand them, it is necessary to see what the law was before they were passed.

At common law, a person in possession of goods could not confer on another, either by sale or by pledge, any better title to the goods than he himself had. To this general rule there was an exception of sales in market overt, and an apparent exception where the person in possession had a title defeasible on account of fraud. But the general rule was that, to make either a sale or a pledge valid against the owner of the goods sold or pledged, it must be shown that the seller or pledgor had authority from the owner to sell or pledge, as the case might be. If the owner of the goods had so acted as to clothe the seller or pledgor with apparent authority to sell or pledge, he was at common law precluded, as against those who were induced *bona fide* to act on the faith of that apparent authority, from denying that he had given such an authority, and the result as to them was the same as if he had really given it. But there was no such preclusion as against those who had notice that the real authority was limited.

And the possession of bills of lading or other documents of title to goods did not at common law confer on the holder of them any greater power than the possession of the goods themselves. The transfer of a bill of lading for goods *in transitu* had the same effect in defeating the unpaid vendor's right to stop *in transitu* that an actual delivery of the goods themselves under the same circumstances would have had. But the transfer of the document of title by means of which actual possession of the goods could be obtained, had no greater effect at common law than the transfer of the actual possession.

Lord Tenterden thus states the law: "If the goods were sent to the consignee as a factor, it was thought that his possession of the bill of lading could not in reason give him any greater power over the goods before their arrival than his actual possession of them afterwards would do: and as, in the case of actual possession, although a factor might sell the goods and thereby bind his principal because his employment and authority are to sell. but could not pawn or pledge them because he is not by his employment authorized so to do, so, before the arrival of the goods. it was held that he could not divest the consignor's right to stop them by indorsing or delivering over the bill of lading as a pledge."

The proposition that a factor is not by his employment authorized to pawn or pledge goods intrusted to him, was for many years much controverted in point of fact. But it having once been decided as a matter of law that he was not so authorized, the courts adhered to what had been decided.

The law in this respect has been altered by 5 & 6 Vict. c. 39, as will be shown hereafter; but the Legislature did not alter it in the first Factors Act, 4 Geo. 4, c. 83, except in the case of consignments by sea. In M'Combie *v.* Davies, 7 East, 5, the decision went so far as to hold that a pledge by a factor was so totally tortious as not even to transfer the lien which the pledgor himself had. This decision is made no longer law by the earlier Factors Acts.

The general principle of law, that, where the true owner has clothed any one with apparent authority to act as his agent, he is bound to those who deal with the apparent agent on the assumption that he really is an agent with that authority, to the same extent as if the apparent authority was real, is illustrated by two decisions which probably were present to the minds of those who framed 6 Geo. 4, c. 94. In Wilkinson
423 son *v.* King, 2 Camp. 335, it appeared that one Ellit was a wharfinger, and was accustomed to sell lead from his wharf. It is not distinctly stated in the report whether these sales were solely of his own lead or also of lead sent to him by others to sell as their factor; but, as it is expressly mentioned that he had never sold any lead for the plaintiff, it appears probable that he sold for others as factor. The defendant *bona fide* bought from Ellit lead belonging to the plaintiff which had been sent to him as wharfinger only. Lord Ellenborough ruled that "Ellit had no color of authority to sell the lead, and no one could

derive title from such a tortious conversion." And several other cases depending on similar sales by Ellit were decided in 1809 and 1810 in the same way. In none of these does there appear to have been any attempt to review in banc the decisions at *nisi prius*. In Pickering *v.* Busk, 15 East, 38, in 1812, the plaintiff, the true owner, had purchased the goods through Swallow, who pursued the public business of broker and an agent for sale, and the goods were at the plaintiff's desire transferred into the name of Swallow It was held that this proved that Swallow had an implied authority to sell, and consequently that the defendants were justified in buying of Swallow and paying him the price. Lord Ellenborough goes somewhat further. He says: "If a person authorize another to assume the apparent right of disposing of property in the ordinary course of trade, it must be presumed that the apparent authority is the real authority. I cannot subscribe to the doctrine that a broker's engagements are necessarily and in all cases limited to his actual authority, the reality of which is afterwards to be tried by the fact. It is clear that he may bind his principal within the limits of the authority with which he has been apparently clothed by his principals in respect of the subject-matter; and there would be no safety in mercantile transactions if he could not." It is to be observed, however, that the other judges base their judgment on the ground that the circumstances proved in fact an implied authority to Swallow to sell; and that Lord Ellenborough limits his more extensive doctrine to the case of a person "authorizing another to assume the apparent right of disposing of property in the ordinary course of trade," or, in other words, intrusting it to an agent whose business it is to sell: and, on Wilkinson *v.* King being cited on the argument, he says: "That was the case of a wharfinger whose proper business it was not to sell, and to whom the goods were sent for the mere purpose of custody:" from whence it may be inferred that he limited his general doctrine to cases in which, as in that before him, the goods were intrusted to an agent whose ordinary business it was to sell, in the course of his business as such agent, and because he was such agent. And Le Blanc, J., expressly says: "This is distinguishable from all the cases where goods are left in the custody of persons whose proper business it is not to sell."

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Perhaps, however, the case of Dyer *v.* Pearson, 3 B. & C. 38, which was decided in 1824, the year before the passing of 6 Geo. 4, c. 94, is that which throws most light on the intention of the legislature. That was trover for wool. Smith, who had sold the wool to the defendant, had been intrusted by the plaintiffs with the bill of lading, for the purpose of warehousing the goods, which he did in his own name. There was no distinct evidence that Smith was in the habit of buying or selling wool for others; and this was relied on in the argument as distinguishing the case from Pickering *v.* Busk, *supra*, which was not questioned; and it was not contended that he in fact had any authority from the plaintiffs to sell. Abbott, C. J., had at the trial left the question to the jury whether the defendant had purchased the

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wool under circumstances which would have induced a cautious man to believe that Smith had authority to sell. The jury found for the defendant. A new trial was granted; and Abbott, C. J., delivering the judgment of the court, says: "The general rule of the law of England is, that a man who has no authority to sell cannot by making a sale transfer the property to another. There is one exception to that rule, viz. the case of sales in market overt. Now, this being the rule of law, I ought either to have told the jury, that even if there was an unsuspicious purchase by the defendant, yet, as Smith had no authority to sell, they should find their verdict for the plaintiffs, or I should have left it to the jury to say whether the plaintiffs had by their own conduct enabled Smith to hold himself forth to the world as having, not the possession only, but the property; for, if the real owner of goods suffer another to have possession of his property and of those documents which are the *indicia* of property, then *perhaps* a sale by such a person would bind the true owner. That would be the most favorable way of putting the case for the defendant; and that question, *if it arises upon the evidence*, ought to have been submitted to the jury." The legislature seem to have intended to declare the law in future on the two points on which in that judgment doubt was expressed, and which I have indicated by putting them in italics.

When we look at the language used in the two earlier Factors Acts with reference to this state of the law, it seems to us clear that the legislature intended by 4 Geo. 4, c. 83, to alter the law in favor of consignees, so far as to enact that, where goods were shipped in the names of persons "intrusted for the purposes of sale" with goods, the consignees might advance money on the security of the goods as if the consignors were the true owners, unless they had notice to the contrary; with a proviso (which may have some bearing on the construction of s. 4 of 5 & 6 Vict. c. 39) that the persons in whose names such goods are so shipped shall be taken to have been intrusted therewith, unless the contrary "appear or be shown in evidence by any person disputing the fact." And by the 2d section of that act, the legislature repealed M'Combie *v.* Davies, *supra*, in so far as it was applicable to those taking pledges from consignees; but that act did not alter the established law as to pledging, with regard to others than consignors and consignees. The 6 Geo. 4, c. 94, s. 1, re-enacted the 1st section of 4 Geo. 4, c. 83.

We are not in the present case concerned with the rights of consignees, except in so far as the provisions respecting them throw light on the other sections of the Acts. The 2d section of 6 Geo. 4, c. 94, made an important alteration in the law, as by it the possession of bills of lading or other documents of title gave a power of selling or pledging the goods to those dealing *bona fide* with the possessor, beyond any which either by common law or by any provision of that statute the possession of the goods themselves gave. This solved one of the doubts expressed in Dyer *v.* Pearson, *supra*, by enacting that the possession of the documents of title might enable the person so possessed to deal with others as if he were the owner of the goods. It was confined, however, to the possession by "persons intrusted with" these documents of title; on which words a construction was put by the courts in the two cases of Phillips *v.* Huth, 6 M. & W. 572, and Hatfield *v.* Phillips, 9 M. & W. 647; 12 Cl. & F. 343.

The 5 & 6 Vict. c. 39, in consequence of these decisions, altered the law as to what should constitute intrusting. The 2d section of 6 Geo. 4, c. 94, also contained a proviso that the purchaser or pledgee had not notice, by the documents or otherwise, that the seller or pledgor was not "the actual and *bona fide*" owner of the goods sold or pledged, — a proviso which, especially after the decision of Fletcher *v.* Heath, 7 B. & C. 517, rendered it unsafe to make advances on goods or documents to persons known to have possession thereof as agents only. This also has been altered by 5 & 6 Vict. c. 39. But, in the 4th section of 6 Geo. 4, c. 94, the language used by the legislature is completely changed. It does not in this section give any power to pledge at all; nor does it use the language of the 2d section, and authorize "any person intrusted with the possession of the goods" to sell them to any one not having notice that this person is not the true owner; but it enacts that it shall be lawful to contract with "any agent" intrusted with any goods, or to whom they may be consigned, for the purchase of such goods, and to pay for the same to "such agent;" and such sale and payment is to be good, notwithstanding the purchaser has notice that the party selling or receiving payment is only an agent; provided such contract or payment is made in the usual course of business, — a proviso which by itself alone shows that the legislature meant by the word "agent" only such agents as in the usual course of business sell goods for their principals and receive payments, such as factors, brokers, &c., and did not mean to include bailees, warehousemen, carriers, and others who may in one sense no doubt be called agents, but who do not sell or receive payment for goods intrusted to them by those employing them. It therefore solves the second doubt in Dyer *v.* Pearson, *supra*, by declaring that, if the evidence should be such as to show that the person in possession of the goods was intrusted as "an agent," a sale by him should bind the true owner.

Then follows a further proviso, that the person dealing with the agent has not notice that the agent is not authorized to sell or receive payment. This latter proviso shows that the framer of the act remembered that a factor might, as between him and his principal, be restrained from selling except on particular terms, or possibly forbidden to sell at all, and yet that the sale on the usual terms, though in contravention of those secret instructions, would be good as regards those who had not notice of this restriction, but bad as regards those who had.

It seems to us, therefore, that the legislature by this section intended to confirm (to use Lord Tenterden's expression) the common law as laid down in Pickering *v.* Busk, *supra*, but did not mean to extend it to all cases in which any person is intrusted with the custody of goods, though that person may in one sense be an agent for the intruster. And it seems to us that, on the construction of the act, and without reference to authority, it must be intended to apply only to cases in which the intrusting is in the course of that kind of agency, so as to create the relation of principal and agent between the intruster and the intrusted. In effect, that the decision in Wilkinson *v.* King, *supra*, was not overruled or shaken in Pickering *v.* Busk, *supra*, and was not intended to be affected by the legislature. For example, if a furnished house be let to one who carries on the business of an auctioneer, he is intrusted as tenant with the furniture, being in fact an auctioneer: but it never was the common law, and could not be intended to be enacted, that if he carried the furniture to his auction room and there sold it, he could confer any better title on the purchaser than if he had as auctioneer acted for some other tenant who committed a similar larceny, as a fraudulent bailee: nor, to come nearer to the present case, that a warehouseman or wharfinger who as such is intrusted with the custody of goods, if he happens also to pursue the trade of a factor, can give a better title by the sale of the goods than he could if they had been intrusted to some other warehouseman who employed him to sell.

This was the construction put upon the act in Monk *v.* Whittenbury, 2 B. & Ad. 484, decided in 1831; and that decision has never been questioned. That decision was before 5 & 6 Vict. c. 39: and the legislature might easily have altered the enactments, if they had been so minded, so as to avoid the effect of that decision, as they did alter them so as to avoid the effect of other decisions.

The 5 & 6 Vict. c. 39, commences with a preamble; and though, of course, the enacting part may either go further than or fall short of effecting what is recited in that preamble as being the object of the legislature, that preamble is of great importance. It first recites that, under 6 Geo. 4, c. 94, "and the present state of the law, advances cannot safely be made upon goods or documents of title to persons known to have possession as agents only." This points to Fletcher *v.* Heath, *supra*, and shows an intention to alter the law as there decided. It then recites that "advances on the security of goods and merchandise have become an usual and ordinary course of business, and it is expedient and necessary that reasonable and safe facilities should be afforded thereto, and that the same protection and validity should be extended to *bona fide* advances upon goods and merchandise as by the said recited act is given to sales, and that owners intrusting agents with the possession of goods and merchandise, or of documents of title thereto, should in all cases where such owners by the said recited act or otherwise would be bound by a contract or agreement of sale, be in like manner bound by any contract or agreement of pledge or lien for any advances *bona fide* made on the security thereof."

This recital shows a plain intention to enact that what had, ever since the case of Paterson *v.* Tash, 2 Str. 1178, been the law, should no longer be so; and that an agent having power to sell should be also enabled to pledge. But there is no indication of any intention to give a power to pledge where there is not power to sell; nor to extend the power to sell beyond that which by the common law and 6 Geo. 4, c. 94, s. 4, was given; nor to alter the construction put upon that enactment by the decision in Monk *v.* Whittenbury, *supra.*

There is a further recital, that the act does not extend to protect exchanges of securities *bona fide* made. This refers to Taylor *v.* Kymer, 3 B. & Ad. 320, and perhaps Bonzi *v.* Stewart, 4 M. & G. 295, though that latter case (after very protracted litigation) was not decided till a few weeks before 5 & 6 Vict. c. 39 received the Royal assent, and this recital shows an intention to alter the law as there decided.

There is no express recital pointing to the decision in Phillips *v.* Huth, *supra*, and the case of Hatfield *v.* Phillips, *supra*, which had then been decided in the Exchequer Chamber and was still pending in the House of Lords; but, from the enactment in the 4th section, it is plain that these cases were in contemplation, and that it was intended to alter the law as laid down in those cases.

The legislature then proceed in the first section to enact that "any agent" who shall thereafter be intrusted with the possession of goods, or of the documents of title to goods, may pledge the same. The legislature, it is to be observed, does not use the words "person intrusted," which are those used in the 2d section of 6 Geo. 4, c. 94, but "agent intrusted," being the words used in the 4th section of the act, on which words a judicial construction had been put in Monk *v.* Whittenbury, *supra.*

The 2d section alters the law as declared in Taylor *v.* Kymer, *supra.* The 4th section alters the law as laid down in Phillips *v.* Huth, *supra,* by enacting "that any agent intrusted as aforesaid and in possession of any such documents of title, whether derived immediately from the owner of such goods or obtained by reason of such agent's having been intrusted with the possession of the goods or of any other document of title, shall be deemed and taken to be intrusted with the possession of the goods: . . . and an agent in possession as aforesaid of such goods or documents shall be taken, for the purposes of this act, to have been intrusted therewith by the owner thereof, unless the contrary can be shown in evidence." It is not necessary to notice any other parts of the act.

Mr. Benjamin argued that the object of the legislature was, to afford facilities for safely making advances; and that this object was only imperfectly carried out if an advance made under such circumstances as the present was not protected. He argued that the defendants had no means of knowing whether Slee was possessed as a warehouseman or as a broker. As far as regards the mohair, this argument fails in fact; for a very little inquiry would have made the defendants aware that Slee was not a broker for mohair at all. As regards the sheep's wool, however, there is force in the argument that the defendants might, without much negligence, be led by Slee to believe that he was intrusted with the sheep's wool as a broker. But, if the plaintiffs knew that the warehouseman whom they trusted was also a wool-broker, the defendants were aware that the wool-broker whom they trusted was also a warehouseman; and there seems no reason why without inquiry they should think he was intrusted in one capacity rather than the other.

Probably 5 & 6 Vict. c. 39, s. 4, requires us to treat him as being so intrusted, unless the contrary is shown in evidence. But we are all of opinion that in this case the plaintiffs have shown in evidence that Slee was not intrusted as broker, but solely as warehouseman. We do not think that the legislature wished to give to all sales and pledges in the ordinary course of business the effect which the common law gives to sales in market overt. If such had been their object, it could easily have been so enacted in terms; which certainly has not been done.

The general rule of law is, that, where a person is deceived by another into believing he may safely deal with property, he bears the loss, unless he can show that he was misled by the act of the true owner. The legislature seem to us to have wished to make it the law, that, where a third person has intrusted goods or the documents of title to goods to an agent who in the course of such agency sells or pledges the goods, he should be deemed by that act to have misled any one who *bona fide* deals with the agent and makes a purchase from or an advance to him without notice that he was not authorized to sell or to procure the advance. And we think that, if this was the intention, it is carried out by the enactments. We do not think that it was wished to make the owner of goods lose his property if he trusted the possession to a person who in some other capacity made sales, in case that person sold them. If such was the wish of those who framed the act, we think they have not used language sufficient to express an intention so to enact.

Hitherto we have been considering the Statute 5 & 6 Vict. c. 39 as if we had to construe its language for the first time, without the assistance of any decided cases. We think, however, that every case that has been decided since the passing of the statute confirms our view. In Wood *v.* Rowcliffe, 6 Hare, 183, Wigram, V. C., held that a person intrusted to keep in her own house furniture belonging to the plaintiff, though in one sense an agent for the owner, was not an agent within the meaning of the act, and consequently could not make a good pledge. In Lamb *v.* Attenborough, 1 B. & S. 831; 31 L. J. (Q. B.) 41, it was held that a clerk, who as such was possessed of delivery orders, was not an agent intrusted within the meaning of the act, and could not make a good pledge. In Heyman *v.* Flewker, 13 C. B. (N. S.) 519; 32 L. J. (C. P.) 132, Willes, J., in delivering judgment, says that what the cases decide "may be stated thus, — that the term 'agent' does not include a mere servant or care-taker, or one who has possession of goods for carriage, safe custody, or otherwise as an independent contracting party; but only persons whose employment corresponds to that of some known kind of commercial agent like that class (factors) from which the act has taken its name." So, it has been repeatedly decided that a sale or pledge of a delivery order or other document of title (not being a bill of lading) by the vendee does not defeat the unpaid vendor's rights, because the vendee is not intrusted as an agent: Jenkyns *v.* Usborne, 7 M. & G. 678; M'Ewan *v.* Smith, 2 H. L. C. 309. And it may be observed that, in many of such cases, in which money has been advanced to the buyer on the faith of the document of title, the buyer must have been a person who carried on business as a commission-merchant; yet it never seems to have occurred to any one that that fact made any difference. So, it has been repeatedly held that, where either the goods or documents of title are obtained from the owner (not on a contract of sale good till defeated, though defeasible on account of fraud, but by some trick), a purchaser or pledgee acquires no title, for the trickster is not "an agent intrusted" with the possession: Kingsford *v.* Merry, 1 H. & N. 503; 26 L. J. (Ex.) 83; Hardman *v.* Booth, 1 H. & C. 803; 32 L. J. (Ex.) 105.

Quite consistently with these latter decisions it was held, first by the Exchequer, on demurrer, in Sheppard *v.* Union Bank of London, 7 H. & N. 661; 31 L. J. (Ex.) 154, and afterwards by the Court of Queen's Bench, on the facts, in Baines *v.* Swainson, 4 B. & S. 270; 32 L. J. (Q. B.) 281, that, if the true owner did in fact intrust the agent as an agent, though he was induced to do so by fraud, a pledge by the agent would be good.

In Fuentes *v.* Montis, Law Rep. 3 C. P. 268; Law Rep. 4 C. P. 93, it was decided, first by the Common Pleas, and afterwards by the Exchequer Chamber, that, after the true owner had demanded back his goods from the factor, who wrongfully refused to give them up, the factor ceased to be "intrusted," and a pledge subsequently made by him was not good. In delivering judgment, Willes, J., speaks of Baines *v.* Swainson, *supra*, as going to the extreme of the law, but does not express dissent from it.

Against this great mass of authority, Mr. Benjamin could produce nothing but some observations of Lord Westbury in Vickers *v.* Hertz, Law Rep. 2 H. L. Sc. 113; but we think, when those are rightly understood, they are not in conflict with the other decisions. The facts in Vickers *v.* Hertz bear a very close resemblance to those in Baines *v.* Swainson, *supra*. Campbell, who was a Glasgow broker, had represented to Vickers that he had made for him a sale to a principal of a large quantity of iron. This, it seems, was a falsehood. Vickers was induced by the falsehood to send a delivery-order to Campbell. He did not intrust him with the delivery-order with a view to his making a sale, for he thought it was already made; but he did intrust him in the course of his business as agent with the document of title, that he might as such agent deliver the goods. The decision of the House of

Lords was, that a pledge by Campbell was good under the Factors Acts. Lord Westbury seems to have understood Willes, J., in Fuentes *v.* Montis, *supra*, as expressing an opinion that the act did not embrace the case of any but a factor who was intrusted for the purpose of effecting a sale not yet made. Had Willes, J., expressed such an opinion, it would, no doubt, have been inconsistent with Baines *v.* Swainson, *supra*, and been overruled by the House of Lords in Vickers *v.* Hertz. We think, however, that he expressed no such opinion, and, consequently, that all the authorities are in unison with the decision of the Common Pleas in this case, which we therefore affirm.

Judgment affirmed.[1]

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JOHNSON *v.* CREDIT LYONNAIS COMPANY.

In the Common Pleas Division, Court of Appeal, December 1, 1877.

[*Reported in* 3 *Common Pleas Division*, 32.]

Cockburn, C. J. These cases come before us on appeal: the first from a judgment of Mr. Justice Denman, after a trial before himself without a jury; the second from a judgment of Mr. Justice Field, after a trial with a jury.

The facts, as well as the questions of law arising thereupon, were the same in both actions. The facts were as follows: —

One Hoffmann, a broker in the tobacco trade, but who also dealt in tobacco as an importing merchant, having imported a quantity of that article, left it in bond in the warehouses of the St. Katharine's Dock Company, receiving the usual dock warrants; and the tobacco was entered in the books of the company as that of Hoffmann.

This tobacco Hoffmann sold to the plaintiff, who carried on the business of a tobacco manufacturer at Bolton, in Lancashire; but it not suiting the plaintiff's purpose to take the tobacco out of bond, which would have involved the necessity of paying the duty before he wanted the tobacco, he did what it appears is frequently, but not always, done in the tobacco trade by purchasers, in order to avoid the immediate payment of the duty: he left the tobacco in bond in the name of Hoffmann, and left the dock warrants in Hoffmann's hands, and took no steps to have any change made in the books of the dock company as to the ownership of the goods.

According to the plaintiff's statement, he was ignorant of the fact that, when goods are thus deposited in the warehouses of the dock company, dock warrants are issued to the party depositing, which represent the goods, and are capable of being transferred, so as to enable the transferee to obtain possession of the goods.

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[1] Bramwell, B., delivered a brief concurring opinion.

Being thus the ostensible owner of the tobacco, Hoffmann fraudulently obtained advances, on the pledge of a portion of it, from the Credit Lyonnais Company, the defendants in one of these actions, and from Blumenthal, the defendant in the other; both these parties acting in perfect good faith, under the belief, induced by his being in possession of the goods and of the *indicia* of ownership, that Hoffmann was the owner of the tobacco. Each of the defendants, on the completion of the transaction, proceeded to do that which, as it seems to me, the plaintiff, as a matter of common prudence, should have done. They caused the entry of the goods to be transferred from the name of Hoffmann to their own in the books of the dock company, and took fresh dock-warrants from the company, giving up the former ones. The transactions between Hoffmann and the defendants were wholly unknown to the plaintiff. He further stated, as I have already mentioned, and the statement does not appear to have been questioned, that he was unaware of the practice of giving dock-warrants as evidence of the title of the party to whom they are given, or of the transfer of such warrants on alienation of the property.

Upon this state of facts, Mr. Justice Denman, in the action against the Credit Lyonnais Company, gave judgment in favor of the plaintiff for the value of the tobacco pledged to the defendants. In the action against Blumenthal — the defence on the ground of estoppel or negligence having been abandoned by the counsel for the defendants — Mr. Justice Field put the question to the jury whether authority, or ostensible authority, had been given by the plaintiff to Hoffmann to deal with the goods as owner, or to pledge them as agent; and on the jury answering in the negative, gave judgment in like manner for the plaintiff.

Two questions are raised by the defendants: the first, whether the case comes within the Factors Acts; the second, whether the conduct of the plaintiff in leaving the *indicia* of title in Hoffmann's hands, and thus enabling him to obtain money on the security of this tobacco, has been such as to disentitle him to recover its value from the defendants.

Upon the first question, namely, whether the case comes within the Factors Acts, I entertain no doubt. I consider it to be settled by the authority of decided cases; but I may add that if the question had presented itself now for the first time, it being clear to my mind that Hoffmann was not "intrusted" with these goods, or with the documents of title relating to them, as agent to sell or consign, or indeed as agent in any sense, but stood only in the position of a paid vendor remaining in possession of the thing sold till it suited the convenience of the buyer to accept delivery, I should have had no hesitation in arriving at the same conclusion.

The other question, namely, whether the plaintiff, having not only by leaving the goods in the possession of Hoffmann, but also by leaving with him the *indicia* of ownership, enabled him to dispose of the goods, as apparent owner, to the defendants, can recover the value from them.

is a far more difficult question, and one on which I have entertained considerable doubt.

That Hoffmann having thus, by being left in undisturbed possession of the goods and the *indicia* of ownership, — there having been nothing to raise a doubt as to the latter, or any means open to the defendants to ascertain the fact, — been enabled to defraud one of two innocent parties, when the question arises as to which of them the loss should fall upon, in reason and justice the loss ought to fall on him who might have prevented, and as a matter of common prudence ought to have prevented, the possibility of the fraud, is what I cannot bring myself to doubt. And I am strongly fortified in this view by the fact that, as soon as the decisions here appealed from had been made public, the legislature by statute (40 & 41 Vict. c. 39) at once proceeded to settle the question in that view in the future by applying the protection given by the Factors Acts to persons acquiring title from agents, to innocent parties purchasing or making advances in such cases as the present. Whether, prior to and independently of such legislation, the law as it stood would have afforded protection, is a different matter. I have come, though, I confess, with reluctance, to the conclusion that, as the law stood, this action could not be resisted, and consequently that this appeal must be dismissed.

The case for the plaintiff rests on the general proposition of law — which as a general proposition cannot be contested — that the mere possession of the property of another, without authority to deal with the thing in question otherwise than for the purpose of safe custody, as was the case here, will not, if the person so in possession takes upon himself to sell or pledge to a third party, divest the owner of his rights as against the third party, however innocent in the transaction the latter party may have been.

The defendants, on the other hand, insisted on two grounds as taking the case out of the general rule: first, that the plaintiff, by leaving the possession of the goods and the *indicia* of property in the hands of Hoffmann, had enabled the latter to pledge the goods to them, and was therefore estopped from denying the right of Hoffmann so to deal with them; secondly, that, even if the property in the tobacco still remained in the plaintiff, so as to entitle him to recover its value; on the other hand, the plaintiff had, in the conduct in question, been guilty of negligence by which the defendants had been induced to deal with Hoffmann as the owner of the tobacco, and to pay him for it; by reason of which they were entitled to recover back the amount by way of counterclaim, or what would come to the same thing, to set it off in the present action.

There have been, no doubt, decisions which would at first sight appear to favor the first of these contentions, but they are, I think, distinguishable from the case before us. In Pickering *v.* Busk, 15 East, 38, the purchaser of hemp lying at a wharf had himself directed the hemp to be transferred in the wharfinger's books into the name of the broker who had bought it for him. It was held that from this an authority to the broker to sell might be implied, though no such authority had in fact been given, and that his sale and receipt of the money, though fraudulent as to his principal, nevertheless bound the latter. "The sale," said Lord Ellenborough, "was made by a person who had all the *indicia* of property; the hemp could only have been transferred into his name for the purpose of sale; and the party who has so transferred it cannot now rescind the contract. If the plaintiff had intended to retain the dominion over the hemp, he should have placed it in the wharfinger's books in his own name." And Bayley, J., says: "It may be admitted that the plaintiff did not give the broker any authority to sell. But an implied authority may be given; and if a person puts goods into the custody of a vendor, whose common business it is to sell, without limiting his authority, he thereby confers an implied authority upon him to sell them." This language might appear to be applicable to the present case; but there is a material difference between the two cases. In Pickering *v.* Busk, *supra*, the purchaser had himself expressly directed that the goods should be entered in the broker's name. In the present case the plaintiff has simply remained passive. He has left things as he found them at the time of his purchase.

The same observation will apply to the case of Boyson *v.* Coles, 6 M. & S. 14, a case which arose prior to the passing of 6 Geo. 4, c. 94, and in which goods had been pledged by a person alleged to have been a factor, but in which the defence was that the plaintiffs had dealt with the broker as purchaser, or, at all events, by the documents which had passed between them had enabled him to appear as such to others, Lord Ellenborough left to the jury whether the plaintiffs had dealt with the parties pledging as purchasers of the goods, or as brokers, directing them that, "if as brokers, the latter had no right to pledge the goods to the defendant, unless the jury considered that the plaintiffs had armed them with such *indicia* of property as to enable them to deal with it to others as their own?" A new trial was applied for, but this ruling was not quarrelled with. On the argument on the rule, Abbott, J., approves of the questions left to the jury, one of them, he says, being "whether the plaintiffs had by their own acts enabled Coles Brothers (the brokers) to hold themselves out as the purchasers, and thus to induce the defendant to advance his money on the credit of the goods."

In Dyer *v.* Pearson, 3 B. & C. 38, where a similar question arose, Abbott, C. J., told the jury "that if a man takes upon himself to purchase from another under circumstances which ought to have excited his suspicion, and induced him to distrust the authority of the person selling, such a purchaser could not hold the property if it afterwards turned out that the person from whom he bought had no authority to sell: and he left it to the jury to say, whether the defendant had purchased under circumstances which would have induced a reasonable, prudent, and cautious man to believe that Smith, of whom he purchased, had authority to sell. If they thought that he had purchased under such circumstances, they were to find for the plaintiffs." This ruling was held to amount to misdirection, and a new trial was granted. "The question," says the Chief Justice, "which I left to the consideration of the jury does not appear to me to have embraced the whole case. The general rule of the law of England is that a man who has no authority to sell cannot, by making a sale, transfer the property to another. There is one exception to that rule, viz., the case of sales in market overt. This was not a sale in market overt, and therefore does not fall within the exception. Now, this being the rule of law, I ought either to have told the jury that even if there was an unsuspicious purchase by the defendants, yet as Smith had no authority to sell, they should find their verdict for the plaintiffs; or I should have left it to the jury to say whether the plaintiffs had, by their own conduct, enabled Smith to hold himself forth to the world as having, not the possession only, but the property; for if the real owner of goods suffer another to have possession of his property, and of those documents which are the *indicia* of property, then perhaps a sale by such a person would bind the true owner. That would be the most favorable way of putting the case for the defendants, and that question, if it arises upon the evidence, ought to have been submitted to the jury."

It is to be observed that the Chief Justice here states the proposition in anything but positive terms. No further mention of the case appears in the reports, and we are consequently not informed what became of it on the new trial, the rule for which was made absolute. Mr. Chitty, however, in his work on Contracts (10th ed. p. 355), referring to these cases, writes thus: "It is said that if the real owner of goods suffers another to have possession thereof, or of those documents which are the *indicia* of property therein, thereby enabling him to hold himself forth to the world as having, not the possession only, but the property, a sale by such a person without notice will bind the true owner." But he adds this qualification: "But probably this proposition ought to be limited to cases where the person who had the possession of the goods was one who, from the nature of his employment, might be taken *prima facie* to have had the right to sell." The law, as thus stated, was approved by the Court of Exchequer in Higgins *v.* Burton, 26 L. J. (Ex.) 342. But the present question was not before the court in the latter case, the question there being whether a person who had bought goods in the name of A., fraudulently representing himself as A.'s agent, and had thus obtained possession of the goods, could pledge them so as to give a title to the pledgee as against the real owner. And it was held, following Kingsford *v.* Merry, 11 Ex. 577, that he could not.

Sitting here in a Court of Appeal, I feel myself at liberty to say that these authorities fail to satisfy me that at common law the leaving by a vendee goods bought, or the documents of title, in the hands of the vendor till it suited the convenience of the former to take possession of them, would, on a fraudulent sale or pledge by the party so possessed, divest the owner of his property, or estop him from asserting his right to it. If this had been so, there would have been, as it seems to me, no necessity for giving effect by statute to the unauthorized sale of goods by a factor.

The doctrine established in Pickard *v.* Sears, 6 A. & E. 469, and Freeman *v.* Cooke, 2 Ex. 654, 18 L. J. (Ex.) 114, and the subsequent cases which have proceeded on the same principle, carry the case no further. In all the cases decided on this principle, in order that a party shall be estopped from denying his assent to an act prejudicial to his rights, and which he might have resisted, but has suffered to be done, it is essential that knowledge of the thing done shall be brought home to him. Here it is clear that the plaintiff had no knowledge whatever of the advances obtained by Hoffmann on the security of the goods, or even of the existence of the dock-warrants which made Hoffmann appear to be the owner. It would be to carry this doctrine much too far to apply it where advantage has been taken of a man's remissness in looking after his own interests to invade or encroach upon his rights, in the absence of knowledge on his part of the thing done, from which his assent to it could reasonably be implied.

The defence, founded on the allegation of negligence, remains to be considered.

That the plaintiff, in omitting to have the goods transferred to his own name, and to have the dock-warrants delivered over to him, was wanting in common prudence, in other words, was guilty of negligence, I cannot bring myself to doubt, and I am strongly confirmed in this view by the passing of the recent statute, as the legislature must have proceeded on the view that there is default in the owner in such a case.

It appears to me no answer to say that he was ignorant of dock-warrants being issued in respect of goods warehoused in the docks. A man who deals in a given market should make himself acquainted with the course of business prevailing there. Moreover, he knew that the tobacco was warehoused in the bonded warehouses of the company. He must have known that the goods would stand in the books of the company as the goods of Hoffmann. He should at least have taken care to have them transferred into his own name. It is no answer, as it seems to me, to say that it is common in the trade for buyers of tobacco to leave the goods and the *indicia* of title in the hands of the seller, and that hitherto no dishonest advantage has been taken of the opportunity thus afforded for fraud. The mercantile community are as a body honorable men; but experience unfortunately tells us that frauds occasionally happen where they might least be expected. The case of Goodwin *v.* Robarts, Law Rep. 10 Ex. 337, which was recently before the courts, affords an example, and other instances of a similar character occur in the books. In the majority of instances this occurs, as in this case, from the carelessness of those concerned, and the omis sion to take the precautionary measures which the regular course of business would prescribe. This manner of proceeding is not the less imprudent and negligent because a number of persons, confiding in the honesty of those with whom they have dealings, think proper, in order to save themselves trouble, to expose themselves to a like risk.

Evidence was gone into at the trial of what was called the "practice" in the tobacco trade of following the course pursued in the present instance by the plaintiff, namely, that of leaving, on the purchase of tobacco in bond, the tobacco and the dock-warrants in the hands of the seller, — whether, with the view of meeting the allegation of negligence, or as a substantive answer in point of law to the defendant's claim, as amounting to a usage of trade, it may be difficult to say. If the former, I have given the answer which occurs to me, namely, that that which would be negligence in one does not become the less so because others are equally negligent. If the latter, two answers present themselves. First, a practice, to amount to a usage of trade, must be general and uniform. But of this the evidence falls altogether short. The plaintiff's witnesses, called to prove the practice, while they asserted that the practice was common, fully admitted that there were many houses in the trade who, when they bought tobacco under similar circumstances, insisted on having the *indicia* of title made over to them. Nor did these witnesses for a moment deny that a purchaser was entitled to have such a demand complied with. This being so, any assertion of usage of trade necessarily fails.

But, besides this, a usage of trade, like any other custom, to be valid must be reasonable. But a usage cannot be said to be reasonable which enables a dishonest vendor, through the negligence of his vendee, to defraud a second purchaser, or a pledgee, by a pretended sale or pledge.

But whether this negligence of the plaintiff will, under the circumstances, give to the defendants any ground of complaint which can be enforced in point of law, is a very different question. Negligence, to afford a ground of action to one who has suffered from it, must have reference to some duty which the party guilty of the negligence owed to him. The law is, in my opinion, correctly stated by Blackburn, J., in Swan v. North British Australian Company, 2 H. & C. 175, at p. 181 ; 32 L. J. (Ex.) 273, at p. 276, where, after referring to what was said by Parke, B., in Freeman v. Cooke, 2 Ex. 654, 18 L. J. (Ex.) 114, namely, that "negligence to have the effect of estopping the party must be the neglect of some duty cast upon the person guilty of it," he goes on to say: "This, I apprehend, is a true and sound principle. A person who does not lock up his goods, which are consequently stolen, may be said to be negligent as regards himself; but, inasmuch as he neglects no duty which the law casts upon him, he is not in consequence estopped from denying the title of those who may have, however innocently, purchased those goods from the thief, except in market overt." The same principle would obviously apply to the case of goods fraudulently sold or pledged by a person left in possession of them. The rule thus laid down is applicable here. The plaintiff may have been negligent, and his negligence may have brought on the defendants the loss of the money they have advanced. But the plaintiff owed no duty to the defendants, — at least no duty which the law can recognize, — either as individuals or as members of the general public.

The case of Young *v.* Grote, 4 Bing. 253, is, as was pointed out in the case just referred to, plainly distinguishable. For, there, there was a duty on the part of the customer to use due care in drawing the check, so as to protect the banker against the risk of forgery in the amount for which the check was drawn.

This being so, I am of opinion that the negligence of the plaintiff neither estops him from claiming the goods in question from the defendants, nor gives the latter a counter-claim for the money which they have advanced to Hoffmann on the security of the goods.

I am therefore of opinion that the judgment of Mr. Justice Denman in the case of Johnson *v.* Credit Lyonnais Company, 2 C. P. D. 224, should be affirmed.

With regard to the judgment of Mr. Justice Field in Johnson *v.* Blumenthal, I feel bound to say that the question put to the jury, as I understand at the instance of counsel, and the answer given to it do not appear to me to be conclusive of the case or sufficient to found the judgment; and if there were any material fact in dispute, I should think it necessary to send the case back to a new trial. But as, upon the admitted facts, the plaintiff is, for the reasons I have given, in my opinion, entitled to judgment, a new trial would be useless and unnecessary. In this action also, therefore, I think that the appeal should be dismissed and the judgment affirmed.

Judgments affirmed.

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40 AND 41 VICTORIA, CAP. 39.

An Act to amend the Factors Acts.

II. Where any agent or person has been intrusted with and continues in the possession of any goods, or documents of title to goods, within the meaning of the principal Acts as amended by this Act, any revocation of his intrustment or agency shall not prejudice or affect the title or rights of any other person who, without notice of such revocation, purchases such goods, or makes advances upon the faith or security of such goods or documents.

III. Where any goods have been sold, and the vendor or any person on his behalf continues or is in possession of the documents of the title thereto, any sale, pledge, or other disposition of the goods or documents made by such vendor or any person or agent intrusted by the vendor with the goods or documents within the meaning of the principal Acts as amended by this Act so continuing or being in possession, shall be as valid and effectual as if such vendor or person were an agent or person intrusted by the vendee with the goods or documents within the meaning of the principal Acts as amended by this Act, provided the person to whom the sale, pledge, or other disposition is made has not notice that the goods have been previously sold.

IV. Where any goods have been sold or contracted to be sold, and the vendee, or any person on his behalf, obtains the possession of the documents of title thereto from the vendor or his agents, any sale, pledge, or disposition of such goods or documents by such vendee so in possession or by any other person or agent intrusted by the vendee with the documents within the meaning of the principal Acts as amended by this Act shall be as valid and effectual as if such vendee or other person were an agent or person intrusted by the vendor with the documents within the meaning of the principal Acts as amended by this Act, provided the person to whom the sale, pledge, or other disposition is made has not notice of any lien or other right of the vendor in respect of the goods.

V. Where any document of title to goods has been lawfully indorsed or otherwise transferred to any person as a vendee or owner of the goods, and such person transfers such document by indorsement (or by delivery where the document is by custom, or by its express terms transferable by delivery, or makes the goods deliverable to the bearer) to a person who takes the same *bona fide* and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu*.

THE FACTORS ACT, 1889.

(52 & 53 *Victoria*, C. 45.)

AN ACT TO AMEND AND CONSOLIDATE THE FACTORS ACTS.

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled, and by the authority of the same, as follows: —

1. For the purposes of this Act. (1) The expression "mercantile agent" shall mean a mercantile agent having in the customary course of his business as such agent authority either to sell goods or to consign goods for the purpose of sale, or to buy goods or to raise money on the security of goods: (2) A person shall be deemed to be in possession of goods or of the documents of title to goods, where the goods or documents are in his actual custody or are held by any other person subject to his control or for him or on his behalf: (3) The expression "goods" shall include wares and merchandise: (4) The expression "document of title" shall include any bill of lading, dock-warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented: (5) The expression "pledge" shall include any contract pledging, or giving a lien or security on, goods, whether in consideration of an original advance or of any further or continuing advance or of any pecuniary liability (6) The expression "person" shall include any body of persons corporate or unincorporate.

2. (1) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the document of title to goods, any sale, pledge or other disposition of the goods made by him, when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same. (2) Where a mercantile agent has, with the consent of the owner, been in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be notwithstanding the determination of the consent provided that the person taking under the disposition has not at the time thereof notice that the consent has been determined

(3) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first mentioned documents shall, for the purposes of this Act, be deemed to be with the consent of the owner. (4) For the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary.

3. A pledge of the documents of title to goods shall be deemed to be a pledge of the goods.

4. Where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge.

5. The consideration necessary for the validity of a sale, pledge, or other disposition, of goods, in pursuance of this Act, may be either a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or any other valuable consideration; but where goods are pledged by a mercantile agent in consideration of the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, the pledgee shall acquire no right or interest in the goods so pledged in excess of the value of the goods, documents, or security when so delivered or transferred in exchange.

6. For the purposes of this Act an agreement made with a mercantile agent through a clerk or other person in the ordinary course of business to make contracts of sale or pledge on his behalf shall be deemed to be an agreement with the agent.

7. (1) Where the owner of goods has given possession of the goods to another person for the purpose of consignment or sale, or has shipped the goods in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall, in respect of advances made to or for the use of such person, have the same lien on the goods as if such person were the owner of the goods, and may transfer any such lien to another person. (2) Nothing in this section shall limit or affect the validity of any sale, pledge, or disposition, by a mercantile agent.

8. Where a person, having sold goods, continues, or is, in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith, and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

9. Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith, and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

10. Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu.*

11. For the purposes of this Act, the transfer of a document may be by indorsement, or, where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, then by delivery.

12. (1) Nothing in this Act shall authorize an agent to exceed or depart from his

authority as between himself and his principal, or exempt him from any liability, civil or criminal, for so doing. (2) Nothing in this Act shall prevent the owner of goods from recovering the goods from an agent or his trustee in bankruptcy at any time before the sale or pledge thereof, or shall prevent the owner of goods pledged by an agent from having the right to redeem the goods at any time before the sale thereof, on satisfying the claim for which the goods were pledged, and paying to the agent, if by him required, any money in respect of which the agent would be by law entitled to retain the goods or the documents of title thereto, or any of them, by way of lien as against the owner, or from recovering from any person with whom the goods have been pledged any balance of money remaining in his hands as the produce of the sale of the goods after deducting the amount of his lien. (3) Nothing in this Act shall prevent the owner of goods sold by an agent from recovering from the buyer the price agreed to be paid for the same, or any part of that price, subject to any right of set-off on the part of the buyer against the agent.

13. The provisions of this Act shall be construed in amplification and not in derogation of the powers exercisable by an agent independently of this Act.

14. The enactments mentioned in the schedule to this Act are hereby repealed as from the commencement of this Act, but this repeal shall not affect any right acquired or liability incurred before the commencement of this Act.

15. This Act shall commence and come into operation on the first day of January one thousand eight hundred and ninety.

16. This Act shall not extend to Scotland.

17. This Act may be cited as the Factors Act, 1889.

LEE *v.* BUTLER.

IN THE QUEEN'S BENCH DIVISION, COURT OF APPEAL, AUGUST 2, 1893.

[*Reported in* [1893] 2 *Queen's Bench*, 318.]

APPEAL from the judgment of Wright, J., at the trial, without a jury, in Middlesex.

The plaintiff's claim in the action was for the return of certain goods alleged to be detained by the defendant, or the value of such goods, and damages for their detention.

The following facts were proved in evidence or admitted at the trial: On May 5, 1892, a hire and purchase agreement in writing was entered into between W. E. Hardy, furniture dealer, and Helen Caroline Lloyd, of Thistle Grove Lane, South Kensington, the terms of which (so far as is material) were as follows :—

"First: The said W. E. Hardy agrees to let on hire unto the said H. C. Lloyd, hereinafter called the hirer, who agrees to take on hire upon the terms hereinafter expressed, the furniture, goods, and chattels mentioned and specified in the schedule hereunder written.

"Second: The said hirer for herself agrees, subject as hereinafter provided, to pay to the said W. E. Hardy, as and by way of rent for the hire and use of the said furniture, goods, and chattels, the respective sums and at the periods following: that is to say, the sum of £1 on May 6, and the further sum of £96 4s. on August 1, 1892.

"Third: The said hirer further agrees that she will not, during the continuance of this agreement, remove the said furniture, goods, and chattels from 5 Thistle Grove Lane aforesaid to any other premises without the consent in writing of the said W. E. Hardy . . ."

The fifth clause provided that if at any time thereafter during the continuance of the agreement any payment of rent thereby reserved should be in arrear and unpaid for the space of one week after the specified days or times whereon the same should become due, or if the hirer should remove the said furniture, goods, and chattels from 5 Thistle Grove Lane, or from any place to which they should have been removed with the consent of W. E. Hardy, then it should be lawful for W. E. Hardy or his agent forthwith to take possession of and recover the said furniture, goods, and chattels without notice to the hirer of his intention so to do, and for that purpose if necessary to enter by force into any premises where the said furniture, goods, and chattels might then be, and search for and remove the same. And in such case the hirer agreed that all moneys paid by her before such default should be applied by W. E. Hardy as payment on account of hire and not as part payment of the said furniture, goods, and chattels.

The fifth clause concluded: —

"The said W. E. Hardy for himself hereby agrees that when and as soon as the said hirer shall have well and truly made all payments of rents hereinbefore reserved and performed all the stipulations and agreements hereinbefore on her part contained, the rent or payments hereinbefore mentioned and reserved for the said furniture, goods, and chattels, shall thereupon cease, and the aforesaid furniture, goods, and chattels shall thenceforth be and become the sole and absolute property of the said hirer. But it is expressly declared and agreed that no property or interest in the said furniture, goods, and chattels other than as tenant as aforesaid shall vest in the said hirer until the whole of the said payments of rent hereby reserved, amounting together to the sum of £97 4*s.*, shall have been actually made by her as hereinbefore provided."

A schedule of the articles of furniture followed.

W. E. Hardy duly assigned the agreement and all his interest thereunder to the plaintiff, and subsequently Mrs. Lloyd, before all the instalments were paid under the agreement, sold and delivered the goods to the defendant, in whose possession they were when the action was brought.

Wright, J., gave judgment for the defendant, holding that the case came within s. 9 of the Factors Act, 1889 (52 & 53 Vict. c. 45), which section afforded a good defence to the action.

The plaintiff appealed.

Lynch, for the appellant.

C. L. Attenborough, for the respondent, was not heard.

Lord Esher, M. R. This is a very plain case, and the construction of the statute is very clear. It deals with "Dispositions by mercantile agents" in one set of sections, and with "Dispositions by sellers and buyers of goods" in another set of sections, in which s. 9 is included. The case is clearly within that section. [His Lordship read s. 9.] Mrs. Lloyd had agreed by this hire and purchase agreement to buy the goods, and they were put into her possession with the consent of the owner. Mrs. Lloyd sold the goods to the defendant without notice that they were not hers, and he, acting in good faith and with no notice of the plaintiff's right, received them. Sect. 9 was passed to meet this very kind of case. I am of opinion that the judgment of Wright, J., was right, and this appeal should be dismissed.

Appeal dismissed.[1]

MASSACHUSETTS REVISED LAWS, CHAPTER 68.

SECTION 1. Every factor or other agent who is intrusted with the possession of merchandise or of a bill of lading consigning merchandise to him with authority to sell the same shall be deemed the true owner of such merchandise, so far as to give validity to any *bona fide* contract of sale made by him.

SECT. 2. A shipper who is in lawful possession of merchandise at the time of shipment and in whose name it is shipped for sale shall be deemed the true owner thereof so far as to entitle the consignee to a lien thereon for money advanced or for securities given to the shipper for or on account of such consignment, unless the consignee, at or before the time when he made the advances or gave the securities, had notice by the bill of lading or otherwise that the shipper was not the actual and *bona fide* owner.

SECT. 3. If a person who is intrusted with merchandise has authority to sell or consign the same, a consignee to whom he consigns it shall have a lien thereon for any money or merchandise advanced or for any negotiable security given by him on the faith of such consignment, to or for the use of the person in whose name the consignment or delivery was made, and for any money, negotiable security or merchandise received for the use of such consignee by the person in whose name the consignment or delivery was made, if such consignee had, at the time of such advance or receipt, probable cause to believe that the person in whose name the merchandise was shipped, transmitted or delivered was the actual owner thereof or had a legal interest therein to the amount of said lien.

SECT. 4. If a consignee or factor, having possession of merchandise with authority to sell the same or having with such authority possession of a bill of lading, permit, certificate, or order for the delivery of merchandise, deposits or pledges such merchandise or a part thereof or such document with any other person as a security for money or merchandise advanced or for a negotiable instrument given by him upon the credit thereof, such other person, if he makes such loan, advance or exchange in good faith and with probable cause to believe that the agent making the deposit or pledge had authority so to do and was not acting fraudulently against the owner of such merchandise, shall, notwithstanding he has notice of such agency, acquire the same interest in and authority over such merchandise and documents as he would have acquired if the agent had been the actual owner thereof.

SECT. 5. If such merchandise or document is accepted in deposit or pledge for an antecedent debt due from such consignee or factor, the person receiving the same shall thereby acquire no other or further right or interest in or authority over or lien upon the same than the consignee or factor might have enforced against the actual owner.

SECT. 6. The provisions of the three preceding sections shall not affect the lien of a consignee or factor for the expenses and charges attending the shipment, transportation and care of merchandise intrusted to him; nor prevent the actual owner of merchandise from recovering it, previous to any pledge thereof, from the consignee or factor or from his assignee in case of his insolvency; nor prevent such owner from recovering any merchandise or document so deposited or pledged, upon tender of the money and restoration of the negotiable security or property so advanced to such consignee or factor, and upon tender of such further amount of money and restoration of such negotiable instrument or property as may have been advanced or given by the consignee or factor to the owner, or upon tender of a sum of money equal to the amount or value of such merchandise; nor prevent him from recovering from a person with whom such merchandise has been so deposited or pledged any balance of money remaining in his hands as the proceeds of the sales thereof, after deducting the amount or value of the money or negotiable security so advanced thereon.[1]

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[1] BOWEN and KAY, L. JJ., concurred.
Conf. Helby *v.* Matthews, [1895] A. C. 471.

THACHER *v.* MOORS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH 19, 1880 — JANUARY 20, 1883.

[*Reported in* 134 *Massachusetts*, 156.]

TORT for the conversion of 184 bags of wool. Writ dated January 12, 1878. Trial in this court, without a jury, at September term 1879, before Ames, J., who reported the case for the consideration of the full court, in substance as follows: —

At the time of the transactions hereinafter stated, the plaintiff was a merchant, doing business in Boston under the name of H. C. Thacher and Company, and was engaged in buying, selling, and receiving consignments of wool for sale on commission, and making advances upon said consignments; and the defendant was a banker, doing business in Boston under the name of J. B. Moors and Company.

One Isaac H. Jones, Jr., up to about Nov. 15, 1877, when he absconded, carried on business in Boston, having his office in Federal Street. Upon the sign on his office door were the words "Wool Broker;" at the entrance of the building in which he had his office was painted the word "Wool;" upon some of his business cards he was styled "Wool Broker," upon others, "Wool Broker and Commission Merchant," and upon his bill-heads, "Wool Commission Merchant." It appeared that he did business in wool, partly as a broker, to a considerable extent on his own account, and sometimes as a commission merchant. He had two large lofts suitable for the storage and exhibition of wool, in which, in addition to his other business, he was accustomed to store wool as a warehouseman for other persons, and also wool belonging or consigned to himself. Jones had a price on, and offered for sale as a broker, all wools in his stores, but there was no evidence that the plaintiff knew this. Jones had had large transactions with the plaintiff, both as a broker and on his own account.

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[1] Sections 1 and 2 are made up from c. 193 of the Acts of 1845; Sections 4, 5, and 6 from c. 216 of the Acts of 1849. The wording of the statute has been somewhat simplified in the Revised Laws, as compared with previous revisions in General Statutes, c. 54 and Public Statutes, c. 71.

The defendant had known Jones for about four years and a half; had visited his office in Federal Street; had on one occasion stored wool with him as a warehouseman, and upon all the evidence must be assumed to have known his general course of business, and that he acted in the different capacities of broker and merchant and warehouseman.

Before July, 1877, Jones applied to the plaintiff to take consignments of wool to be made to him by George B. Fessenden, of Wells River, Vermont. The plaintiff agreed to accept such consignments, and to advance about three-fourths of their value. No agreement was made by the plaintiff with Jones at the time as to warehousing or selling said wool, or as to Jones's acting as a broker in the sale of the same.

On July 9, 1877, the first consignment was made. A railroad receipt and an invoice were enclosed in a letter to Jones, and were brought and delivered by him to the plaintiff, in whose possession they have since remained. The receipt was signed by the agent of a railroad company in New Hampshire, and stated that a certain number of sacks of wool were "received of G. B. Fessenden," and were "consigned to H. C. Thacher & Co., Boston." The invoice was headed, "Invoice of forty-five bags wool consigned to H. C. Thacher & Co. for sale for my account," and was signed "Geo. B. Fessenden." Upon the arrival of the wool in Boston, the plaintiff gave orders to the carrier to deliver it to a truckman who acted frequently for Jones, to be stored in Jones's lofts, and received from Jones the following receipt: "Boston, July 12, 1877. Received in store 102 Federal Street, for ac. H. C. Thacher & Co. 45 bags fleece wool, Fessenden consgt. ac. I. H. Jones, Jr." All the subsequent consignments were made in the same way, and similar receipts for all the consignments were given by Jones to the plaintiff. The plaintiff paid drafts upon him for three-fourths of the value of the parcels of wool as consigned, and also paid freight to the carrier. The wool in controversy is part of said consignments. Some of the drafts on the plaintiff were payable to the order of Jones.

The wool was bought by Fessenden upon joint account with Jones, under an arrangement between them, by which Fessenden was to buy the wool of the farmers in Vermont, and Jones was to find the money (either furnishing it himself or procuring some one else to advance upon the wool) and have control of the sale of it in Boston, and the profits were to be divided between them. The plaintiff had no knowledge of this arrangement until after Jones absconded; and had no reason to suppose or suspect that Jones had any interest in the wool, or was a partner with Fessenden in the transaction. The plaintiff did not intentionally give up the control of the wool, or intend to part with his rights in delivering the same to Jones, as before stated. Jones advanced money in excess of that advanced by the plaintiff.

The wool after being received in Jones's lofts was sorted, by an order of the plaintiff given to Jones, by cutting open each bag and separating the different kinds of fleeces, one from the others. The different kinds were then put into new and separate bags. This sorting is customary, and is necessary to put the wool into a condition to be exhibited to buyers. While the wool was lying open, it was seen by the plaintiff in Jones's lofts.

Jones had no authority from the plaintiff to sell said wool as a factor or consignee, but said wool was intrusted by the plaintiff to Jones as a warehouseman, for the purposes of sale, and with authority as broker to receive offers for and to negotiate sales of the same, to be reported to and settled by the plaintiff, in whose name the bills of sale were made, and who collected the price. Jones, as such broker, showed the wool to his customers, for the purpose of getting offers to purchase it; and, in two cases, reported to the plaintiff offers for two several lots, which were accepted by the plaintiff. Jones then made a broker's memorandum or bought-and-sold note, which he rendered to the plaintiff. The plaintiff then ordered the wool weighed, and sent a bill of parcels, with a certificate of weights, to the buyer, from whom he received the price, or a negotiable security in payment thereof, without previous direct communication between himself and the buyer. Jones received a broker's commission on the sales, and also warehouse charges. Jones did not (before the transactions with the defendant) sell any of the wool in his own name, or receive the proceeds himself, as a consignee or factor usually does, and had no authority from the plaintiff to dispose of the wool as if he were a consignee or factor. Jones entered this wool in the books in which he kept account of wool stored by him as a warehouseman, including all wools consigned to him; and also entered it in a separate book under head of "Fessenden Joint Account." These were the only sales of this wool in which Jones took any part, and in both of these cases Jones consulted the plaintiff as to the price.

Jones, while said wool, with other wool belonging to the plaintiff and for which the plaintiff held his receipts, was in his lofts, applied to the defendant at various times for loans of money upon pledges of different parcels of wool, of which he produced a memorandum and of which he said he was the owner, which statements were afterwards incorporated into contracts of pledge made with the defendant. The defendant examined samples of the wool, and agreed to make Jones loans on it, upon his having the wool put in store in the lofts of George B. Drake & Co., wool commission merchants, whose store was next to that of Jones, and bringing him a warehouse receipt therefor in each instance. The warehouse receipts were signed by George B. Drake & Co. upon printed blanks furnished by the defendant. At different times, from July 27 to Nov. 10, 1877, Jones pledged to the defendant the different parcels making up the wool in controversy. The defendant acted in good faith, but did not ask Jones to exhibit any bill of sale, or bill of lading, or invoice, or other document of title; nor did he examine Jones's books, or see any document of title, except the warehouse receipts of George B. Drake & Co. The defendant simply asked Jones if he owned the wool, and Jones replied that he did; and the defendant relied upon this assurance and upon Jones's possession.

Neither the plaintiff nor the defendant had seen or asked to see any of Jones's books until after he absconded. As soon as the defendant learned that Jones had absconded, he made demand under his contracts of pledge, sought a purchaser, negotiated a sale of all the wool held by him in pledge from Jones, including the wool in controversy, and on Nov. 22, 1877, sold the same.

Before suit, and upon the day of the date of the writ, the plaintiff demanded of the defendant the wool in controversy, and the defendant refused to deliver the same.

Upon the foregoing facts, the judge ruled, as matter of law, as follows: 1. The plaintiff had a right to consider Fessenden the owner of the wool, and had, under the Gen. Sts. c. 54, § 1, a lien upon it for his advances. 2. The receipts which the plaintiff took from Jones, whether they are in the usual form of warehouse receipts or not, implied that Jones held the wool for the plaintiff, and that the latter had not lost his lien by delivering the wool to Jones, under the circumstances stated. 3. Under the Gen. Sts. c. 54, §§ 3, 4, Jones was neither a "person intrusted with" the disposal of the wool, "and having authority to sell or consign the same," nor "a consignee or factor having possession of" the wool "with authority to sell the same," "or having possession of a bill of lading, permit, certificate, or order for the delivery of" the wool "with like authority." 4. Under the Gen. Sts. c. 54, §§ 3, 5, Jones was not in fact invested by the plaintiff with the *jus disponendi* of the wool. He had no authority from the plaintiff to sell or consign the same; it was not in his possession as consignee or factor having authority to sell; and he had possession of no bill of lading, permit, certificate, or order for the delivery of the wool with like authority. 5. As the defendant knew that Jones was a wool-broker and warehouseman, as well as a dealer in wool on his own account and as a commission merchant, and as no bill of lading, document, or writing of any kind in relation to Jones's title in the wool had been called for or exhibited, the mere possession of the property, and the oral assertion of Jones that it was his, would not, as matter of law, furnish or amount to "probable cause," within the meaning of the statute; and it was the defendant's duty, in such a state of facts, to have made further inquiry, and to have required further evidence of Jones's right to dispose of the property. 6. The defendant was guilty of a conversion of the wool in controversy when the different parcels thereof were received by him in pledge from Jones; or, if not then, upon Nov. 22, 1877, when he sold the wool; or, if not then, upon Jan. 12, 1878, the date of the plaintiff's demand.

The judge thereupon found for the plaintiff. If, upon the facts found and the rulings, or any of them, the plaintiff was entitled to recover, by agreement of parties the case was to be sent to an assessor to determine the plaintiff's damages, according to the rules prescribed by the court, and judgment entered for the amount ot damages found by such assessor; otherwise, the finding to be set aside and a new trial ordered.

FIELD, J. It is convenient to consider this case, in the first instance, as if Jones originally had no interest in this wool, and had none at any time except what he derived from the plaintiff, and then to consider what is the effect upon the rights of the parties of the facts, that the wool was originally bought by Fessenden "upon joint account with Jones, under an arrangement between them, by which Fessenden was to buy the wool of the farmers in Vermont, and Jones was to find the money (either furnishing it himself or procuring some one else to advance upon the wool) and have control of the sale of it in Boston, and the profits were to be divided between them," and that Jones under this arrangement procured the advances to be made by the plaintiff, and furnished other money of his own, and retained his interest in the wool until the sale of it by the defendant.

Disregarding then this interest of Jones, the plaintiff was the consignee of the wool for sale on account of Fessenden, to whom he had made advances; the wool had been shipped to him for sale, and railroad receipts and invoices sent him; the wool had been received, and, by the plaintiff's orders to the railroad company, had been delivered to a truckman and stored in the lofts of Jones.

The report finds that "Jones had no authority from the plaintiff to sell said wool as a factor or consignee, but said wool was intrusted by the plaintiff to Jones as a warehouseman, for the purposes of sale, and with authority as broker to receive offers for and to negotiate sales of the same, to be reported to and settled by the plaintiff, in whose name the bills of sale were made, and who collected the price.

The meaning of the clause that the wool was intrusted by the plaintiff to Jones as a warehouseman, for the purposes of sale, as qualified by the words which follow, and other words of the report, is that the wool was stored with Jones in order that it might be sold, and that Jones was authorized as a broker to negotiate sales, to be reported to the plaintiff, the terms of which were to be settled by him. Jones had no express authority to make and conclude sales himself, and, as a warehouseman, he had no such implied authority. He was not, therefore, either a "factor or other agent intrusted with the possession of merchandise for the purpose of sale," within the meaning of the Gen. Sts. c. 54, § 2. (And this section does not give validity to a pledge. Michigan State Bank *v.* Gardner, 15 Gray, 362.) Nor was he "a person intrusted with merchandise, and having authority to sell or consign the same," within the meaning of the Gen. Sts. c. 54, § 3. In these sections the words "for the purpose of sale," and the words "having authority to sell," mean much the same thing; which is, that in the one case the factor or other agent is intrusted with the possession of the merchandise "for the purpose of sale" by him, so that he can himself make a sale and transfer the title to the merchandise; and, in the other, that the person intrusted with the merchandise has, as a person so intrusted, authority given him to sell or consign it. The same construction must be given to similar words in § 4. See Stollenwerck *v.* Thacher, 115 Mass. 224; Nickerson *v.* Darrow, 5 Allen, 419.

A warehouseman who is also a broker, with authority only to receive offers for merchandise stored with him as warehouseman, and report them to his principal, who concludes the sale, if any is made, is not within the provisions of either of these sections. The pledge of this wool to the defendant, therefore, is not protected by the statute; and the facts show that it was made by Jones without any authority from the plaintiff, and without any acts done by the plaintiff whereby the defendant was misled into the belief that Jones had any such authority, whether as owner or otherwise. The fact that he found the wool in the store of Jones, which he knew was used by Jones "to store wool as a warehouseman for other persons, and also wool belonging or consigned to himself," does not bring the case within the decisions upon ostensible or apparent ownership. Neither the railroad receipt nor the invoice was delivered by the plaintiff to Jones, but both were retained by the plaintiff; and Jones, so far as it appeared to the defendant, was no more the ostensible owner of this wool than of any other wool stored with him as warehouseman. The assertion of Jones that he owned the wool was incompetent, as evidence of ownership, against the plaintiff, and could not enlarge his authority as agent. Mussey *v.* Beecher, 3 Cush. 511; Stollenwerck *v.* Thacher, *supra.*

There remains to be considered the effect upon the rights of the parties of the interest which Jones had in the wool. It is perhaps not important to determine exactly the respective rights of Fessenden and Jones under their agreement; but we assume that Fessenden and Jones were partners in this adventure, with the right in Jones as against his co-partner of controlling the sale of the wool in Boston; and, for the purpose of considering the principal questions in this case, we shall treat Jones as the general owner.

It is argued that, as Jones was the general owner, and had all the rights of an owner to sell or pledge the wool, the lien of the plaintiff was lost by the plaintiff's delivering possession of it to Jones in the manner and under the circumstances which have been stated in the report. Whatever the authority of Fessenden, under his agreement with Jones, may have been to consign the wool to the plaintiff, it is plain that, if the plaintiff had retained possession of the wool, he would have had a valid lien upon it for his advances against Jones, both by virtue of the Gen. Sts. c. 54, § 1, and by the general principles of law, because Jones had procured the consignment to be made to the plaintiff, and by his acts was estopped from setting up, against the plaintiff, any title to the wool inconsistent with the validity of the lien acquired by the plaintiff as consignee. The interest of the plaintiff in this merchandise was that of a consignee for sale who had made advances upon it, and his rights and duties in most respects are well defined in the law. The possession of a warehouseman, although he has a lien for his charges, is not inconsistent with the possession of the consignee, and it is in accordance with the usage of commission merchants to store merchandise consigned to them in warehouses. A consignee's rights in the merchandise are not lost by putting the merchandise in the warehouse of another person, to be stored until it can be sold. The plaintiff never intended to relinquish his lien, or even to put the property into the possession of the owner; but it is argued that, as he did intend to put it into the possession of Jones, who was the owner, although the plaintiff did not know it, this union of possession and general property in Jones enabled him to convey a good title to an innocent pledgee for value. No decided case has gone so far as this. It has not even been decided in this Commonwealth, that, if the plaintiff had known that Jones was the owner of the merchandise, the deposit of it in good faith with him as a warehouseman, with authority to negotiate sales as a broker, to be concluded by the plaintiff, would have enabled Jones to vest a good title in an innocent purchaser by a sale made by him on his own account. Macomber *v.* Parker, 14 Pick. 497. Walker *v.* Staples, 5 Allen, 34. Thayer *v.* Dwight, 104 Mass. 254. See Casey *v.* Cavaroc, 96 U. S. 467; Clark *v.* Iselin, 21 Wall. 360; Thompson *v.* Dolliver, 132 Mass. 103.

In this Commonwealth, although a sale of personal chattels is not valid against a subsequent purchaser, without delivery, yet, if there has been a delivery, possession by the vendor is only evidence of fraud, and the sale is not void against a subsequent purchaser, unless fraud in fact is proved. Zuchtmann *v.* Roberts, 109 Mass. 53; Ingalls *v.* Herrick, 108 Mass. 351; Thorndike *v.* Bath, 114 Mass. 116; Dempsey *v.* Gardner, 127 Mass. 381.

In conditional sales, possession by the vendee does not enable him to convey a good title to a purchaser. The cases here and elsewhere are numerous where the pledgee has lost his lien by delivering the pledge to his pledgor, to be used by him or to be held by him for his own use, or to be held by him with a right to substitute other property for that originally pledged; but possession obtained by the pledgor by force or fraud has never yet been held to destroy the lien of the pledgee, unless the delivery, although fraudulently obtained, was with the intention on the part of the pledgee that the pledgor might treat the pledge as his own property. The mere fact that the pledgor has possession, so that in him the possession and the general ownership are united, does not, as matter of law, destroy the lien of the pledgee, without regard to the circumstances under which, or the purpose for which, the possession was obtained. Macomber *v.* Parker, *supra*; Walcott *v.* Keith, 2 Foster, 196. To hold that the union of possession and general property in the same person, however acquired, necessarily destroys the special property of a consignee of merchandise, would enable warehousemen, who hold merchandise in store for commission merchants, to buy in the title of their consignors, and thus obtain full control over the disposition of the merchandise stored, without the authority or knowledge of the consignees.

In all the cases cited by the defendant in which it has been held that the lien of a pledgee was lost, the property pledged had been delivered to the pledgor by the pledgee, knowing him to be the pledgor, and the pledgor had been authorized to hold the property, or to make some use or disposition of it for his own benefit in a manner inconsistent with keeping it solely as agent, and for the benefit, of the pledgee, except the case of Geddes *v.* Bennett, 6 La. An. 516, and there the circumstances were such as in the opinion of the court to estop the plaintiffs from claiming their lien, even if they had one, which it seems they had not as against third persons, because the provisions of the Code of Louisiana had not been complied with.

But it is unnecessary to consider what would be the result, if the interest which Jones had in the merchandise had been known to the plaintiff. The want of such knowledge is decisive. The plaintiff cannot be held to have intended that Jones should exercise any of the rights of ownership over the merchandise on account of his delivery of it to him, because he did not know that Jones was an owner, and it was not a consequence naturally to be expected from delivering the merchandise to him to be stored that it would come into the possession of the general owner; and in no legal sense can the plaintiff be said to have voluntarily delivered the merchandise into the hands of the general owner. In the absence of any act or conduct which, in law, prevents a consignee of merchandise for sale from setting up his rights of property by reason of an apparent ownership or authority to sell which he has conferred upon another, those rights are lost only by his dealing with the merchandise in a manner inconsistent with the bailment, or inconsistent with his possession and preservation of the merchandise solely for the purpose of sale under the consignment, or by dealing with it in such a manner that an intention to abandon or relinquish his rights can be inferred.

In this case there has been no such dealing with the merchandise, and no such intention can be inferred. The right which Jones had as owner to sell his interest in the property, subject to the right of the plaintiff, is not an authority to sell within the meaning of the Gen. Sts. c. 51. That chapter has no reference to the right of an owner of merchandise to sell as owner, but to the authority to sell given to consignees, factors, agents, or other persons intrusted with the possession of merchandise. See Jenkyns *v.* Usborne, 7 Man. & G. 678; Fuentes *v.* Montis, L. R. 3 C. P. 268, and L. R. 4 C. P. 93.

The rulings of the justice before whom this case was tried were therefore correct; and the defendant has converted the wool to his own use. It was a conversion when the wool was taken from the possession of Jones by order of the defendant, under a claim of a right of property in it, and was stored with Drake and Company, subject, and deliverable only, to the order of the defendant. Stanley *v.* Gaylord, 1 Cush. 536; Moody *v.* Blake, 117 Mass. 23; Bearce *v.* Bowker, 115 Mass. 129.

The justice before whom the case was tried found for the plaintiff, and reported the case to the full court, with the statement that, "if the plaintiff was entitled to recover, by agreement of parties, the case was to be sent to an assessor to determine the plaintiff's damages, according to the rules prescribed by the court." The ordinary rule of damages is the market value of the property at the time of the conversion, with interest from that time, and a consignee of merchandise is entitled to recover full damages, and is responsible over to his consignor for any balance remaining after satisfying his claims upon the property. Ullman *v.* Barnard, 7 Gray, 554.

Whether the amount of the damages, thus estimated, is greater than the amount of the money for which the plaintiff had a lien on the property, the report does not show; and, if so, whether the defendant has so far succeeded to the rights of the owners that he is entitled to retain or deduct from these damages the surplus which remains after satisfying the claims of the plaintiff, the report does not enable us accurately to determine. See Chamberlin *v.* Shaw, 18 Pick. 278, 283; Spoor *v.* Holland, 8 Wend. 445; Ingersoll *v.* Van Bokkelin, 7 Cow. 670.

In accordance with the terms of the report, an assessor must be appointed to assess damages as of the full value of the property; but, if desired by the defendant, he may have authority, as auditor, to hear and report any facts, in addition to those found in this report, bearing upon the right of the defendant to retain the surplus, if any, remaining after satisfying the claims of the plaintiff upon the property.

Ordered accordingly.[1]

NEW YORK LAWS OF 1830, CAP. 179.[2]

SECTION 1. After this Act shall take effect, every person in whose name any merchandise shall be shipped, shall be deemed the true owner thereof, so far as to entitle the consignee of such merchandise to a lien thereon, (1) for any money advanced, or negotiable security given by such consignee, to or for the use of the person in whose name such shipment shall have been made; and (2) for any money or negotiable security received by the person in whose name such shipment shall have been made, to or for the use of such consignee.

SECT. 2. The lien provided for in the preceding section shall not exist where such consignee shall have notice by the bill of lading or otherwise, at or before the advancing of any money or security by the person in whose name the shipment shall have been made, that such person is not the actual and *bona fide* owner thereof.

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[1] See further Goodwin *v.* Mass. L. & T. Co., 152 Mass. 189; H. A. Prentice Co. *v.* Page, 164 Mass. 276; Cairns *v.* Page, 165 Mass. 552. *Conf.* Hastings *v.* Pearson, [1893] 1 Q. B. 62.

[2] Sections 1 and 2 were repealed by Laws of 1897, c. 418.

SECT. 3. Every factor or other agent, intrusted with the possession of any bill of lading, custom-house permit, or warehouse-keeper's receipt for the delivery of any such merchandise, and every such factor or agent not having the documentary evidence of title, who shall be intrusted with the possession of any merchandise for the purpose of sale, or as a security for any advances to be made or obtained thereon, shall be deemed to be the true owner thereof, so far as to give validity to any contract made by such agent with any other person, for the sale or disposition of the whole or any part of such merchandise, for any money advanced, or negotiable instrument or other obligation in writing given by such other person upon the faith thereof.

SECT. 4. Every person who shall hereafter accept or take any such merchandise in deposit from any such agent, as a security for any antecedent debt or demand, shall not acquire thereby, or enforce any right or interest in or to such merchandise or document, other than was possessed or might have been enforced by such agent at the time of such deposit.

SECT. 5. Nothing contained in the two last preceding sections of this Act shall be construed to prevent the true owner of any merchandise so deposited from demanding or receiving the same, upon repayment of the money advanced, or on restoration of the security given, on the deposit of such merchandise, and upon satisfying such lien as may exist thereon in favor of the agent who may have deposited the same; nor from recovering any balance which may remain in the hands of the person with whom such merchandise shall have been deposited, as the produce of the sale thereof, after satisfying the amount justly due to such person by reason of such deposit.

SECT. 6. Nothing contained in this Act shall authorize a common carrier, warehouse-keeper, or other person to whom merchandise or other property may be committed for transportation or storage only, to sell or hypothecate the same.

SECT. 8. Nothing contained in the last preceding section shall be construed to prevent the Court of Chancery from compelling discovery, or granting relief upon any bill to be filed in that court by the owner of any merchandise so intrusted or consigned, against the factor or agent by whom such merchandise shall have been applied or sold contrary to the provisions of the said section, or against any person who shall have been knowingly a party to such fraudulent application or sale thereof; but no answer to any such bill shall be read in evidence against the defendant making the same, on the trial of any indictment for the fraud charged in the bill.

STEVENS *v.* WILSON AND OTHERS.

NEW YORK COURT OF ERRORS, DECEMBER, 1846.

[*Reported in* 3 *Denio,* 472.]

ON error from the Supreme Court. Wilson and the other defendants in error brought replevin against Stevens, in the Superior Court of the city of New York, for a quantity of feathers. Verdict and judgment for the plaintiffs; which judgment was affirmed on error in the Supreme Court. For a statement of the facts and the opinion of the court, see 6 Hill, 512. The question in the case was, whether the defendant, who had made advances upon the feathers to one Colgate, the plaintiffs' factor, with knowledge that he was not the owner of the property, was entitled to hold it for such advances.

A. Crist, for the plaintiff in error.

S. A. Foot, for the defendants in error.

THE CHANCELLOR. Upon the charge of the judge the jury must have decided that the goods did not belong to Colgate, the factor or agent of the defendants in error, but were in his hands for sale as the factor of the real owners. And I think the judge who tried the cause, as well as the Supreme Court, was right in supposing that the Act of 1830, for the amendment of the law relative to principals and factors or agents (1 R. S. 762, tit. 5 of 2d ed.), does not authorize the agent or factor for the purposes of sale, to pledge the goods to a person who knows the character in which the pledgor holds the same. Mr. Justice Bronson, who delivered the opinion of the Supreme Court in this case, has correctly stated the rule of the common law, that an agent or factor, intrusted with the goods of his principal to sell, could not pledge the same so as to authorize the pledgee to hold them for advances made thereon to the factor or agent, even if he supposed the latter to be the real owner of the goods. Paterson *v.* Tash, 2 Strange, 1178; Daubigny *v.* Duval, 5 T. R. 604. Even where the principal had drawn upon the factor in anticipation of the sale of the goods, it was held in the cases of Fielding *v.* Kymer, 2 Brod. & Bing. 639, and Graham *v.* Dyster, 6 Maule & Sel. 1, that the factor was not authorized to pledge the goods. In this last case, Mr. Justice Abbott, afterwards Lord Chief Justice Tenterden, said it had been established by many decisions, and might be considered as a settled principle of law, that a factor could not pledge so as to transfer his lien to the pawnee. This rule of the common law was founded upon the principle that he who deals with one acting *ex mandato*, can obtain from him no better or different title than that which his mandate authorizes him to give.

The Statute 4 Geo. 4, ch. 83, passed in July, 1823, altered the common-law rule in England in this respect, as to persons dealing with the consignees of factors intrusted with goods for the purpose of sale, so far as to protect the rights of the pledgee to the extent of the advances he had made, or the liabilities he had incurred, upon the faith of the pledge and the supposition that the nominal consignor, the factor, was the owner of the goods. But this statute contained an express exception of cases where the consignee was aware of the fact that the nominal consignor was not the real owner of the goods. It also contained a provision that the deposit or pledge of goods by the consignee thereof should give to the person with whom they were deposited or pledged the same right, and no other, that the consignee himself possessed. The provisions of that act appear to have been confined to consignees of goods, and persons dealing with them, where the consignees supposed the consignors were the real owners of such goods, when in fact such consignors had only been intrusted with the goods for the purpose of sale. The first section of the Act of 6 Geo. 4, ch. 94, passed about two years afterwards, contained but a very slight modification of the previous act, so as to protect the consignee without notice, and others dealing with him, before they had notice that the person in whose name goods were shipped, with the assent of the owner, was not himself the real owner. But the second section of that act extended the protection to persons dealing with an agent or factor who had in his possession documentary evidence showing him *prima facie* to be the owner of the goods, and where the persons so dealing with him were ignorant of his fiduciary character, and had bought the goods or advanced money or negotiable securities upon the deposit or pledge of the goods and upon the faith of such *prima facie* evidence of ownership. The third section declared that persons taking such goods in deposit or pledge for an antecedent debt, even without notice of the fiduciary character of the agent or factor having in his possession such *prima facie* evidence of ownership, should acquire no other right or interest therein, as against the owner, than the agent or factor himself possessed; but might acquire, possess, and enforce the right to that extent. And the fifth section expressly authorized the taking of such goods in pledge from the agent, or broker, having such *prima facie* evidence of title, even with notice of his fiduciary character; but the pledgee was only to obtain such right or interest therein as the pledgor himself possessed.

Our Act relative to principals and factors or agents, in the first and second sections, protects consignees of merchandise shipped in the name of a person who is not the real owner, where they are ignorant of the fact that such consignor is not the owner. The third section then provides that "Every factor or other agent intrusted with the possession of any bill of lading, custom-house permit, or warehouse-keeper's receipt for the delivery of any such merchandise, and every such factor or agent, not having the documentary evidence of title, who shall be intrusted with the possession of any merchandise for the purposes of sale, or as a security for any advances to be made or obtained thereon, shall be deemed to be the true owner thereof, so far as to give validity to any contract made by such agent with any other person for the sale or disposition of the whole or any part of such merchandise, for any money advanced, or negotiable instrument or other obligation in writing given by such other person upon the faith thereof." 1 R. S. 762, tit. 5, § 3, of 2d ed. It is perfectly evident from the whole of this section, taken in connection with the second section and the previous law upon the subject, that the words "on the faith thereof" refer to the ownership of the goods; so as to protect the purchaser, or pledgee, who has advanced his money or given his negotiable note or acceptance or other written obligation, upon the faith or belief of the fact that the person with whom he dealt was the real owner of the property. Any other construction of the statute would do great injustice to the legislature who passed the Act of 1830. For it would authorize the agent or factor to commit a fraud upon his principal, with the connivance of the purchaser or pledgee who had notice of the fiduciary character of the vendor or pledgor. It would also be in direct conflict with the seventh section of the same statute, which makes such a fraud an indictable offence, not only against the agent or factor, but also against every person who shall knowingly connive with or aid him in the commission of the fraud.

Our statute does not, as in the fifth section of the 6 Geo. 4, ch. 94, authorize the agent or factor to pledge the goods of his principal to the extent of his lien, to persons who are aware of his fiduciary character and without any authority for that purpose from his principal. But even under the British statute it has been held that a mere liability of the agent or factor, upon acceptances for his principal, is not sufficient to give such agent or factor a lien which will authorize him to pledge the goods to a third person without the consent of his principal. In Fletcher *v.* Heath, 7 Barn. & Cress. 517, and Blandy *v.* Allan, Danson & Lloyd's Merc. Cas. 22, the factor was under acceptances for his principal at the time he pledged the goods for advances thereon, but which acceptances the principal afterwards duly paid or provided for. And it was held that the pledgee could not hold the goods to the amount of the acceptances for which the factor was liable at the time the goods were pledged, but which he was not afterwards compelled to pay.

Here the judge who tried the cause not only gave to the defendant in the court below all his legal rights, but protected him so far as any equity existed as between the factor and his principals, if not much further. I therefore think the judgment of the Supreme Court should be affirmed. *Judgment affirmed.*[1]

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JOHN COLLINS, RESPONDENT *v.* STEPHEN RALLI AND OTHERS, APPELLANTS.

NEW YORK SUPREME COURT, FEBRUARY TERM, 1880.

[*Reported in* 20 *Hun*, 246.]

APPEAL from a judgment for the plaintiff, entered upon a referee's report.

The referee found that on Dec. 28, 1877, Henry M. Cutter, a member of the firm of H. M. Cutter & Co., cotton-brokers, called upon the plaintiff and by falsely and fraudulently representing that he was authorized to buy cotton for the Freeman Manufacturing Company of North Adams, Massachusetts, induced the plaintiff to sell 100 bales of cotton to that company. By representing that he desired to ship the cotton immediately, Cutter procured from the plaintiff a delivery order upon the warehousemen who were storing the cotton. At their warehouse Cutter had the cotton weighed and marked and loaded upon a truck; tags, with the name and address of the mills, being fastened to each bale. Cutter stored the cotton in another warehouse, some of the bales at that time still having the tags upon them, and took out receipts therefor from the keeper of such warehouse in his own name first, and afterwards in the name of his brokers. All the tags were removed from the bales while in this latter warehouse. Thereafter the defendants purchased the cotton in good faith and for value through their brokers, receiving the warehouseman's receipts therefor, and subsequently shipped it to Liverpool.

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[1] The concurring opinion of Senator LOTT and the dissenting opinion of Senator JOHNSON are omitted.

That plaintiff was guilty of no negligence, in any of the transactions above stated, but in all respects exercised due care and caution therein, and all his acts in respect thereto were in the usual and ordinary course of business of selling cotton to spinners through the medium of a broker.

That plaintiff parted with the custody of said cotton to said H. M. Cutter & Co. for the sole purpose of having the same shipped and delivered to the pretended purchasers.[1]

Coudert Brothers, for the appellants.

Freling H. Smith, for the respondent.

PRATT, J. The facts in this case clearly show that Cutter & Co. were guilty of larceny in obtaining the temporary custody of, and appropriating to their own use the cotton in question in this action. They had, by false and fraudulent statements, induced the plaintiffs to believe that they represented and were authorized to purchase this cotton for certain manufacturing companies, and relying upon their representation, the plaintiff sold the same to these manufacturing companies as he supposed through Cutter & Co., as brokers, and so they were allowed to put the cotton aboard their trucks after it had been tagged and addressed to the supposed purchasers for conveyance to the depot for shipment.

This was done in pursuance of the usual custom obtaining in respect to shipment of goods purchased by manufacturing companies through brokers.

In such cases it appears the dealer allows the broker to cart the goods for shipment. The possession of Cutter & Co. was therefore temporary, and given to them for a specific purpose, and they procured such possession fraudulently and with the purpose and design of converting the goods to their own use. The evidence, which is undisputed, shows this conclusively.

The case is therefore brought directly within the definition of larceny given in Loomis v. The People, 67 N. Y. 322; and also 2 R. S., p. 679, § 63; Smith *v.* The People, 53 N. Y. 113; Bassett *v.* Spofford, 45 *id.* 391; Zink v. The People, 6 Abb. N. C. 413; 2 East's P. C. 681, 693.

The defendants rely upon Rex v. Atkinson, 2 East's P. C. 673, as an authority in opposition to these views; but in that case the offence charged was held not to be a felony simply, as it came within the statute of 33 H. 8th Ch. 1, against obtaining goods by false tokens or counterfeit letters, and was therefore punishable as a misdemeanor only (East P. C. 687). Whether or not Cutter & Co. were guilty of larceny, however, is important in the determination of the case only upon the question of estoppel, for it cannot well be claimed that an owner has conferred upon the thief *indicia* of title to his stolen goods, or that he cannot reclaim them because of any negligence charged. Bassett *v.* Spofford, *supra.*

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[1] The statement of facts has been abbreviated.

Whatever may be the grade of the offence of Cutter & Co. in defrauding plaintiff of his goods, they could convey no title to them even to an innocent purchaser for value unless plaintiff committed, or omitted some act in respect to them whereby such purchaser was, and a prudent person would naturally be, misled by some apparent ownership or power of Cutter & Co., or their representatives in or over the same, created by such act or omission.

If plaintiff clothed Cutter & Co. with apparent title, or power to sell, or did anything out of the usual course of business calculated to and which did actually mislead the defendants in respect to the ownership or right of sale of the cotton, it would clearly be inequitable to permit the plaintiff to recover therefor from the defendants, who had parted with their money on the faith and credit of the appearances so created by him. The principle of estoppel would doubtless apply. McNeil *v.* Tenth National Bank, 46 N. Y. 329.

The question therefore arises, did plaintiff so clothe Cutter & Co. with apparent title to or authority to dispose of the cotton in question. Defendants claim that by giving to them the delivery orders he conferred upon them *indicia* of title.

It seems scarcely necessary to discuss this proposition. The delivery orders were but the usual means adopted to put Cutter & Co. into temporary possession of the cotton to enable them to weigh, tag, and cart it for shipment to the manufacturing companies they had falsely and fraudulently represented as purchasers. These orders worked no harm to any one. They were not seen by defendants or any person representing them, and their existence even was unknown to them. If the delivery orders were of such character as to indicate title in Cutter & Co., yet, as defendants were not misled by them, they furnish no support to their claim of estoppel. This is a familiar rule of law, and was so held in Boyson *v.* Coles, 6 M. & S. 14, which is a case similar in principle to the one at bar. It was also held in that case that a delivery order is evidence of right of possession, and not of ownership. Says Abbott, J.: "Upon this point, all that appears to have been imparted to the defendant, as the act of the plaintiffs, was the transfer order to the dock company, upon which the transfer was made to him by Coles Brothers; but I consider the transfer order merely as affecting the possession; farther than that I cannot carry it; and possession alone is not a sufficient emblem of authority to entitle a factor to pledge so as to enable the pawnee to hold the goods against the real owner. In the present case, it does not appear that the defendant was misled by any act or document with which the plaintiffs were concerned, other than such as regarded possession, and therefore the jury were warranted in the conclusion which they came to on the second question." People *v.* Bank of North America, 75 N. Y. 547. The purpose of these orders was served when they were delivered to the warehousemen who had the cotton in store, and they obeyed them. They no more indicate title than a written direction to one's cobbler to deliver to his servant a pair of shoes, clothes the latter with apparent ownership and right of sale of them. McEwan *v.* Judd, 2 H. of L. Cas. 309.

Defendants also insist that plaintiff, by intrusting Cutter & Co. with the temporary possession of the cotton for shipment, vested them with *indicia* of title. It is true that possession is some evidence of ownership, but the rule is elementary that bare possession is not sufficient to enable one to convey title to chattels. Ballard *v.* Burgett, 40 N. Y. 314; McNeil *v.* Tenth Nat. Bank, *supra;* F. and M. Bk. *v.* Atkinson, 74 N. Y. 587; F. and M. Bk. *v.* Logan, *id.* 568; Loomis *v.* People, *supra;* McGoldrick *v.* Willits, 52 N. Y. 612; Saltus *v.* Everett, 20 Wend. 267; Lickbarrow *v.* Mason, 2 T. R. 62; Boyson *v.* Coles, *supra.* If it were otherwise, ordinary business affairs could not be conducted with safety. The demands of trade require almost innumerable agencies in the transportation of merchandise, and necessitate their delivery to employes, agents, and even strangers, for that purpose.

The case of Higgins *v.* Burton, 26 L. J. N. S. 342, Ex., is identical in principle with the one at bar. Plaintiff there had dealings with one Fitzgibbon, a merchant at Cork, in whose employ one Dix had been, who was known to plaintiff as agent for Fitzgibbon. Dix was discharged by Fitzgibbon, and afterwards and before plaintiffs were informed of it proposed to purchase from them, in Fitzgibbon's name, some silks, which were delivered to him and by him sent to defendant, who was an auctioneer, by whom they were sold and the proceeds paid over to Dix. Afterwards Dix obtained other goods from plaintiff in a similar way, upon which defendants made advances in ignorance of the fraud. The plaintiff brought trover and recovered. Watson, B., says: "Dix only affected to have the authority of Fitzgibbon to purchase the goods; he had in fact no such authority and no property passed to him. There was no real contract and he could give no better title than he had; and the pledge to the defendant passed no property. The case of Hardman *v.* Booth, 1 H. & C. 803; 7 L. T. Rep. N. S. 638; Cundy *v.* Lindsay, 38 *id.* 573; and Barker *et al.* *v.* Dinsmore, 72 Penn. 427, are similar in their facts and to the same effect. Babcock *v.* Lawson, 20 Alb. L. J. 407, cited and relied upon by defendant's counsel, does not conflict with these authorities or the views here stated. That case has no similarity to this. The language of Chief Justice Cockburn, in relation to possession as evidence of title, relates only to the possession of a factor or one otherwise held out as having power to sell. The distinction must be borne in mind between the case in hand and that of a person procuring the sale of goods by means of false pretences. Here there was no sale; there was no purchaser, and so the title remained in plaintiff. If one by fraudulent contrivances induce the sale and delivery of goods to himself, he could doubtless convey a good title to a *bona fide* purchaser of them for value so long as the original owner has not exercised his right to revoke the sale and reclaim his goods. The reason of this rule is obvious. The owner in the case supposed has clothed the fraudulent purchaser with a qualified title, as well as given him possession, and therefore it would be a rank injustice to permit him to take them from an innocent person who had in his purchase relied upon the evidences of title so created. The principle of estoppel in such cases would prevail. This distinction is pointed out in Cundy *v.* Lindsay, *supra*, in which Lord Chancellor Cairns in his opinion says: "The result, therefore, is this, that your lordships have not here to deal with one of those cases in which there is *de facto* a contract made, which may afterwards be impeached and set aside on the ground of fraud, but you have to deal with a case which ranges itself under a completely different chapter of law: the case namely in which the contract never comes into existence. That being so, it is idle to talk of property passing." Zink *v.* The People, *supra;* McGoldrick *v.* Willits 52 N. Y. 612; Smith *v.* The People, 53 *id.* 111.

The rule of law applicable to the two classes of cases, and the distinction above referred to, are accurately and tersely stated in the head-note to the case of Higgins *v.* Burton, *supra*, as follows: "When the owner of goods suffers another to have possession of them, or of the documents which are the evidence of property therein, on a sale to him obtained by means of fraudulent representations, and avoidable at the option of the owner, a sale or pledge by such party before the owner has exercised his option and without notice to the subsequent purchaser is binding; but this is not so when the party has merely obtained the goods by means of false pretences, without any contract of sale to himself, as when he falsely and fraudulently represents that another person has authorized him to purchase the goods; and in such case the original owner can recover the goods from a party to whom they have been sold or pledged by the person who fraudulently obtained them before any notice of the fraud or any disaffirmance of the transaction by the real owner."

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The only case that has been cited or which we have been able to find in conflict with these views is Craig *v.* Marsh, 2 Daly, 61. The learned judge who wrote the opinion seems to have been misled by the general language of the opinion of some of the cases of sales of goods by false pretences, and not to have kept in mind the distinction between this line of authorities and those in which there is *de facto* no contract of sale made, as stated by Lord Chancellor Cairns in Cundy *v.* Lindsay, *supra*, in commenting on this distinction. The opinion itself, and the cases cited and relied upon by the learned judge, indicate this mistake. The counsel for the plaintiffs in that case also seems to have fallen into the error of conceding that the person fraudulently procuring the goods was not guilty of larceny, and the concession doubtless misled the court. The case, so far as we are aware, has not been cited with approval or followed, and is not supported by any of the authorities referred to in the brief opinion of the court.

This brings us to a consideration of the effect of section 6, chapter 326, of the Laws of 1858, upon the rights of the parties. This Act is entitled "An Act to prevent the issue of false receipts, and to punish fraudulent transfers of property by warehousemen, wharfingers, and others (3d Edm. Stat. p. 667).

The section in question read as follows: "Warehouse receipts given for any goods . . . stored or deposited with any warehouseman . . . may be transferred by indorsement thereof, and any person to whom the same may be so transferred shall be deemed and taken to be the owner of the goods . . . therein specified, so far as to give validity to any pledge, lien, or transfer made or created by such person or persons." The learned counsel for the defendants insist, that the provisions of this section afford them a complete protection against a recovery in this action; that, having purchased the cotton upon the faith of the negotiable warehouse receipts, and paid therefor full market value, this case falls both within the spirit and the letter of the section. All the other sections of this Act, except the last, which is unimportant, prohibit the issue of false receipts, etc., and prescribe the penalty for a violation of their provisions. The scope and object of the Act, therefore, seems to be to protect the mercantile community against fraudulent practices by warehousemen, wharfingers, and others, in respect to these receipts for goods stored or represented to be stored with them. That this is the purpose is shown by the title of the Act. The sixth section is simply an enunciation of common law principles. It estops the warehouseman from disputing the title of the innocent holder of a negotiable receipt issued by him, and renders him liable to account to such holder for the goods therein represented, whether falsely issued or not. The clause, "warehouse receipts given for any goods . . . stored or deposited with any warehouseman," means receipts given for goods so stored or deposited by any person having the title thereto, real or apparent, or authority from such person therefor. This section of the Act proceeds upon the assumption that the receipt is so issued. Any other construction would enable warehousemen to issue receipts for goods, known by them to be stolen, and so convey title to them, or even themselves to commit larceny, and by issuing receipts for the stolen property defraud the plundered owner of all title to and power of reclaiming it. Such a construction would work a change in the law hardly contemplated by the legislature when the Act under consideration was passed, and yet the construction insisted upon by the defendants would accomplish precisely this result. Courts often have to look beyond the mere words of a statute in determining its meaning, and give to it such an interpretation as the mischief sought to be cured and the evident intention of the legislature indicate. Chapter 179 of the Laws of 1830, commonly called the Factor Act, is entirely analogous, and has been construed by the Court of Appeals in conformity with the interpretation above given to the Warehouse Act. The Factor Act provides that "every person in whose name any merchandise shall be shipped shall be deemed the true owner thereof," etc. Now it is evident that a literal reading of this clause would give a thief who shipped stolen goods in his own name the same power to convey a good title to them, as the same character of construction would the warehouseman under the sixth section of the Warehouse Act, as above shown; but the Court of Appeals has held in Kinsey *v.* Leggett, 71 N .Y. 387, and other cases, that the Act "only applies when the shipment is made with the consent of the real owner in the name of another;" that "the Act was not intended to deprive actual owners (of their property) who had not parted with their title, or who, by fraud and without any fault on their part, had lost control over it." Merch. and Trad. Bk. *v.* F. and M. Bk., 60 N. Y. 40; Howland *v.* Woodruff, *id.* 73; First National Bank of Toledo *v.* Shaw, 61 *id.* 283; Covell *v.* Hill, 4 Denio, 323; s. c. 2 Seld. 374; F. and M. Bk. *v.* Logan, 74 N. Y. 568.

The precise question here presented was decided by the Commission of Appeals in the First National Bank of Toledo *v.* Shaw, 61 N. Y. 283. The plaintiff had discounted drafts drawn upon T. W. Griffin & Co., of New York City, upon the security of a bill of lading of a cargo of wheat, which stated that the wheat was shipped on account of plaintiff to Kidd, Pierce, & Co., of New York, to be held by them until payment of the drafts, and then to be delivered to T. W. Griffin & Co., the wheat at Buffalo to be received and forwarded by A. L. Griffin & Co. to Kidd, Pierce, & Co. A. L. Griffin & Co. transshipped by canal from Buffalo, and issued a canal bill of lading, in substance like the above, with the addition that the freight, etc., were to be paid to Young Bros., and sent this bill to T. W. Griffin & Co. or to Young Bros. On the arrival of the wheat at New York, it was unloaded by direction of T. W. Griffin & Co. at the warehouse of Shaw & Co., who issued to them a negotiable warehouse receipt therefor, according to their custom, which was to issue warehouse receipts to any one who sent boats to them without demanding to see the bill of lading.

T. W. Griffin & Co. indorsed and delivered the warehouse receipt to the New York Guaranty and Indemnity Company, and that company, upon the faith of it, made a loan of $14,000 to Griffin & Co. One of the drafts held by the bank was afterwards protested for non-payment, and it then brought an action against Shaw & Co. and the Guaranty and Indemnity Company to recover possession of the wheat; and the Commission of Appeals held that it was the duty of the warehousemen (Shaw & Co.) to have made inquiries as to the title of T. W. Griffin & Co., and inasmuch as the latter had no title or *indicia* of title save the bare manual possession of the wheat, that the warehouse receipt afforded no protection to the Guaranty and Indemnity Company. Commissioner Dwight says, at page 297 of the reported case: "The warehousemen (Shaw & Co.) were bound to inquire whether a bill of lading accompanied the shipment. Their custom to make no inquiries, but to warehouse grain for any one who had the possession, could not in any respect prejudice the rights of the plaintiff. Having warehoused it, they were bound to hold the grain for the rightful owner. Their receipt given for the grain was no protection to the Guaranty and Indemnity Company. Shaw & Co. simply trusted to a person having the naked possession, without any title or *indicia* of it. If on that bare possession they issued evidences of title, they were mere waste paper, under which the Guaranty Company can make no claim. A mere possessor cannot confer ownership by falsely asserting, through bills of lading or warehouse receipts, that he has a title." Again, at page 302, he says: "If the Guaranty Company saw fit to act on the so-called warehouse receipt, which itself had no solid foundation, it acted at its peril." And at page 303, etc., he says: "Shaw & Co. could not safely repose on the mere possession of Griffin & Co., but were bound to look into the shipping documents, and are accordingly chargeable with constructive notice of their contents. The Guaranty Company are in the same position with Shaw & Co. The warehouse receipt being mere waste paper, that company can claim no rights under it."

It is indisputable that the precise point in controversy in this action is here determined, and that it was directly involved in that case. If, then, Shaw & Co. had no right to issue a warehouse receipt for goods to one having control of the boat by and in which they were shipped, and then contained, and if a receipt so issued is worthless, and no protection to one acting and advancing on the faith of it, it is needless to argue that there is no justification for the warehouseman. Richards, in the case at bar, issuing receipts, as is shown by the testimony of the witness Kane, contrary to the usual course of business, to one having merely the naked manual possession of the goods for a temporary purpose, and where the shipping tags on the goods were in themselves sufficient evidence at least to put a prudent man on inquiry as to the nature and purpose of such possession; and if in the Toledo Bank Case the warehouse receipts furnished no ground for protection to the Guaranty Company, the receipts issued by Richards surely cannot avail the defendants in this action.

In Geneva National Bank *v.* Reamer, 7 Weekly Digest, 462, the court, at Special Term, simply held that the question for whom the grain covered by the receipt was received or held by the warehouseman was one of fact, and should have been submitted to the jury, and the learned justice in his opinion correctly remarks: "A receipt fraudulently issued to one who has no property held in store for him cannot bind or affect property held for another." In Yenni *v.* McNamee, 45 N. Y. 619, the receipt given was held not to be a warehouse receipt under the meaning of the statute. In McCombie *v.* Spader, 1 Hun, 193, the goods covered by the receipt were sold to the person putting them in store, although the sale was fraudulently procured; hence he was in position before the goods were reclaimed by the original owner to convey good title to them by sale directly to an innocent purchaser, or through the medium of a warehouse receipt.

Plaintiff's demand of the defendants, before suit brought, was sufficient. It is evident from the testimony that they knew to what cotton he referred. The larceny and flight of Cutter & Co. had become a matter of public comment, and the cotton in question was called by them the Cutter cotton, and known to them to have come through Cutter & Co., and the plaintiff, by his demand, made orally and in writing on the 2d of March, 1878, specified the exact number of bales required, and so designated them as connected with the fraud of Cutter & Co. as to have left no doubt in the mind of the plaintiff as to the cotton called for.

The demand formerly made by plaintiff, Jan. 11, 1878, when he found a portion of the cotton in defendants' possession, was also sufficient. If they had any misgivings at the time of either demand as to the cotton referred to, it was their duty so to inform plaintiff, and thus procure a more definite description of it. Their failure so to do was a waiver of any defect there may be in the demands in this respect. Marine Bank of Buffalo *v.* Fiske, 71 N. Y. 355.

The demand and refusal to deliver the cotton, however, was only evidence of conversion, and as it appeared upon the trial that the defendants had actually converted it by shipping it to Liverpool nearly two months before the commencement of the action, and there disposing of it, a demand was unnecessary. Marine Bank of Buffalo *v.* Fiske, *supra;* Pease *v.* Smith, 61 N. Y. 477; Connah *v.* Hale, 23 Wend. 462.

We have thus gone over, at considerable length, the various questions raised in this case and argued in the briefs of counsel with much force and skill, because of their great importance, and as to some of them, their novelty. All the parties to this action are innocent of fault in respect to the matters in controversy, and it is simply the duty of the court to see to it that the loss, which in any event must work a hardship, falls where the law casts it.

The judgment appealed from must be affirmed, with costs.

BARNARD, P. J., and GILBERT, J., concurred.

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Judgment affirmed, with costs.[1]

NEW YORK SECURITY AND TRUST COMPANY, RESPONDENT, *v.* ERNST LIPMAN, ET AL., DEFENDANTS, AND HONG KONG AND SHANGHAI BANKING CORPORATION, ET AL., APPELLANTS.

NEW YORK COURT OF APPEALS, NOVEMBER 23, 1898–JANUARY 10, 1899.

[*Reported in* 157 *New York*, 551.]

VANN, J. This action was brought to settle conflicting claims to the proceeds of a quantity of burlaps. All the claimants derived title through the firm of Lipman & Co., manufacturers and importers, of Dundee, Scotland, who were represented in this country by Ludwig Gutmann, as their general agent. When Lipman & Co. shipped the goods to this country they transmitted the bills of lading (which were generally made out to Lipman & Co. both as consignors and consignees, but in one case to one of the appellants as consignee) together with consular invoices to one of the appellants who advanced money thereon. The appellants thereafter sent the bills of lading and invoices together with a blank trust receipt to Gutmann. The bill of lading made out to one of the appellants as consignee was indorsed by him when so sent. Gutmann signed and returned the trust receipts, but retained the bills of lading and invoices. The trust receipts were to the effect that a bill of lading for a certain number of bales had been received from the appellants by Lipman & Co. which "we hereby agree to hold as their property . . . and on sale of said goods, or any portion thereof, we further bind ourselves to remit . . . the proceeds thereof as soon as received; the intention of the undersigned in giving this trust receipt being to protect and preserve unimpaired the title and interest of 'the appellants named' in said goods, and to act in the premises entirely as their trustees."

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[1] This decision was affirmed by the Court of Appeals, 85 N. Y. 637, and was followed in Soltau *v.* Gerdau, 119 N. Y. 380.

Thereafter, Gutmann by means of the bills of lading and invoices was enabled to enter the goods at the custom house and send the goods to a bonded warehouse, The Terminal Warehouse Company. The warehouse receipts were made out without other identification of the goods than a specified number of bales of burlaps. This was done at Gutmann's request so that he could substitute other bales equal in kind and quality for those in storage whenever he liked. The warehouse company allowed him to do this, and many substitutions were made. All the receipts covering the bales in dispute were negotiable in form, running to Lipman & Co.

In order to secure a loan for his principals from the plaintiff, Gutmann made a note in their name and indorsed warehouse receipts also in their name. The plaintiff never saw the bills of lading or invoices and knew nothing of the trust receipts. Lipman & Co. afterwards failed. None of the bales then in the warehouse and regarded as covered by the receipts held by the plaintiff were in the warehouse at the time the plaintiff made its loan, substitutions having been made.

This is the history of the bales in question.

The trust receipts were a secret arrangement between the appellants and Lipman & Company, known only to themselves, the effect of which, as between themselves, assuming that they truthfully express the actual transaction, it is unnecessary to decide. There is some reason to believe that the appellants were simply pledgees out of possession, and hence with no title. As to third persons, the naked receipts, without other proof, such as the making of a loan or of advances, were slender evidence of title, and although the attention of the appellants was repeatedly called to this defect during the trial, no effort was made to remedy it, except to some extent by Cotesworth & Powell, as already stated.

Independent of the question of substitution, which will be considered later, these facts bring the case directly within the provisions of the Factors' Act, which declares under what circumstances a factor or agent shall be deemed the true owner as to third persons acting in good faith. (L. 1830, ch. 179.) That act makes "every factor or other agent, intrusted with the possession of any bill of lading, custom house permit or warehouse keeper's receipt, for the delivery of any" merchandise, or if he has not the documentary evidence of title, if he is "intrusted with the possession of any merchandise for the purpose of sale, or as a security for any advances to be made or obtained thereon . . . the true owner thereof, so far as to give validity to any contract made by such agent with any other person for the sale or disposition of the whole or any part of such merchandise, for any money advanced or negotiable instrument or other obligation in writing given by such other person upon the faith thereof." (Id. § 3.) By the next section it is declared that the holder of an antecedent debt who accepts or takes merchandise in deposit from any such agent as security therefor, shall not acquire thereby any right other than was possessed by the agent at the time of the deposit. Subsequent sections protect the true owner to a certain extent by enabling him to redeem the merchandise when pledged, and to recover any balance upon the sale thereof. They prohibit those to whom merchandise may be committed for transportation or storage only, from selling or hypothecating the same, and finally make it a misdemeanor for any factor or agent to sell, pledge or dispose of any merchandise or documentary evidence of title for his own benefit contrary to good faith and with intent to defraud the true owner. (Id. § 7.)

While Lipman & Company are called trustees in the receipts given by them to the appellants, we think they were agents within the meaning of the Factors' Act. Two of the receipts authorize a sale by Lipman & Company, while the third fairly contemplates a sale by the use of the words "said merchandise or the proceeds thereof." This also appears from evidence outside of the receipts. Lipman & Company were "intrusted with the possession of" the bills of lading and the consular invoices, to which formal declarations, duly acknowledged, were attached, stating that they were the owners of the goods. Having the lawful evidence of title, furnished by the appellants to enable them to sell the goods and remit the proceeds, they became agents for that purpose. Their authorized action was that of agents and was of the kind contemplated by the Factors' Act as ordinarily done by agents. Calling them trustees does not make them trustees as to third persons, with no notice of the secret agreement. The object of the statute was to protect innocent persons who deal in reliance upon apparent ownership, resting upon possession either of the merchandise itself or documentary evidence of ownership. (Cartwright *v.* Wilmerding, 24 N. Y

521; Pegram *v.* Carson, 10 Bos. 505; Meacham on Agency, § 995.) We have carefully examined the authorities relied upon by the appellants, but find nothing in conflict with these views.

The remaining question relates to the substitution of bales. The appellants claim that the plaintiff never advanced any money on account of their bales, and that it never at the request of Lipman & Company surrendered any goods pledged to it in substitution for the bales belonging to the appellants. This is true, but the Special Term is presumed to have found, according to the evidence, that prior to the original loan Lipman & Company had established with the bonded warehouse a course of dealing, by which the warehouse company issued negotiable open receipts to them for certain specified quantities of burlaps without specifying any particular bales; that the warehouse company held against such open receipts as many bales as they called for, always retaining a sufficient quantity to cover all open receipts outstanding, the holders of which could at any time call upon the warehouse for the quantities specified therein; that at the date of the failure of Lipman & Company, by the process of transfer in the warehouse, the bales consigned by the appellants to Lipman & Company were held by the warehouse company to satisfy the open receipts that it had given to Lipman & Company, and which were then held by the plaintiff.

The legal effect of the open warehouse receipt was an undertaking by the warehouse company to deliver the number of bales specified therein, stored with it by Lipman & Company, to that firm or their assigns upon the return of the receipt. It hence was under an obligation to keep on hand the number of bales called for by such receipt as long as it was outstanding. It did not agree to deliver any particular bales, for the receipt was open and contained no identifying marks. If it delivered the number of bales stored with it by Lipman & Company, called for by the receipt, upon the return thereof, it satisfied its engagement. According to the uncontradicted evidence all the bales were practically of the same value, and when the plaintiff demanded two hundred bales, under the open negotiable receipts, pledged to it by Lipman & Company, the warehouse company was under obligation, as bailee for the plaintiff, to deliver the number of bales called for, and if it did so its contract with the plaintiff as assignee of the open receipt was fully performed. Hence, the warehouse company, being under this obligation, was in the position, when it surrendered the original two hundred bales to Lipman & Company, or upon their order, of parting with value under the agreement in force between them as to the substitution of new bales in the place of old ones withdrawn. Their liability to account to the plaintiff for two hundred bales was a good consideration for the substitution of two hundred other bales, of like constituent units, upon the surrender of the former. This is made very plain by the opinion of the Circuit Court of Appeals, written in a case brought by one Blydenstein against this plaintiff as defendant to recover part of the proceeds of the two hundred bales in question upon a claim similar to those asserted by the appellants in this action. (Blydenstein *v.* N. Y. Security & Trust Co., 67 Fed. Rep. 469.) We close our review by quoting from that opinion as follows: "The trust company, therefore, on September 7, 1892, obtained a valid lien on 500 bales of Lipman & Co.'s burlaps then stored in the warehouse. Thereupon the warehouse company became its bailee, and held the bales for it. (Gibson *v.* Stevens, 8 How. [U. S.] 384.) Whenever thereafter Lipman & Co. asked to substitute other similar goods of their own for those originally delivered as collateral, the surrender of an equal quantity of the original security of equal value would be a valuable consideration for the giving of the new security. The pledgee as to the latter would be a holder for value, and the exchange would have no effect upon the rights of the pledgee as founded upon the original contract. (Colebrooke on Col. Sec. § 15; Clark *v.* Iselin, 21 Wall. 360.) The same rule should apply where the goods offered in substitution and in exchange, for which goods already pledged are surrendered, are such as have been intrusted to the factor in the manner provided for by the Factors' Act, when the surrender is made upon the faith of the factor's possession. The contract for disposition of such goods is not for 'advances of money,' but it would be too narrow a construction of the state statute, which, according to the decisions of the state courts, should be liberally construed, to hold that one who parts with money's worth in the form of valuable property is deprived of its protection because he did not first transform such property into cash. When, therefore, Lipman & Co., after having deposited the 38 bales in warehouse, subject to their order, called upon the warehouse company to deliver 38 bales already covered by the pledged receipts, and with no older free bales than these to substitute in their place, they did in fact apply for an exchange of part of the security collateral to their loan, thus offering to pledge the new 38 bales if the old ones were delivered to them. The offer was accepted, and, on the faith of their possession of the bales which they thus offered to pledge, the older bales were given up to them. This was a valuable consideration, parted with in good faith, and entitles the person paying it to the protection of the Factors' Act, as against the plaintiffs (here the defendants), who had intrusted Lipman & Co. with the possession of the goods. The trust company, on December 15, 1892, had a valid lien on all of the 200 bales remaining in the warehouse under the two uncanceled open receipts of December 1, 1891, and they certainly did not lose such lien by returning the original receipts to the warehouse and accepting in exchange a single one in their own name for the full account."

We think the judgment should be affirmed, with costs.

All concur, except PARKER, Ch. J., not sitting, and GRAY, J., absent

Judgment affirmed.[1]

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[1] The statement of facts in the opinion has been abbreviated.

COMMERCIAL BANK OF SELMA *v.* HURT.

SAME *v.* LEE.

ALABAMA SUPREME COURT, NOVEMBER 2, 1892, JANUARY 31, 1893.

[*Reported in* 12 *Southern Reporter,* 568; *ib.* 572.]

WALKER, J. The claim of the appellant, the Commercial Bank of Selma, to the cotton involved in this suit rests upon a transfer and delivery by the H. C. Keeble Company of warehouse receipts therefor as collateral security for a note made by that company to the bank. The H. C. Keeble Company was a corporation engaged in business as a cotton factor and grocery merchant in the city of Selma. The appellee, who was the owner of the cotton, had had it shipped to that company, with instructions not to sell it until ordered to do so. The consignee had the cotton stored in the warehouse of Phillips & Parish, and took the warehouse receipts therefor in its own name. No advances were made to the appellee on this cotton, and there is no evidence that he authorized the consignee to store it and take the warehouse receipts in its own name, or to pledge the cotton itself, or the warehouse receipts. Under the common law, a factor or commission merchant has no implied authority to pledge the goods of his principal for his own use. Unless the result is controlled by some statute, the attempted pledge does not work a divestiture of the title of the principal, and the party receiving such a pledge and advancing his money acquires no right to the property as against the principal, whether he knew he was dealing with a factor or not. Bott *v.* McCoy, 20 Ala. 578; Voss *v.* Robertson, 46 Ala. 483; Allen *v.* Bank, 120 U. S. 20, 7 Sup. Ct. Rep. 460; 1 Lawson, Rights, Rem. & Pr. § 229. In England, and in several of the States in this country, statutes have been enacted for the protection of third persons who, in good faith and in ignorance of any defects of title, advance money or incur obligations on the faith of property which is apparently owned by the persons with whom they deal, who, however, in fact, hold it merely as factors or agents, having been intrusted by the owners with possession of the property or of documentary evidence of title to it. Soltau *v.* Gerdau, 119 N. Y. 380, 23 N. E. Rep. 864; Howland *v.* Woodruff, 60 N. Y. 73; Price *v.* Insurance Co., 43 Wis. 267; Macky *v.* Dillinger, 73 Pa. St. 85; George *v.* Bank, 41 Fed. Rep. 257. Decisions controlled by such statutes have no bearing upon this case, as we have no statute purporting to change the common-law rule which protects the owner against an unauthorized pledge of his property by one who, as factor or agent to sell, has been intrusted with the possession and custody of it. No statute is appealed to which could give any color to a claim that an unauthorized pledge by a factor of the property itself which was intrusted to him would have any other effect as against the principal than was accorded to such a transaction by the common law.

If the H. C. Keeble Company, instead of having the cotton stored in the warehouse of Phillips & Parish, had retained possession of it until, without any authority or license from the appellee, the cotton itself was delivered to the bank in pledge to secure the payment of the note of the H. C. Keeble Company, it is plain that the bank would not have acquired any greater title to the property than that company had to confer, and the appellee would have been entitled to recover the cotton from the bank, or to hold the bank liable for its conversion. But it is claimed that the factor, having stored the cotton in a warehouse, and obtained warehouse receipts therefor to itself, was enabled, by the transfer of those receipts, to confer upon the bank a claim to the cotton which must prevail against the title of the true owner. Section 1178 of the Code is relied upon as giving this effect to the transfer of warehouse receipts by the persons to whom they are issued. The clause of that section upon which this claim is based is in the following words: "The receipt of a warehouseman, on which the words 'Not negotiable' are not plainly written or stamped, may be transferred by the indorsement thereof, and any person to whom the same is transferred must be deemed and taken to be the owner of the things or property therein specified, so far as to give validity to any pledge, lien, or transfer made or created by such person." Sections 1175, 1177–1179, of the Code, are based upon an Act approved February 28, 1881, entitled "An Act to prevent the issue of false receipts, and to punish the fraudulent transfer of property by warehousemen, wharfingers, and others." Acts Ala. 1880–81, p. 133. In the process of codification the provisions of that statute were redrafted, and somewhat modified. But the provisions of the four sections above mentioned are all in furtherance of the main legislative purpose, which was indicated in the title and in the corresponding sections of the original Act. So far as warehouse receipts are concerned, the purpose of the statute is, in the first place, to prevent the issue of such receipts unless the property therein described has been actually received, and is in the possession of the person issuing the receipt. This purpose is manifested in section 1175 of the Code. The purpose, in the next place, is to give definite legal recognition to such receipts as true tokens of the possession of the property described in them; and to regulate the manner in which the holder of such a token of possession may, by an assignment of it, convey his interest in the property described as effectually as he could by a transfer and delivery of the property itself. The provisions to this end are embodied in sections 1177–1179. Undoubtedly it was the intention of the legislature to facilitate and throw safeguards around dealings in personal property by the use of paper representative of it. To this end the holder of a warehouse receipt is so far treated as the possessor of the property mentioned in it that his transfer of the receipt, in the mode prescribed by the statute, operates in the same manner as the direct delivery of the property itself would do. The transfer of the receipt is given effect as a symbolical delivery of possession. The statute does not undertake to make the receipt better evidence of title than the actual possession of the property itself. We cannot conceive that it could have been within the contemplation of the legislature that the provisions of the statute would enable a thief, by depositing the stolen property with a warehouseman, and obtaining a receipt for it in due form, to confer upon an innocent purchaser for value and in good faith a claim to the property which would prevail against that of the true owner.

In Collins *v.* Ralli, 20 Hun, 246, it was held that a New York statute substantially identical with the provision above quoted did not protect the purchasers for value and in good faith of warehouse receipts, when the possession of the cotton they represented by the person to whom they were issued had been larcenous. After quoting the statute, the court said: "The learned counsel for the defendants insist that the provisions of this section afford them complete protection against a recovery in this action; that, having purchased the cotton upon the faith of the negotiable warehouse receipts, and paid therefor full market value, this case falls within the spirit and the letter of the section. All the other sections of this Act, except the last, which is unimportant, prohibit the issue of false receipts, etc., and prescribe the penalty for a violation of their provisions. The scope and object of the Act, therefore, seems to be to protect the mercantile community against fraudulent practices by warehousemen, wharfingers, and others, in respect to these receipts for goods stored or represented to be stored with them. That this is the purpose is shown by the title of the Act. . . . The clause 'warehouse receipts given for any goods . . . stored or deposited with any warehouseman' means receipts given for goods so stored or deposited by any person having the title thereto, real or apparent, or authority of such person therefor. This section of the Act proceeds upon the assumption that the receipt is so issued. Any other construction would enable warehousemen to issue receipts for goods, known by them to be stolen, and so convey title to them, or even themselves to commit larceny, and, by issuing receipts for the stolen property, defraud the plundered owner of all title to and power of reclaiming it. Such a construction would work a change in the law hardly contemplated by the legislature when the Act under consideration was passed, and yet the construction insisted upon by the defendants would accomplish precisely this result. Courts often have to look beyond the mere words of a statute in determining its meaning, and give to it such an interpretation as the mischief sought to be cured and the evident intention of the legislature indicate." The judgment in that case was affirmed by the Court of Appeals (Collins *v.* Ralli, 85 N. Y. 637), and the decision has been approved in subsequent cases (Hentz *v.* Miller, 94 N. Y. 64; Soltau *v.* Gerdau, *supra*). To put it in the power of a factor to give effect to an unauthorized pledge of the property of his principal by resorting to the device of pledging a receipt for the property instead of the property itself, would as clearly be an abridgment of the common-law rights of the owner as it would be to allow a thief, by using a receipt for the stolen property instead of the property itself, to defeat the common-law right of the owner to reclaim the stolen property in whosesoever hands it may be found. The statute under consideration does not purport to deal with the right of the owner of personal property to recover it from the one who claims under a disposition of it which was unauthorized by the owner. The object in view being to recognize dealings in personal property by the use of certain tokens of its possession, to prevent the issue of such tokens except when the property mentioned in them has actually been received by the persons issuing them, and to regulate the transfer of the property by assignment of the token, as a substitute for actual delivery of the property. The statute was framed on the assumption that the possession of the property by the person to whom the token was issued was accompanied by ownership and a right to dispose of it, and questions presented by the assertion of a paramount claim to the property were not dealt with by the statute, but were left to be determined by existing laws governing the right of the true owner of property to follow and reclaim it in the hands of persons claiming under an unauthorized disposition of it by one not the true owner, but in actual possession of it. There is evidence in section 1178 of the Code of the absence of any intention to enable the holder of a warehouse receipt, by a transfer of it by indorsement, to confer any better claim to the property than he could if he had not stored the property with a warehouseman, but had invested the person with whom he dealt with actual possession of it. Immediately after the clause already quoted from that section is the following provision: "But this section must not be so construed as to affect or impair the lien of a landlord on such things or property for rent or advances, or to affect or impair any lien thereon created by contract, of which notice is given by registration in the manner prescribed by law." It is not to be supposed that the legislature was more solicitous to protect the rights of lienholders than those of the owners of the property. The assumption is that it is the owner who has had the property stored and obtained a warehouse receipt for it, and the provision just quoted simply makes it plain that he cannot, by a transfer of the receipt, any more than he could by a disposition of the property accompanied by an actual delivery of possession, affect or impair liens upon it. It is further provided in the same section that, "in the event of the loss or destruction of such receipt, the warehouseman, not having notice of the transfer thereof by indorsement, may make delivery of the things or property to the rightful owner thereof; and if the things or property, or any part thereof, be claimed or taken from the custody or possession of the warehouseman under legal process, the surrender thereof may be made without delivery or cancellation of such receipt, or without indorsement thereon." The first of these two clauses shows that it was assumed that the receipt was issued to the rightful owner of the property. The second of them shows that it was no part of the legislative intention to make the fact that his receipt is outstanding a protection to the warehouseman against paramount claims to the property, or to displace, in the case of the issue of a warehouse receipt to another, the common-law rules governing the rights of the owner to recover his property from a stranger claiming under a disposition of it not binding on him. The apparent object of the statutory provisions in reference to warehouse receipts is to give them, for purposes of commerce, recognition and credit as substitutes for the property described in them, and to give dealings in them the same effect as similar dealings with the property itself. We think that they are made negotiable only in the sense that in their passage through the channels of commerce the law regards the property which they describe as following them, and gives to their regular transfer by indorsement the effect of a manual delivery of the things specified in them. No intention is disclosed to give dealings in them any more controlling effect upon the title to the property they represent than would be given to similar dealings with the property itself. At last they are mere tokens of possession, and no guaranties of title by the persons issuing them. The warehouseman holds himself out as the custodian for the legal holder of the receipt of the property mentioned in it, but he does not warrant the title of the property against the claims of strangers to the contract of storage.

This view of the statute is well supported by pertinent authorities. By the express terms of the statute which was under consideration in the case of Insurance Co. *v.* Kiger, 103 U. S. 352, the unauthorized pledge by a factor of a warehouse receipt for the property of his principal was ineffectual as against the principal. On that ground the owner of the property in that case was held to be entitled to recover it, the adverse claim being under a pledge by the factor of warehouse receipts for it. But in overruling the claim of the pledgee against the warehouseman, based upon the provisions of the statute declaring warehouse receipts issued under it negotiable by indorsement, and making the warehouseman liable to the legal holder or owner of the receipt for the market value of the property therein described, the court said: "There is no pretence of fraud or collusion, and we think it would be a surprise to warehousemen to be told that when they issue their receipts for property in store they become not only responsible as custodians of the property, but guarantors of its title to the assignees of the receipts. Such a rule would make it necessary for a warehouseman, before giving a receipt, not only to ascertain whether he had the property actually in store, but whether the title of the bailor was valid and unincumbered. Certainly this could not have been in contemplation when warehouse receipts were made by statute negotiable, and to some extent evidence of ownership." In the course of the opinion, these expressions were used: "Undoubtedly the possession of the receipts was equivalent to the possession of the property. . . . The receipt in the hands of the company represented the cotton stored by Aiken & Watt, and gave the company the same rights it would have had if the cotton, instead of the receipts, had been handed over. The company got by the receipt such interest in the cotton as Aiken & Watt could by their pledge convey, and that is all Boyd & Co. agreed to deliver on the return of their receipts by the lawful holder." In noticing a Missouri statute, almost identical in its title and provisions with the original Act on which the sections of the Code under consideration were based, it was said in Allen *v.* Bank, 120 U. S. 20-35, 7 Sup. Ct. Rep. 460: "None of these provisions are limited or even addressed to factors or other agents authorized to sell goods of their principals, and intrusted for that purpose with the possession either of the goods or of warehouse receipts, bills of lading, or other similar documents in which such agents are named as consignees. But their leading object is to regulate the manner and effect of transferring warehouse receipts and bills of lading by indorsement." The meaning of the later statute which was relied on in that case was not determined by the court except to the extent of the decision that the pledgee of the warehouse receipts, without their indorsement in writing, was not entitled to its protection. As representatives of property, bills of lading and warehouse receipts are instruments of similar character. They are dealt with as substitutes for the property itself. The assignment of a bill of lading for value, while the goods are in transit, is limited to the effect of symbolizing their sale and delivery, and the assignee is thereby invested with all the rights of a purchaser with actual delivery of possession, but no more. Douglas *v.* Bank, 86 Ky. 176, 5 S. W. Rep. 420; Moore *v.* Robinson, 62 Ala. 537. In Shaw *v.* Railroad Co., 101 U. S. 557, it was recognized that a statute declaring that bills of lading "shall be negotiable by written indorsement thereon and delivery, in the same manner as bills of exchange and promissory notes," should not, in the absence of language clearly evidencing such an intention, be construed as effecting such an innovation upon the common-law right of the owner of property to protection against its misappropriation by others that such misappropriation could be successfully made by the use of a symbol or representative of the property, when it would not prevail against the claim of the owner if the possession of the property itself had been acquired in a similar manner. In National Bank of Commerce *v.* Chicago B. & N. R. Co., 44 Minn. 224, 46 N. W. Rep. 342, 560, the proposition was stated and applied that it is always a good defence to a carrier, even against an innocent indorsee of the bill of lading, that the property was taken from its possession by one having a paramount title; and it was decided that the correctness of this proposition was not affected by a statute which provided that bills of lading or receipts for any goods, wares, merchandise, etc., when in transit by cars or vessels, "shall be negotiable, and may be transferred by indorsement and delivery of such receipt or bill of lading, and any person to whom the said receipt or bill of lading may be transferred shall be deemed and taken to be the owner of the goods, wares, or merchandise therein specified," etc. Mitchell, J., delivering the opinion of the court, said of this statute: "It was not intended to totally change the character of bills of lading, and put them on the footing of bills of exchange, and charge the negotiation of them with the consequences which attend or follow the negotiation of bills or notes. On the contrary, we think the sole object of the statute was to prescribe the mode of transferring or assigning bills of lading, and to provide that such transfer and delivery of these symbols of property should, for certain purposes, be equivalent to an actual transfer and delivery of the property itself." Our conclusion is that it would be a perversion of the manifest purpose of the statute to construe it as having the effect of putting the symbol of the property upon a higher plane, as an evidence of title, than the actual possession of the property it describes. The statute does not undertake to make the transfer and delivery of the symbol more than the equivalent of an actual transfer and delivery of the property itself.

Conceding that the clause in the contract of pledge, "which cotton has been advanced upon by us to its full value," does not show that the pledgor's character as a factor was recognized in the transaction, and that it was the intention of the parties to limit the operation of the pledge to the pledgor's actual interest in the cotton by reason of advances made upon it, we have, then, the simple case of a pledge by a factor of the property of his principal for his own use. The warehouse receipts which he obtained are to be regarded as the cotton itself which he held in the capacity of an agent to sell. We have no "Factors' Act" to raise up a statutory estoppel against the owner, based upon his act in intrusting the factor with possession of the goods, or documentary evidence of ownership and right of disposal, and thereby leading innocent third persons to deal with the factor on the faith of his apparent ownership. There is nothing to take this case out of the influence of the common-law rule, which protects the owner of personal property against an unauthorized pledge of it by one who held it merely as factor or as agent to sell. The original defendants, the warehousemen, having disclaimed all interest in the suit, the plaintiff was entitled to recover his cotton, and the claim of the bank, based upon the attempted pledge by the H. C. Keeble Company, presented no legal obstacle to the plaintiff's recovery.

It affirmatively appears that the appellant was not injured by the admission of evidence of the market value of the cotton prior to the date of the transfer of the warehouse receipts. That evidence was that in September the cotton was worth $9\frac{3}{8}$ cents per pound. The undisputed evidence was that the cotton was worth 9 cents per pound in December and January, after the transfer of the warehouse receipts. The jury assessed the value of all of it at only 9 cents per pound. This valuation was supported by the undisputed evidence, excluding the evidence of the higher value in September. In view of the conclusion that on the undisputed evidence the plaintiff was entitled to recover, it is unnecessary to consider the various charges given and refused.

Affirmed.

STONE, C. J. The case of Commercial Bank *v.* Lee is in all material respects precisely like the case of Bank *v.* Hurt. In the opinion in that case all the facts material to a consideration of this case are presented and commented on. The claim of the Commercial Bank in the present suit is the same as that asserted by it in its suit against Hurt. In this case the asserted claim to the cotton in controversy is by virtue of the identical indorsement of cotton receipts by the H. C. Keeble Company which was relied on in that case. The alleged transfer was indorsed on the back of the note which the H. C. Keeble Company gave the Commercial Bank of Selma, and is in the following words: "We hereby transfer two hundred and ninety-eight bales of cotton, marked, numbered, and stored as shown in the warehouse receipts, which are herewith transferred and delivered as collateral for the within note, which cotton has been advanced upon by us to its full value; and we hereby authorize the Commercial Bank of Selma to take actual possession of the same at any time they may desire, and to sell the same without notice, at public or private sale, applying the proceeds to the credit of this note. [Signed] H. C. Keeble Company." Accompanying the indorsement, the Keeble Company delivered to the bank warehouse receipts for the cotton which is the subject of this suit. Those receipts were signed by warehousemen, and in them they acknowledged they had received the cotton from the H. C. Keeble Company for storage, at the same time announcing therein that W. R. Lee was the shipper. The receipts also stated that the name W. R. Lee was marked on the cotton. It was an uncontroverted fact on the trial that the H. C. Keeble Company was engaged in the sale of cotton as factors for their customers. There was no testimony offered tending to prove the truth of the recital in the indorsement that the H. C. Keeble Company had made advances on the cotton in controversy. The claim of the Commercial Bank is rested mainly on section 1178 of the Code of 1886, which reads as follows: "The receipt of a warehouseman, on which the words 'Not negotiable' are not plainly written or stamped, may be transferred by the indorsement thereof, and any person to whom the same is transferred must be deemed and taken to be the owner of the things or property therein specified, so far as to give validity to any pledge, lien, or transfer made or created by such person." This section of the Code of 1886 was doubtless taken from section 6 of the Act "To prevent the issue of false receipts," etc., approved Feb. 28, 1881 (Sess. Acts, 1880-81, p. 133). The rendering of the Statute in the Code of 1886 is not a literal copy of the original statute. Possibly it was the intention to embody the same idea. As expressed in the Code, it may admit of question whether its language is broad enough to place the first indorsee of a warehouse receipt on the high ground claimed for him in this suit. Literally that statute creates the presumption of ownership in the first indorsee so far only as to give validity to any pledge, lien, or transfer made or created "by such person." This language, if interpreted by grammatical rules, only authorizes the person to whom the warehouse receipt is indorsed to pledge or transfer it; and only upholds the binding efficacy of such pledge or transfer, when made by the indorsee. Thus interpreted, the Commercial

Bank can claim no benefit or advantage under that statute, because the pledge or transfer was not made by an indorsee of the warehouse receipts. Possibly the original statute, as enacted by the legislature, is susceptible of a broader interpretation. We need not, however, decide this question. We prefer to place our decision on a different principle. It will be remembered that in the indorsement on the note by which the Keeble Company transferred to the Commercial Bank all the title or interest the latter can or does assert to the cotton is the following language: "Which cotton has been advanced upon by us to its full value." This language clearly and unmistakably shows that the Keeble Company was not the owner of the cotton in absolute right, but that they only claimed to have advanced upon it to its full value. This was notice to the bank that the Keeble Company was not the owner of the cotton, but that it asserted a lien upon it by virtue of advances alleged to have been made by it to the owner. And this notice was strengthened by the recital in the warehouse receipt that Lee was the shipper of the cotton. If this pertinent information had been followed up, the Commercial Bank could not have failed to learn the true title and status of the cotton. Notice, sufficient to put one on inquiry, is notice of all that such inquiry will naturally lead to. This leads us to the inevitable conclusion that the bank, in receiving the transfer of the warehouse receipts, received them with the equivalent of notice of the true state of the account between the owner and shipper of the cotton and the Keeble Company, the factor for its sale. From this it follows that the bank became the purchaser, not of the cotton, but only of the interest and claim which the Keeble Company owned and could assert. Such interest, acquired with such notice, is in no sense the character of interest which section 1178 of the Code intends to secure and protect in an indorsee of a warehouse receipt. It rests, not upon the strength of the indorsement made, but in the confidence the indorsee entertains in the assurance that the cotton had been advanced upon to its full value. The transaction does not fall within the influence of the statute invoked in its support. As said by Mr. Justice Bronson, in discussing this subject in a leading case: "It is impossible to suppose that the legislature intended a factor to commit a fraud upon his principal by pledging or obtaining advances upon the goods for his own purposes, when the pledgee or person making the advances upon the goods knew that he was not dealing with the true owner." Stevens *v.* Wilson, 6 Hill, 512, 3 Denio, 472; Warner *v.* Martin, 11 How. 209; Covell *v.* Hill, 6 N. Y. 374; Cartwright *v.* Wilmerding, 24 N. Y. 521; Dows *v.* Greene, *id.* 638; Howland *v.* Woodruff, 60 N. Y. 73; Allen *v.* Bank, 120 U. S. 20, 7 Sup. Ct. Rep. 460; Shaw *v.* Railroad Co., 101 U. S. 557. There is no error in the record.

Affirmed.

NOTE. — Factors Acts have been passed in the following States: Kentucky, Laws of 1880, May 5; Maine, Rev. St. c. 31; Maryland, Rev. Code, Art. 34; Massachusetts, Rev. L. c. 68; Missouri, Rev. St. § 6281; New York, Acts of 1830, c. 179; Ohio, Rev.

St. §§ 3215–3219; Pennsylvania, Brightly's Purdon's Dig. p. 773; Rhode Island, Pub. St. c. 136; Wisconsin, Rev. St. §§ 3345, 3346.

Without the aid of statute a factor has power to sell on credit. Scott *v.* Surman, Willes, 400, 407; De Lazardi *v.* Hewitt, 7 B. Mon. 697; Greely *v.* Bartlett, 7 Greenl. 172, 179; Pinkham *v.* Crocker, 77 Me. 563; Goodenow *v.* Tyler, 7 Mass. 36; Roosevelt *v.* Doherty, 129 Mass. 301, 303; Van Alen *v.* Vanderpool, 6 Johns. 69; Geyer *v.* Decker, 1 Yeates, 486.

But a pledge by a factor is not valid unless protected by statute. Cole *v.* Northwestern Bank, L. R. 10 C. P. 354; Johnson *v.* Credit Lyonnais Co., 3 C. P. D. 32; Warner *v.* Martin, 11 How. 209; Allen *v.* St. Louis Bank, 120 U. S. 20; Wright *v.* Solomon, 19 Cal. 64; Gray *v.* Agnew, 95 Ill. 315; First Nat. Bank *v.* Schween, 127 Ill. 573; Michigan State Bank *v.* Gardner, 15 Gray, 362, 374; Hazard *v.* Fiske, 83 N. Y. 287; Laussatt *v.* Lippincott, 6 S. & R. 386; McCreary *v.* Gaines, 55 Tex. 485.

Nor can a factor transfer title to his principal's goods by way of barter. Guerreiro *v.* Peile, 3 B. & Ald. 616; Warner *v.* Martin, 11 How. 209, 226; Potter *v.* Dennison, 5 Gilm. 590; Benny *v.* Rhodes, 18 Mo. 151; Benny *v.* Pegram, 18 Mo. 191; Holton *v.* Smith, 7 N. H. 446. In Warner *v.* Martin, 11 How. 209, 224, Mr. Justice Wayne said in regard to wrongful transfers by a factor: —

"When goods are so pledged or disposed of, the principal may recover them back by an action of trover against the pawnee, without tendering to the factor what may be due to him, and without any tender to the pawnee of the sum for which the goods were pledged (Daubigney *v.* Duval, 5 T. R. 604); or without any demand of such goods (6 East, 538; 12 Mod. 514); and it is no excuse that the pawnee was wholly ignorant that he who held the goods held them as a mere agent or factor (Martini *v.* Coles, 1 Maule & Selw 140), unless, indeed, where the principal has held forth the agent as the principal (6 Maule & Selw. 147). But a factor who has a lien on the goods of his principal may deliver them over to a third person, as a security to the extent of his lien, and may appoint such person to keep possession of the goods for him. In that case the principal must tender the amount of the lien due to the factor, before he can be entitled to recover back the goods so pledged. Hartop *v.* Hoare, Str. 1187; Daubigny *v.* Duval, 5 T. R. 604; 6 East, 538; 7 East, 5; 3 Chitty's Com. Law, 193. So a sale upon credit, instead of being for ready money, under a general authority to sell, and in a trade where the usage is to sell for ready money only, creates no contract between the owner and the buyer, and the thing sold may be recovered in an action of trover. Paley, Principal and Agent, 109; 12 Mod. 514. Under any of these irregular transfers, courts of equity (as is now being done in this case) will compel the holder to give an account of the property he holds.

"But it was said, though a factor may not pledge the merchandise of his principal as a security for his debt, he may sell to his creditor in payment of an antecedent debt. No case can be found affirming such a doctrine. It is a misconception, arising from the misapplication of correct principles to a case not belonging to any one of them. The power of the factor to make such a sale, and the right of the creditor to retain the property, has been erroneously put upon its being the usual course of business between factors to make a set-off of balances as they may exist in favor of one or the other of them against the price of subsequent purchases in their dealings. The difference between such a practice and a sale for an antecedent debt must be obvious to every one when it is stated. In the one, the mutual dealing between mercantile persons who buy and sell on their own account, and who also sell upon commission for others, is according to the well-known usage of trade. Its convenience requires that such a practice shall be permitted. But it must be remembered it is an allowance for the convenience of trade, and for a readier settlement of accounts between factors for their purchases from each other in that character. It does not, however, in any instance, bind a principal in the transfer of merchandise, if there has been a departure from the usages of trade, or a violation of any principle regulating the obligations and rights of principal and factor.

"Again, it has been supposed that the right of a factor to sell the merchandise of his principal to his own creditor, in payment of an antecedent debt, finds its sanction in the fact of the creditor's belief that his debtor is the owner of the merchandise, and his ignorance that it belongs to another; and if in the last he has been deceived, that the person by whom the delinquent factor has been trusted shall be the loser. The principle does not cover the case. When a contract is proposed between factors, or between a factor and any other creditor, to pass property for an antecedent debt, it is not a sale in the legal sense of that word or in any sense in which it is used in reference to the commission which a factor has to sell. See Berry *v.* Williamson, 8 Howard, 495. It is not according to the usage of trade. It is a naked transfer of property in payment of a debt. Money, it is true, is the consideration of such a transfer, but no money passes between the contracting parties. The creditor pays none, and when the debtor has given to him the property of another in release of his obligation, their relation has only been changed by his violation of an agency which society in its business relations cannot do without, which every man has a right to use, and which every person undertaking it promises to discharge with unbroken fidelity. When such a transfer of property is made by a factor for his debt, it is a departure from the usage of trade, known as well by the creditor as it is by the factor. It is more; it is the violation of all that a factor contracts to do with the property of his principal. It has been given to him to sell. He may sell for cash, or he may do so upon credit, as may be the usage of trade. A transfer for an antecedent debt is not doing one thing or the other. Both creditor and debtor know it to be neither. That their dealing for such a purpose will be a transaction out of the usage of the business of a factor. It does not matter that the creditor may not know, when he takes the property, that the factor's principal owns it; that he believed it to be the factor's in good faith. His dealing with his debtor is an attempt between them to have the latter's debt paid by the accord and satisfaction of the common law. That is, when, instead of a sale for a price, a thing is given by the debtor to the creditor in payment, in which we all know that, if the thing given is the property of another, there will be no satisfaction. It is the *dation en payement* of the civil law as it prevails in Louisiana, which is, when a debtor gives, and the creditor receives, instead of money, a movable or immovable thing in satisfaction of the debt."

CHAPTER IV.

SPECIAL RIGHTS AND REMEDIES OF THE SELLER.

SECTION I.

Recovery of the Price.

BEMENT *v.* SMITH.

Supreme Court of New York, July Term, 1836.

read

[*Reported in* 15 *Wendell*, 493.]

This was an action of assumpsit, tried at the Seneca circuit in November, 1834, before the Hon. Daniel Moseley, one of the circuit judges.

In March, 1834, the defendant employed the plaintiff, a carriage-maker, to build a sulky for him, to be worth ten dollars more than a sulky made for a Mr. Putnam; for which he promised to pay $80, part in a note against one Joseph Bement, a brother of the plaintiff, for the sum of ten or eleven dollars, and the residue in his own note, at six or twelve months, or in the notes of other persons as good as his own. In June, 1834, the plaintiff took the sulky to the residence of the defendant, and told him that he delivered it to him, and demanded payment, in pursuance of the terms of the contract. The defendant denied having agreed to receive the carriage. Whereupon the plaintiff told him he would leave it with a Mr. De Wolf, residing in the neighborhood; which he accordingly did, and in July, 1834, commenced this suit. It was proved that the value of the sulky was $80, and that it was worth $10 more than Putnam's. The declaration contained three special counts, substantially alike, setting forth the contract, alleging performance on the part of the plaintiff, by a delivery of the sulky, and stating a refusal to perform, on the part of the defendant. The declaration also contained a general count, for work and labor, and goods sold. The judge, after denying a motion for a nonsuit, made on the assumed grounds of variance between the declaration and proof, charged the jury that the tender of the carriage was substantially a fulfilment of the contract on the part of the plaintiff, and that he was entitled to sustain his action for the price agreed upon between the parties. The defendant's counsel requested the judge to charge the jury that the measure of damages was not the value of the sulky, but only the expense of taking it to the residence of the defendant, delay, loss of sale, &c. The judge declined so to charge, and reiterated the instruction that the value of the article was the measure of damages. The jury found for the plaintiff, with $83.26 damages. The defendant moved for a new trial. The cause was submitted on written arguments.

W. R. Smith, for the defendant.

O. H. Platt and *J. F. Stevens*, for plaintiff.

By the court, SAVAGE, C. J. The defendant presents no defence upon the merits. His defence is entirely technical, and raises two questions: 1. Whether the tender of the sulky was equivalent to a delivery, and sustained the averment in the declaration that the sulky was delivered; and 2. Whether the rule of damages should be the value of the sulky, or the particular damages to be proved, resulting from the breach of the contract. There is no question raised here upon the Statute of Frauds. The contract is therefore admitted to be a valid one; and relating to something not *in solido* at the time of the contract, there is no question of its validity.

The plaintiff agreed to make and deliver the article in question at a particular time and place, and the defendant agreed to pay for it, on delivery, in a particular manner. The plaintiff made, and as far as was in his power, delivered the sulky. He offered it to the defendant at the place and within the time agreed upon. It was not the plaintiff's fault that the delivery was not complete, that was the fault of the defendant. There are many cases in which an offer to perform an executory contract is tantamount to a performance. This, I apprehend, is one of them. The case of Towers *v.* Osborne, Strange, 506, was like this. The question here presented was not raised, but the defendant there sought to screen himself under the Statute of Frauds. The defendant bespoke a chariot, and when it was made, refused to take it; so far the cases are parallel. In an action for the value, it was objected that the contract was not binding, there being no note in writing, nor earnest nor delivery. The objection was overruled. In that case the action was brought for the value, not for damages for the breach of contract. This case is like it in that particular; this action is brought for the value, that is, for the price agreed on; and it is shown that the sulky was of that value. The case of Crookshank *v.* Burrell, 18 Johns. R. 58, was an action in which the plaintiff declared against the defendant on a contract whereby the plaintiff was to make the woodwork of a wagon, for which the defendant was to pay in lambs. The defendant was to come for the wagon. The question was upon the Statute of Frauds. Spencer, C. J., states what had been held in some of the English cases, 4 Burr. 2101, and 7 T. R. 14, that a distinction existed between a contract to sell goods then in existence, and an agreement for a thing not yet made. The latter is not a contract for the sale and purchase of goods, but a contract for work and labor merely. The case of Crookshank *v.* Burrell is much like this, with this exception: there the purchaser was to send for the wagon; here the manufacturer was to take it to him. There it was held that the manufacturer was entitled to recover, on proving that he had made the wagon according to the contract: here it is proved that the sulky was made, and taken to the place of delivery according to contract. The merits of the two cases are the same. It seems to be conceded that an averment of a tender of the sulky by the plaintiff, and a refusal of the defendant to receive it, would have been sufficient; and if so, it seems rather technical to turn the plaintiff out of court, when he has proved all that would have been required of him to sustain his action. The plaintiff, in his special counts, does not declare for the sale and delivery, but upon the special contract; and herein this case is distinguishable from several cases cited on the part of the defendant, and shows that it was not necessary to have declared for goods bargained and sold. It seems to me, therefore, that the judge was right in refusing the nonsuit, and in holding that the evidence showed substantially a fulfilment of the contract. The variance as to the amount of Joseph Bement's note, I think, is immaterial; but if otherwise, it may be amended. The alleged variance as to the price of the sulky is not sustained by the facts of the case.

The only remaining question, therefore, is as to the damages which the plaintiff was entitled to recover. It is true that the plaintiff does not recover directly as for goods sold; but in the case of Towers *v.* Osborne the plaintiff recovered the value of the chariot, and in Crookshank *v.* Burrell the recovery was for the value of the wagon. The amount of damages which ought to be recovered was not the question before the court in either of those cases; but if the value of the article was not the true measure, we may infer that the point would have been raised. Upon principle, I may ask, what should be the rule? A mechanic makes an article to order, and the customer refuses to receive it: is it not right and just that the mechanic should be paid the price agreed upon, and the customer left to dispose of the article as he may? A contrary rule might be found a great embarrassment to trade. The mechanic or merchant, upon a valid contract of sale, may, after refusal to receive, sell the article to another and sue for the difference between the contract price and the actual sale. Sands and Crump *v.* Taylor and Lovett, 5 Johns. R. 395, 410, 411; 1 Salkeld, 113; 6 Modern, 162. In the first of these cases, the plaintiffs sold the defendants a cargo of wheat. The defendants received part, but refused to receive the remainder. The plaintiffs tendered the remainder, and gave notice that unless it was received and paid for, it would be sold at auction, and the defendants held responsible for any deficiency in the amount of sales. It was held, upon this part of the case, that the subsequent sale of the residue was not a waiver of the contract, the vendor being at liberty to dispose of it *bona fide*, in consequence of the refusal of the purchaser to accept the wheat. This case shows that where there has been a valid contract of sale, the vendor is entitled to the full price, whether the vendee receive the goods or not. I cannot see why the same principle is not applicable in this case. Here was a valid contract to make and deliver the sulky. The plaintiff performed the contract on his part. The defendant refused to receive the sulky. The plaintiff might, upon notice, have sold the sulky at auction, and if it sold for less than $80, the defendant must have paid the balance. The reason given by Kent, C. J., 5 Johns. R. 411, is, that it would be unreasonable to oblige him to let the article perish on his hands, and run the risk of the insolvency of the buyer. But if after tender or notice, whichever may be necessary, the vendor chooses to run that risk and permit the article to perish, or, as in this case, if he deposit it with a third person for the use of the vendee, he certainly must have a right to do so, and prosecute for the whole price. Suppose a tailor makes a garment, or a shoemaker a pair of shoes, to order, and performs his part of the contract, is he not entitled to the price of the article furnished? I think he is, and that the plaintiff in this case was entitled to his verdict.

The question upon the action being prematurely brought before the expiration of the credit which was to have been given, cannot properly arise in this case, as the plaintiff recovers upon the special contract, and not upon a count for goods sold and delivered.

New trial denied.[1]

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[1] "The vendor of personal property, in a suit against the vendee for not taking and paying for the property, has the choice ordinarily of either one of three methods to indemnify himself: (1) He may store or retain the property for the vendee, and sue him for the entire purchase price; (2) he may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; or, (3) he may keep the property as his own, and recover the difference between the market price at the time and place of delivery, and the contract price." Dustan *v.* McAndrew, 44 N. Y. 72, 78, *per* Earl, C.

Habeler *v.* Rogers, 131 Fed. Rep. 43, 45 (C. C. A.); Kinkead *v.* Lynch, 132 Fed. Rep. 692; Magnes *v.* Sioux City Seed Co., 14 Col. App. 219; Darby *v.* Hall, 3 Pennewill (Del.), 25; Ames *v.* Moir, 130 Ill. 582; Comstock *v.* Price, 103 Ill. App. 19; Rastetter *v.* Reynolds, 160 Ind. 133, 139; McCormick Machine Co. *v.* Markert, 107 Ia. 340; Ball *v.* Offutt, 10 Bush, 632 (*conf.* Singer Mfg. Co. *v.* Cheney, 21 Ky. L. Rep. 550); McIntyre *v.* Kline, 30 Miss. 361; Atkinson *v.* Truesdell, 127 N. Y. 230; Van Brocklin *v.* Smeallie, 140 N. Y. 70; Cragin *v.* O'Connell, 50 N. Y. App. Div. 339, 169 N. Y. 573; Levy *v.* Glassberg, 92 N. Y. Supp. 50 (N. Y. App. Div.); Shawhan *v.* Van Nest, 25 Ohio St. 490; Rhodes *v.* Mooney, 43 Ohio St. 421, 425; Smith *v.* Wheeler, 7 Oreg. 49; Ballentine *v.* Robinson, 46 Pa. 177; Reynolds *v.* Calender, 19 Pa. Super. Ct. 610; Pratt *v.* S. Freeman & Sons Co., 115 Wis. 648, *acc.* See also Dwiggins *v.* Clark, 94 Ind. 49; Black River Lumber Co. *v.* Warner, 95 Mo. 374; Gordon *v.* Norris, 49 N. H. 376.

Atkinson *v.* Bell, 8 B. & C. 277 (see also Elliott *v.* Pybus, 10 Bing. 512); Grier *v.* Simpson, 8 Houst. 7; John Deere Co. *v.* Gorman, 9 Kan. App. 675; Moody *v.* Brown, 34 Me. 107; Tufts *v.* Grewer, 83 Me. 407; Greenleaf *v.* Gallagher, 93 Me. 549; Greenleaf *v.* Hamilton, 94 Me. 118; Tufts *v.* Bennett, 163 Mass. 398; McCormick Machine Co. *v.* Balfany, 78 Minn. 370; First Bank *v.* Ragsdale, 171 Mo. 168, 185 (*conf.* Ozark Lumber Co. *v.* Chicago Lumber Co., 51 Mo. App. 555); Funke *v.* Allen, 54 Neb. 407; Unexcelled Fire Works Co. *v.* Polites, 130 Pa. 536; Puritan Coke Co. *v.* Clark, 204 Pa. 556; Gammage *v.* Alexander, 14 Tex. 414; Tufts *v.* Lawrence, 77 Tex. 526; Rider *v.* Kelley, 32 Vt. 268; American Leather Co. *v.* Chalkley, 101 Va. 458, 463, *contra.* See also Morris *v.* Cohn, 55 Ark. 401; Dowagiac Mfg. Co. *v.* Mahon, 101 N. W. Rep. 903 (N. Dak.).

JAMES T. WHITE & ANOTHER *v.* JAMES M. SOLOMON.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, NOVEMBER 23–26, 1895.

[*Reported in* 164 *Massachusetts,* 516.]

HOLMES, J. This is an action upon the following contract:

"White's Physiological Manikin.

"Place and date: 75 Court Street, Boston, Mass., June 7, 1889.

"Messrs. J. T. White & Co., Publishers, New York.

"Gentlemen: Please deliver according to shipping directions given below, one White's Physiological Manikin, Medical Edition, price $35.00. In consideration of its delivery for me, freight prepaid, at the express office specified below, I promise to pay the sum of $35.00 as follows: $10.00 upon delivery at the express office, and the balance in monthly payments of $5.00, each payable on the first of each and every month thereafter, until the whole amount is paid, for which the publishers are authorized to draw when due.

"It is expressly hereby agreed that in case of the failure to pay any one of the said instalments after maturity thereof, all of said instalments remaining unpaid shall immediately become due and payable, and the said James T. White & Co. may take or cause to be taken the said manikin from the possession of the said or their representatives, to whom he may have delivered the same without recourse against said James T. White & Co. for any money paid on account thereof. It being expressly agreed that the money paid on account shall be for the use and wear of said manikin.

"Shipping directions to be filled out by the agent.

"To whom sent. J. M. Solomon.
75 Court Street.
Town, Boston. County of Suffolk.
State, Massachusetts.

"James M. Solomon,
75 Court Street,
Agent W. F. Byrd."

There was evidence, and we must assume the judge who tried the case to have found, that the manikin was delivered as agreed to the express company, freight prepaid, that the defendant refused to receive it, that in consequence the express company after a time left the manikin at the plaintiffs' place of business, in pursuance of a rule of the company and without the plaintiffs' assent, and that it is held subject to the defendant's order. There had been no repudiation of the contract by the defendant before the delivery of the manikin at the express office.

The main question is whether the judge who tried the case ought to have ruled that "the plaintiffs are not entitled to recover the price of the article in question, but must offer evidence to the court upon the question of damages for the alleged breach of said contract." A majority of the court are of opinion that this ruling properly was refused. We assume in favor of the defendant, but without deciding, that the title to the manikin did not pass by delivery at the express office, but that assumption does not dispose of the case. In an ordinary contract of sale the payment and the transfer of the goods are to be concurrent acts, and if the buyer refuses to accept the goods, even wrongfully, he cannot be sued for the price, because the event on which he undertook to pay the price has not happened; and although the fact that it has not happened is due to his own wrong, still he has not promised to pay the price in the present situation, but must be sued for his breach of contract in preventing the event on which the price would be due from coming to pass. The damages for such a breach necessarily would be diminished by the fact that the vendor still had the title to the goods. But in the case at bar the buyer has said in terms, that although the title does not pass by the delivery to the express company, if it does not, delivery shall be the whole consideration for an immediate debt (partly *solvendum in futuro*) of the whole value of the manikin, and that the passing of the title shall come as a future advantage to him when he has paid the whole. The words "in consideration of its delivery" are not accidental or insignificant. The contract is carefully drawn, so far as to make clear that the vendors intend to reserve unusual advantages and to impose unusual burdens. We are not to construe equities into the contract, but to carry it out as the parties were content to make it. If a man is willing to contract that he shall be liable for the whole value of a chattel before the title passes, there is nothing to prevent his doing so, and thereby binding himself to pay the whole sum. See the observations of Blackburn, J., in Martineau *v.* Kitching, L. R. 7 Q. B. 436, 455. Benjamin, Sales, (4th ed.) 716, 717. When, as here, all the conditions have been complied with the performance of which by the terms of the contract entitles the vendors to the whole sum, if the vendors afterwards have not either broken the contract or done any act diminishing the rights given them in express words, the buyer cannot by an act of his own repudiating the title gain a right of recoupment, or otherwise diminish his obligation to pay the whole sum which he has promised. See Smith *v.* Bergengren, 153 Mass. 236, 238.

If the first payment of ten dollars upon delivery were to be made upon delivery to the buyer, it well may be that, if the buyer refused to accept the manikin or to pay the ten dollars, the sellers' only remedy would be for a breach, and that they could not leave the manikin at his house and waive the payment against his will, with the result of making the whole sum due. But here the delivery is to be to an express company and the provision for payment of ten dollars "upon delivery at the express office" must mean after the delivery, so that the delivery is the first act, and by itself without more fixes the rights of the vendors to the price, just as the transfer of the stock did in Thompson *v.* Alger, 12 Met. 428, 444. Our decision is in accord with the following cases; we know of no decisions to the contrary. Marvin Safe Co. *v.* Emanuel, 21 Abb. N. C. 181. Brewer *v.* Ford, 54 Hun, 116, 120; s. c. 59 Hun, 17, 19; 126 N. Y. 643. Carnahan *v.* Hughes, 108 Ind. 225.[1] See further Burnley *v.* Tufts, 66 Miss. 48; Tufts *v.* Griffin, 107 N. C. 47; but compare Tufts *v.* Grewer, 83 Maine, 407; Swallow *v.* Emery, 111 Mass. 355, 357.

Two remaining exceptions may be disposed of in a few words. It is objected that a deposition of one of the plaintiffs was not admissible because he refused to answer a cross-interrogatory. The cross-interrogatory was whether or not one Byrd had made other sales than the contract in suit for the plaintiffs. It does not appear to have been material. Therefore the deposition properly was admitted. We need not consider whether, if the question had been material, the deposition ought to have been excluded unless before the trial the defect had been brought to the attention of the court that it might pass such order on the subject as should seem proper.

It was objected that there was no evidence of the defendant's signature. But the defendant's answer to an interrogatory, "The signature resembles mine. I wish to have the contract identified before answering further," coupled with the absence of any later denial, was enough. *Exceptions overruled.*[2]

JAMES W. TUFTS *v.* J. S. GRIFFIN.

NORTH CAROLINA SUPREME COURT, SEPTEMBER TERM, 1890.

[*Reported in* 107 *North Carolina*, 47.]

SHEPHERD, J. This is a case of the first impression in this State. We have here an absolute promise of the defendant to pay the plaintiff a certain sum, it being the balance of the purchase-money due the plaintiff upon the sale of a soda apparatus to the defendant. The sale was a conditional one (see Clayton *v.* Hester, 80 N. C. 275; Frick *v.* Hilliard, 95 N. C. 117, and the cases cited), and under the contract, the defendant took the apparatus into his possession and used it in all respects as his own. Without any negligence on the part of the defendant, and before any default in the payment of the purchase-money, the property was destroyed by fire.

The question is, who shall bear the loss? The defendant insists that it should fall upon the plaintiff, because the transaction amounted to nothing more than an executory agreement to sell, and that, inasmuch as the plaintiff cannot now perform the contract, the defendant should not be compelled to pay. It is very true that such contracts are sometimes called executory (as in the case of Ellison *v.* Jones, 4 Ired. 48), and the vendee is also termed a bailee (Perry *v.* Young, 105 N. C. 466), but it must be observed that these expressions are used in reference to the strict legal title to the property, and they can, therefore, have no influence in the determination of the present question, which is purely one of consideration for an absolute promise to pay.

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[1] Smith *v.* Aldrich, 180 Mass. 367; Gray *v.* Booth, 64 N. Y. App. Div. 231; National Cash Register Co. *v.* Hill, 48 S. E. Rep. 637 (N. C.); Tufts *v.* Poness, 32 Ont. 51.

[2] FIELD, C. J., wrote a dissenting opinion in which ALLEN and MORTON, JJ., concurred.

The recent decision in Tufts *v.* Burnley (66 Miss. 49) is directly in point. There, it seems that this same plaintiff sold a soda apparatus under a contract precisely similar to this, and the property was destroyed, as in this case, after some of the notes had been paid and before the maturity of the others. The Court decided that the plaintiff was entitled to recover the amount due upon the remaining notes. As we entirely concur in the reasoning upon which the decision is based, we will reproduce a part of the language of the opinion. The Court says: " Burnley unconditionally and absolutely promised to pay a certain sum for the property, the possession of which he received from Tufts. The fact that the property has been destroyed while in his custody, and before the time for the payment of the note last due, on payment of which only his right to the legal title of the property would have accrued, does not relieve him of payment of the price agreed on. He got exactly what he contracted for, viz., the possession of the property and the right to acquire an absolute title by payment of the agreed price. The transaction was something more than an executory conditional sale. The seller had done all he was to do, except to receive the purchase-price; the purchaser had received all that he was to receive as the consideration of his promise to pay. The inquiry is not whether, if he had foreseen the contingency which has occurred, he would have provided against it, nor whether he might have made a more prudent contract, but it is whether, by the contract, he has made his promise absolute or conditional. The contract was a lawful one, and, as we have said, imposed upon the buyer an absolute obligation to pay. To relieve him from this obligation, the Court must make a new agreement for the parties, instead of enforcing the one made, which it cannot do."

As is said in the foregoing extract, the vendor has done all that he was required to do, and the transaction amounted to "a conditional sale, to be defeated upon the non-performance of the conditions. . . . The vendee had an interest in the property which he could convey, and which was attachable by his creditors, and which could be *ripened* into an absolute title by the performance of the condtions." 1 Whart. Cont. 617.

The vendee had the actual legal and rightful possession, with a right of property upon the payment of the money. Vincent *v.* Cornell, 13 Mass. 296.

The vendor could not have interfered with this possession "until a failure to perform the conditions." Newhall *v.* Kingsbury, 131 Mass. 445.

Having acquired these rights under the contract, and the property having been subjected to the risks incident to the exercise of the exclusive right of possession, it would seem against natural justice, to say that there was no consideration for the promise, and that the loss should fall upon the plaintiff.

The case of Swallow *v.* Emery, 111 Mass. 556 (cited by the defendant) may perhaps be distinguished from ours, because it was agreed that, upon the payment of the price, the vendor was to *execute a bill of sale to the vendee.* However this may be, we think that the principles enunciated in Tufts *v.* Burnley, *supra*, are better sustained, both by reason and authority, and we therefore affirm the judgment of the Court below. *No error.*[1]

SECTION II.

LIENS AND THEIR ENFORCEMENT.

LANGFORT *v.* ADMINISTRATRIX OF TILER.

Suggestion
enforcement o
vendor's li

AT GUILDHALL, EASTER TERM, 1704.

[*Reported in* 1 *Salkeld*, 113.[2]]

THE defendant, who was administratrix to her late husband, used to deal in tea in his lifetime, and bought four tubs of the plaintiff at so much *per* tub, one of which she paid for and took away, leaving £50 in earnest for the other three; and HOLT, C. J., ruled, 1st, That the husband was liable upon the wife's contract, because they cohabited. 2dly, That notwithstanding the earnest, the money must be paid upon fetching away the goods, because no other time for payment is appointed. 3dly, That earnest only binds the bargain, and gives the party a right to demand; but then a demand without the payment of the money is void. 4thly, That after earnest given, the vendor cannot sell the goods to another, without a default in the vendee; and therefore if the vendee does not come and pay and take the goods, the vendor ought to go and request him; and then if he does not come and pay, and take away the goods in convenient time, the agreement is dissolved, and he is at liberty to sell them to any other person.

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[1] Chicago Equipment Co. *v.* Merchants' Bank, 136 U. S. 268, 283; Burnley *v.* Tufts, 66 Miss. 48; Tufts *v.* Wynne, 45 Mo. App. 42; Topp *v.* White, 12 Heisk. 165; Goldie *v.* Harper, 31 Ont. 284, *acc.* See also Osborn *v.* South Shore Co., 91 Wis. 526; Hesselbacher *v.* Ballantyne, 28 Ont. 182.

Arthur *v.* Blackman, 63 Fed. Rep. 536; Bishop *v.* Minderhout, 128 Ala. 162; Randle *v.* Stone, 77 Ga. 501; Glisson *v.* Heggie, 105 Ga. 30, 32; Mountain City Co. *v.* Butler, 109 Ga. 469; Swallow *v.* Emery, 111 Mass. 355; Sloan *v.* McCarty, 134 Mass. 245, *contra.*

[2] Also reported, *sub nom.* Langford *v.* Tyler in Holt, 96 and 6 Mod. 162.

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ul case is this problem here: Suppose the goods are perishable,
e vendee keeps on delaying payment; he will not rescind;
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rescission would
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MARTINDALE *v.* SMITH.

IN THE QUEEN'S BENCH, APRIL 15, 1841.

[*Reported in* 1 *Queen's Bench*, 389.]

TROVER for goods and chattels, to wit, six stacks of oats, etc., of which plaintiff was lawfully possessed as of his own property. Pleas. 1. Not guilty. 2. That plaintiff was not possessed of the goods and chattels as of his own property, in manner, form, etc. Issues thereon.

On trial before *Alderson*, B., at the *Cumberland* Spring Assizes, 1839, it appeared that defendant, being owner of six stacks of oats then standing on his ground, sold them to the plaintiff, under the following written contract.

"*April* 23d, 1838. Sold to Mr. *John Martindale* of Catterlen six oat stacks, for 85*l*.

John Smith gives John Martindale liberty to let the stacks stand, if he thinks fit, until the middle of *August* next; and *John Martindale* to pay John Smith for the stacks in twelve weeks from the date hereof."

Signed by the parties.

In the beginning of *July*, the defendant told the plaintiff that, if he, plaintiff, did not pay on the 16th of that month, defendant would consider the contract at an end. The plaintiff did not pay on that day, but afterwards requested time, which the defendant refused to give, adding that plaintiff, as he had failed in payment at the time appointed by the contract, should not have the stacks. Two or three days afterwards, the plaintiff tendered the money; which the defendant refused to accept. On the 14th of *August*, the plaintiff served defendant with a written notice, in which he repeated the tender, and stated that he should attend to remove the stacks on the next day at ten in the morning, and demanded that he should then be admitted to the field in which the stacks were, requiring the defendant not to sell them. An actual tender was then again made, and refused: and defendant afterwards sold the stacks. The defendant's counsel contended that plaintiff, having made default in payment at the appointed day, was not entitled to the possession. The learned judge directed a verdict for the plaintiff, giving leave to move to enter a verdict for the defendant on the second issue. In *Easter* term, 1839, *Dundas* obtained a rule accordingly.

Alexander and *Knowles* showed cause.

Cresswell, *Dundas* and *Ramshay*, contra.

Lord Denman, C. J., now delivered the judgment of the Court. After stating the facts, his lordship proceeded as follows.

Having taken time to consider our judgment, owing to the doubt excited by a most ingenious argument, whether the vendor had not a right to treat the sale as at an end and reinvest the property in himself by reason of the vendee's failure to pay the price at the appointed time, we are clearly of opinion that he had no such right, and that the action is well brought against him. For the sale of a specific chattel on credit, though that credit may be limited to a definite period, transfers the property in the goods to the vendee, giving the vendor a right of action for the price, and a lien upon the goods, if they remain in his possession, till that price be paid. But that default of payment does not rescind the contract. Such is the doctrine cited by *Holroyd* J., from *Com. Dig. Agreement* (B. 3), in Tarling *v.* Baxter[1]; and it will be found consistent with all the numerous cases referred to in the course of the argument. In a sale of chattels, time is not of the essence of the contract, unless it is made so by express agreement, than which nothing can be more easy, by introducing conditional words into the bargain. The late case of Stead *v.* Dawber[2] does not apply, depending (as *Parke* B. truly observed in Marshall *v.* Lynn[3]), not on the materiality of the alteration in the contract, but on the fact of the alteration only.

Pothier, in his *Traité du contrat de vente*, part v. ch. 2, 6,[4] cites the civil code for the proposition, that a purchaser's delay in paying the price does not give the vendor a right to require a dissolution of the contract; he can only exact by legal procedure the payment of the price due to him. "Non ex eo, quod emptor non satis conventioni fecit, contractus irritus constituitur."[5] He adds, however, that, from the difficulty of enforcing payment from debtors, the French law had departed from the rigor of these principles, permitting a suit for the dissolution of the contract for default of payment. The judge then appointed a more distant day; which passed, and no payment made, the vendor was permitted to resume possession of the thing sold. But, even after sentence of dissolution, the purchaser may prevent that effect, and keep what he had bought, by appealing, and offering, on that appeal, the price which he owes, with interest and expenses.

The vendor's right, therefore, to detain the thing sold against the purchaser must be considered as a right of lien till the price is paid, not a right to rescind the bargain. My brother Alderson directed the jury according to these principles; and the rule for setting aside the verdict must be discharged.

Rule discharged.[6]

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[1] 6 B. & C. 360, 362.

[2] 10 A. & E. 57.

[3] 6 M. & W. 117.

[4] Art. 475. (*Œuvres*, tom. 1, p. 640, 2d ed.)

[5] *Cod.* lib. iv. tit. 44, s. 14.

[6] Page *v.* Cowasjee Eduljee L. R., 1 P. C. 127, *acc.* See also Chapman *v.* Morton, 11 M. & W. 534. See, however, Sale of Goods Act, § 48.

OGG *v.* SHUTER.

In the Common Pleas, January 22, 1875.

[*Reported in Law Reports,* 10 *Common Pleas,* 159.]

In the Court of Appeal, November 23, 1875.

[*Reported in* 1 *Common Pleas Division,* 47.]

Declaration for a conversion of 251 sacks of potatoes.

Pleas: Not guilty; and that the goods were not the plaintiffs' as alleged. Issues thereon.

At the trial, before Keating, J., the facts were as follows: The plaintiffs had, in January, 1874, entered into a contract with Mons. Paresys Loutré, of Merville, in France, for the purchase from him of potatoes. The contract was contained in several letters between the purchasers and the vendor. The terms ultimately agreed on were as follows, viz. for twenty tons of potatoes at 84 francs per 1,000 kilogrammes, deliverable in the course of the current month free on board of a ship at Dunkirk, payment to be by cash against bill of lading signed by the captain. It was also stipulated that there should be a part payment in earnest of the bargain.

The plaintiffs paid £30 in part payment, and potatoes were shipped under the contract on board the ship "Blonde," at Dunkirk, for London, in sacks sent over for the purpose by the plaintiffs, under a bill of lading which made them deliverable to order. The vendor indorsed the bill of lading to the defendant, and instructed him to present the draft for the balance of the purchase-money to the plaintiffs against the bill of lading. On the arrival of the "Blonde" in the Thames, and before her cargo was discharged, it was erroneously supposed by the plaintiffs, for some reason or other which did not very clearly appear, that the shipment was sixteen sacks short, and, consequently, when the draft was presented by the defendant they declined to accept for the full amount on the ground that the shipment was short, but stated that if on discharge of the cargo it proved that the full quantity was on board they would immediately accept the draft, or, if preferred, that they were ready to pay the amount of the purchase-money due, after deducting for the sixteen sacks, immediately. The defendant said that if the shipment proved short it would be made good, but he would be satisfied with nothing but immediate acceptance of the draft, and on the plaintiffs not accepting, sold the potatoes forthwith; the price of potatoes having risen considerably in the mean time. It appeared when the ship was unloaded that the full quantity was on board, and the plaintiffs then claimed the goods, and were ready to pay the price, but the goods were delivered to the defendant's vendee.

On these facts, the verdict by consent was entered for the plaintiffs for £32 17*s.* 6*d.* damages, leave being reserved to the defendant to move to enter a verdict, on the ground that neither the property nor the possession of the goods had passed to the plaintiffs, the Court to have power to draw inferences of fact.

A rule *nisi* had been obtained accordingly.

Cur. adv. vult

LORD COLERIDGE, C. J. The facts in this case are shortly these. There is a contract for the sale of potatoes by the person whom the defendant represents to the plaintiffs, to be delivered free on board within a month, and payment is to be by cash against bill of lading. The goods are shipped in the plaintiffs' sacks, under a bill of lading, which is indorsed to the defendant. A part payment of £30 is made. The action being for a conversion of the potatoes by the defendant, it was objected by his counsel that the property in the potatoes had never passed to the plaintiffs. It was contended on the other side that the property had passed, and that the vendor had merely reserved a lien on the goods for the price. My brother Keating directed a verdict for the plaintiffs, reserving leave to the defendant to move. I am of opinion that his ruling was correct. The result of the decisions which were cited is, that the question whether the property in goods has passed under a contract of sale is a question of intention to be gathered from all the circumstances, the expressions made use of in the contract, and also the surrounding circumstances. In the case of a specific chattel, the rule is that the sale passes the property. So also the general rule, as laid down in several cases, is that, in the absence of countervailing circumstances, the specific appropriation of goods to the contract, by their being placed in vessels or receptacles provided by the purchasers, would pass the property. Here the potatoes were separated from a larger bulk, and placed in the plaintiff's sacks, which had been sent over for the purpose. In addition to this very strong fact there is also the expression "free on board" in the contract, which has in previous cases been relied on, not as absolutely conclusive to show that the property passed, but as a strong element to be considered in favor of that conclusion. There is also the further fact that there was a part payment of £30. All these are very strong circumstances to show that the property passed; but it is contended, on the other hand, that the expression, "cash against bill of lading," in the contract, is of itself conclusive to ascertain the intention of the vendor; that, the bill of lading being the *indicium* of property, the fact that the purchaser was not to receive it until he paid the price unmistakably indicated the intention that till then the property should not pass. In support of this view a great many cases and *dicta* of judges were cited. These authorities appear to me to go no further than the conclusion that, in the absence of countervailing circumstances, the stipulation for cash against bill of lading would have been conclusive. In like manner many of the circumstances existing in this case have been held, in the absence of countervailing circumstances, to be conclusive evidence of an intention to pass the property. There is also another strong fact against the plaintiffs' contention, viz. that the bill of lading was indorsed to the order of the defendant; but that again is only evidence of the intention, and may be rebutted by contrary evidence. The rule as deducible from all the cases, and as it is laid down in the learned works of Mr. Justice Blackburn and Mr. Benjamin on Sale, is, that the question whether the property has passed being one of intention to be collected from all the circumstances, no single circumstance is necessarily conclusive in all cases, but the conclusion to be drawn must depend on a balance of the various circumstances on one side and the other. The question is therefore one of fact for a jury, and we have here — being placed in the position of a jury — to determine it as a question of fact. I am of opinion that, taken altogether, the evidence in this case shows that it was intended by the parties that the property should pass at Dunkirk. There was another point raised as to the form of the action to which it is necessary to advert. It was contended that the plaintiffs could not maintain trover because there was at least a lien on the part of the vendor. This question appears to me to depend on the question whether there was an absolute refusal by the plaintiffs to accept the bill of exchange in compliance with the terms of the contract. If there was, our decision on this point must be for the defendant. The facts, however, do not appear to me to show that there was such a refusal on the part of the plaintiffs to accept the bill. When the potatoes arrived, it was supposed by both parties that there were sixteen sacks short. The plaintiffs said that they could not accept the bill for the price of the full number when they were sixteen short; that they were quite ready immediately to pay the amount less the deficiency, or if the defendant liked to wait till the vessel was unloaded, they would accept for what was actually on board. The defendant would be satisfied with nothing else than the immediate and absolute acceptance of the bill for the full amount. The plaintiffs never refused to comply with the contract; and when it turned out that the parties were mistaken, and the full quantity was on board, they were perfectly willing to have taken the whole. Under these circumstances it appears to me that the right of lien did not exist, and the right of possession as well as of property had passed to the plaintiffs. This rule must therefore be discharged.

GROVE, J. I am of the same opinion. Mr. Willis appeared at first disposed to contend that the term "cash against bill of lading" was absolutely conclusive evidence of the intention not to pass the property; but finding that he could not sustain this view, he argued that it was *primâ facie* conclusive, and that there was no circumstance in the present case sufficient to rebut it. Standing by itself it might be conclusive, but there are additional facts in this case. There is first the fact that the bill of lading was indorsed to the consignor's agent, which is strongly in the defendant's favor. But then there are the other circumstances which appear to me of still greater weight in the plaintiffs' favor, viz. that the delivery was to be free on board, that there was a part payment, and that the sacks in which the potatoes were shipped were the plaintiffs'. All these are extremely strong facts pointing to the conclusion that the property passed, and one of these was considered so very strong in the case of Browne *v.* Hare, 3 H. & N. 484; 4 H. & N. 822; 27 L. J. (Ex.) 372; 29 L. J. (Ex.) 6, as to make that almost a decision in point to the present case. It is true that the cases run very fine, but they none of them, I think, depart from the proposition that the question is one of intention for the jury, when there are circumstances pointing both ways. The case of Browne *v.* Hare is very plainly to that effect. In that case the oil, which was the subject of the contract, was to be shipped "free on board," and was to be paid for by bill of exchange on delivery to the defendants of the bill of lading. It was so shipped free on board, and the bill of lading taken deliverable to shippers' order. So far the case was very similar to the present, but the bill of lading was there indorsed to the purchasers, whereas here it was indorsed to the vendor's agent. It was held that the property passed to the purchasers when the goods were placed "free on board" in performance of the contract, and that it was a question for the jury whether the plaintiffs so shipped the oil in performance of their contract to place it free on board, or for the purpose of retaining a control over it and continuing to be owners contrary to the contract. The expression "free on board" appears to have been the main point relied upon in that case. Here, not only were the potatoes to be delivered "free on board," but there was part payment and delivery into plaintiffs' sacks, which alone would be the strongest evidence, according to one class of decisions, that the property passed. The terms "cash against bill of lading" may very well be satisfied by construing them as meant to preserve the vendor's lien, and so as not at all inconsistent with the other facts pointing to an intention that the property should pass.[1]

This decision was appealed from:

Milward, Q. C., and *Willis*, for the defendant.

Prentice, Q. C., and *Hall*, for the plaintiff.

The judgment of the court (Lord Cairns, C.; Kelly, C.B.; Bramwell, B.; and Blackburn, J.) was delivered by

LORD CAIRNS, C. In this case it appears, from the judgments below, that the Court of Common Pleas drew the inference of fact that the plaintiffs were not in default in refusing to accept the draft for £34 which was tendered to them for acceptance along with the bill of lading. We have been unable to reconcile this finding with the statements in the case, more particularly with the statement in paragraph 13,[2] which seems to us to show that the plaintiffs were in default.

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[1] DENMAN and KEATING, JJ., delivered concurring opinions.

[2] This related to the refusal to accept the draft on January 30.

Taking this fact, as we understand it, we think that the judgment in favor of the plaintiffs is erroneous, and should be reversed. The transactions in which merchants shipping goods on the orders of others protect themselves by taking a bill of lading, making the goods deliverable to the shipper's order, involve property of immense value, and we are unwilling to decide more than is required by the particular case. But we think this much is clear, that where the shipper takes and keeps in his own or his agent's hands a bill of lading in this form to protect himself, this is effectual so far as to preserve to him a hold over the goods until the bill of lading is handed over on the conditions being fulfilled, or at least until the consignee is ready and willing and offers to fulfil these conditions, and demands the bill of lading. And we think that such a hold retained under the bill of lading is not merely a right to retain possession till those conditions are fulfilled, but involves in it a power to dispose of the goods on the vendee's default, so long at least as the vendee continues in default. It is not necessary in this case to consider what would be the effect of an offer by the plaintiffs to accept the draft and pay the money before the sale, for no such offer in this case was ever made.

Judgment reversed.

MIRABITA *v.* THE IMPERIAL OTTOMAN BANK.

In the Court of Appeal, February 18, 1878.

[*Reported in 3 Exchequer Division,* 164.]

Appeal from the judgment of the Exchequer Division, in favor of the plaintiff on a special case stated by an arbitrator.

The plaintiff is a merchant carrying on business at Malta and Constantinople. The defendants are a banking company incorporated by a firman of the Sultan, and carrying on business at Constantinople with agencies at London and Larnaca.

On the 26th of June, 1873, a contract was made between the plaintiff and Phatsea & Pappa, a firm at Larnaca, for certain umber to be sold to and shipped for the plaintiff by Phatsea & Pappa at Larnaca.

On the 7th of July, 1873, the plaintiff wrote to Phatsea & Pappa stating that he would send ships on receiving advice of the quantity of umber ready for shipment, and also that the bills of lading must state that Phatsea & Pappa shipped the umber "by order and on account of the plaintiff."

On the 26th of August, 1873, Phatsea & Pappa had 600 tons of umber ready for delivery and shipment under the contract, and they chartered by order of the plaintiff and for his account a British ship, the "Princess of Wales," then lying at Alexandria, to carry a cargo of such umber from Larnaca to London. The plaintiff approved of the charter-party. The "Princess of Wales" proceeded to Larnaca, where she took on board a cargo of 600 tons of umber. About the 9th of October the plaintiff sent £150 to Phatsea & Pappa for ship's advances, of which sum £70 was paid to the master.

On the 9th of October the master signed four bills of lading for the cargo, which stated the goods to be shipped by Phatsea & Pappa, and to be delivered "to order or assigns." The bills of lading were given to Phatsea & Pappa.

On the 10th of October the "Princess of Wales" sailed from Larnaca, and on the 14th of October Phatsea & Pappa informed the plaintiff by telegram that the vessel had left with 600 tons on the 10th instant; that they would shortly receive bills of lading and draft at sixty days, and requesting them to insure the cargo. The plaintiff communicated with his son, F. Mirabita, trading in London as Mirabita Brothers, and through him effected an insurance on the cargo.

Phatsea & Pappa drew a bill of exchange for 280 Turkish liras on the plaintiff, and indorsed and handed it with the bills of lading to Corkji, from whom they had bought the umber which formed the cargo. Phatsea & Pappa had paid Corkji for the umber, and they handed him the bill of exchange by way of accommodation, to enable him to obtain an advance from the defendants and in anticipation of future supplies of umber.

Corkji discounted the bill of exchange at the Larnaca agency of the defendants' bank, and with the bill of exchange handed them the bills of lading, saying that they were to be sent to Constantinople, and given up to the plaintiff on payment by him of the bill of exchange at maturity.

The Larnaca agency forwarded the bill of exchange and bills of lading to their bank at Constantinople, Pappa having come to Constantinople and handed to the plaintiff the charter-party and invoice of the cargo, which stated that the same was "shipped by order and on account of the plaintiff." The defendants' bank at Constantinople presented the bill of exchange to the plaintiff for acceptance, but he declined to accept without receiving the bills of lading. The bill of exchange and the bills of lading were then returned to the Larnaca agency. The plaintiff afterwards offered to the defendants' bank at Constantinople to pay the bill of exchange before maturity on receipt of the bills of lading, but in consequence of the documents having been returned to Larnaca this offer could not be accepted.

It was then arranged between the plaintiff and Pappa that a new bill of exchange for £254 11*s.* should be drawn by Phatsea & Pappa to the order of Corkji on Mirabita Brothers in London at two months' date, which should be substituted for the former bill for 280 Turkish liras, and notice of the agreement was given to the defendants' bank at Constantinople.

A new bill of exchange, dated the 9th of October, 1873, was, in accordance with the terms so agreed, drawn by Phatsea & Pappa and sent by them to Corkji, who handed it to the Larnaca agency, saying that it was to be sent with the bills of lading to London, where Mirabita Brothers would be ready to accept and pay the bill of exchange at maturity against delivery of bills of lading. The Larnaca agency accordingly gave up the first bill of exchange, and on the 20th of November, 1873, forwarded the bill for £254 11*s*. to their agency in London, and directed them "to give up the bills of lading on payment of the inclosed bill of exchange."

At the time of making the agreement with the plaintiff for the drawing of the bill of exchange for £254 11*s*., as already mentioned, it was doubtful whether the bills of lading would reach England before the arrival of the ship. Pappa thereupon gave the plaintiff a letter, addressed to the master of the "Princess of Wales," to be used in case the ship should arrive in England before the bills of lading, which letter purported to authorize the master, if the bills of lading had not come to hand, to deliver the cargo to the plaintiff.

On the 3rd of December the "Princess of Wales" reached Gravesend, and was ordered to the Millwall Docks by F. Mirabita.

On the same day the bill of exchange for £254 11*s*., together with the bills of lading, was delivered by post, and in the course of the day was left at the office of Mirabita Brothers, with the following note attached: "Bill of lading for Terra umber, weighing 600 tons, per 'Princess of Wales,' to be given up against the payment of attached draft, £254 11*s*., on Mirabita Brothers."

F. Mirabita returned the bill of exchange to the defendants' London agency, stating that he was ready to pay the bill at maturity, but he did not then accept it.

On the 8th of December the defendants' London agency gave orders to the ship's brokers to enter cargo in the name of the bank, and on the 12th the cargo was entered at the Custom House in the defendants' name; but the defendants took no other steps towards taking possession of the cargo till after the 20th of December.

On the 12th of December F. Mirabita called on the defendants, and offered to pay the bill and receive the bills of lading. The defendants' manager refused to accept payment, alleging that they had taken possession of the cargo and thereby had made themselves liable for freight. They had done nothing to take possession of the cargo or to make them liable for freight.

On the 18th of December F. Mirabita again offered to pay the bill of exchange and to give a guarantee for the freight. After some further negotiation the defendants landed the cargo, and after heavy charges for demurrage, landing, and other expenses had been incurred, sold the cargo in bulk, without any authority from the plaintiff or F. Mirabita, for a sum which was not sufficient to pay the amount of the bill of exchange, freight, and expenses; the cargo was worth more than the amount of the bill of exchange, freight, and expenses, and if the plaintiff had obtained possession of it he would have made a profit therefrom.

So far as it was a question for the jury, the arbitrator found as a fact that it was the intention of Phatsea & Pappa and of the plaintiff that the property in the cargo of umber should pass to the plaintiff upon its shipment on board the "Princess of Wales," subject to a lien on the same for payment of the price; and their intention that the property in the cargo should be vested in the plaintiff continued from the time of shipment until the arrival of the ship in England.

The court is to be at liberty to draw inferences of fact, and to disregard the above finding, if a jury would not have been justified in coming to such a conclusion from the facts above stated. The question was whether the plaintiff is entitled to recover damages from the defendants for their dealing with the cargo as above mentioned.

Matthews, Q. C., and *Arthur Wilson*, for the defendants.

M. White, Q. C., and *Archibald*, for the plaintiff.

Cur. adv. vult.

The following judgments were delivered: —

BRAMWELL, L. J. This case has been argued on the footing that the law of England or a like law is applicable, and we must so deal with it. We must treat as the governing bargain between the plaintiff and Phatsea & Co., the one made at the time it was arranged that the payment should be made by a bill at two months, and that the vendees should not be entitled to the 600 tons of umber, or bills of lading of them, until payment of the bill of exchange. No question arises as to the defendants' rights; for it was admitted, and properly admitted, that the defendants did wrong in refusing the amount of the bill, and selling the umber. On the other hand, there is no contract between the plaintiff and the defendants. So that in the result the case is reduced to this: When the defendants tortiously disposed of the umber, had the plaintiff such a property therein, or right thereto. as to entitle him to maintain this action? It is argued that he had not, and the reason given is, that as the umber was not specific and ascertained, and as on shipment the shippers took a bill of lading to order, and gave an interest in it to Corkji, who transferred it to the defendants, no property passed; and for this a long series of authorities, beginning with Wait *v.* Baker, 2 Ex. 1, and ending with Ogg *v.* Shuter, 1 C. P. D. 47, is cited. It is almost superfluous to say that by these authorities I am bound, that I pay them unlimited respect, and I may add I do so the more readily as I think the rule they establish is a beneficial one. But what is that rule? It is somewhat variously expressed as being either that the property remains in the shipper, or that he has a *jus disponendi*. Undoubtedly he has a property or power which enables him to confer a title on a pledgee or vendee, though in breach of his contract with the vendor. This appears from Wait *v.* Baker; Gabarron *v.* Kreeft, Law Rep. 10 Ex. 274; and to some extent from Ellershaw *v.* Magniac, 6 Ex. 570. In the first case, Parke, B., expressly says that the vendee Baker could under the circumstances maintain an action against Lethbridge for having sold the barley to

Wait. This property or power exists then; and therefore if the vendors of the umber had sold it to the defendants this action would not be maintainable. But in that case the defendants would have acquired a right, while, as I have said, it is admitted that no right in them can be relied on. I think it is not necessary to inquire whether what the shipper possesses is a property, strictly so called, in the goods, or a *jus disponendi*, because I think, whichever it is, the result must be the same, for the following reasons. That the vendee has an interest in the specific goods as soon as they are shipped is plain. By the contract they are at his risk. If lost or damaged, he must bear the loss. If specially good, and above the average quality which the seller was bound to deliver, the benefit is the vendee's. If he pays the price, and the vendor receives it, not having transferred the property, nor created any right over it in another, the property vests. It is found in this case that as far as intention went the property was to be in the plaintiff on shipment. If the plaintiff had paid, and the defendants had accepted the amount of the bill of exchange, it cannot be doubted that the property would have vested in the plaintiff. Why? Not by any delivery. None might have been made; the defendants might have wrongfully withheld the bills of lading. The property would have vested by virtue of the original contract of sale. It follows that it vested on tender of the price, and that whether the vendor's right was a right of property or a *jus disponendi*; for whichever it was it was their intention that it should cease on the plaintiff's paying the price, and therefore it would cease unless meanwhile some title had been conferred on a third person to something more than the price. This, though wrongful as regards the plaintiff, would have been valid. But no such title exists here. There is nothing in the authorities inconsistent with this. The only case that may be thought to seem so is Wait *v.* Baker, *supra*, where, though the vendee tendered the price, he was held to have acquired no property. But it is manifest that in that case the vendor originally took the bill of lading to order, and kept it in his possession, to deal with as he thought fit, and never intended that the property should pass until he handed the bill of lading to the vendee on such terms as he chose to exact. Parke, B., says: "There is no pretence for saying that Lethbridge agreed that the property should pass." "There was nothing that amounted to an appropriation, in the sense of that term, which alone would pass the property." "There was no agreement between the two parties that that specific cargo should become the property of the defendant," the vendee. Here all the evidence shows that there was such an agreement. The arbitrator says it existed in fact at the time of shipment, but the subsequent conduct of both parties shows it. What seems decisive is this: the plaintiff must have a right against some one; has he any against Phatsea? Now Phatsea has done nothing that he had no right to do, and he has done everything he was bound to do, treating the altered agreement as governing. No action therefore would lie against him. It must then be the defendants who are in the wrong. I think they are, that the property was to pass on payment, and consequently on tender of payment, of the bill of exchange; that the bill of lading was handed to the Larnaca Bank to be delivered to the plaintiff on payment of the bill of exchange; that therefore the plaintiff can maintain this action, and the judgment should be affirmed. I would add that I agree with the reasoning of my brother Cleasby in the court below; and I would further remark that I believe this is a question which would not have been open to the slightest doubt if the action had been brought after the coming into operation of the Judicature Acts. Cotton, L. J., has favored me with a perusal of his judgment, and I entirely agree with it.

Cotton, L. J. In this case the vendors on shipping the goods, the subject of the contract, took a bill of lading requiring the delivery of the goods to be to their order, and dealt with that bill of lading in this way in order to secure payment of the bill of exchange which they then drew on the plaintiff. The bill of exchange was discounted with the defendants, and the bill of lading was transferred to them as security for the payment of the bill of exchange; this bill of exchange having been refused acceptance, a second bill of exchange was drawn and given in lieu of the first bill, upon the terms of the delivery of the bill of lading to the plaintiff upon payment of the second bill of exchange, and in so dealing with the bill of exchange the vendors intended that upon payment the plaintiff, the purchaser, should obtain the goods, and they agreed, and, as far as they could, transferred to the purchaser their right to insist that on payment of the bill of exchange the bill of lading should be handed over.

I mention those facts for the purpose of adding this: that the action was instituted before the passing of the Judicature Acts, and therefore it is simply to be dealt with as a legal question; and we cannot inquire here how far the plaintiff has the right in equity to insist that he occupies the same position as the vendors, and to insist that as against the pledgee of the bill of lading the plaintiff, as transferee of the right, has a good equitable title, even if he has not a legal title. In fact in the present case it simply turns on this question, whether the property in the goods in question has, under the circumstances, passed to the plaintiff.

Now I quite agree with the judgment of Bramwell, L. J., but as several cases were cited in the argument which it was contended were adverse to the ground of our decision, I think it better to state what I consider to be the principle of those decisions, and to point out how far that principle is applicable to such cases as this: Under a contract for sale of chattels not specific the property does not pass to the purchaser unless there is afterwards an appropriation of the specific chattels to pass under the contract, that is, unless both parties agree as to the specific chattels in which the property is to pass, and nothing remains to be done in order to pass it. In the case of such a contract the delivery by the vendor to a common carrier, or (unless the effect of the shipment is restricted by the terms of the bill of lading) shipment on board a ship of, or chartered for, the purchaser, is an appropriation sufficient to pass the property. If, however, the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, and does so not as agent or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property, and that consequently there is no final appropriation, and the property does not on shipment pass to the purchasers. When the vendor on shipment takes the bill of lading to his own order, he has the power of absolutely disposing of the cargo, and may prevent the purchaser from ever asserting any right of property therein; and accordingly in Wait *v.* Baker, *supra*, Ellershaw *v.* Magniac, *supra*, and Gabarron *v.* Kreeft, *supra* (in each of which cases the vendors had dealt with the bills of lading for their own benefit), the decisions were that the purchaser had no property in the goods, though he had offered to accept bills for or had paid the price. So, if the vendor deals with or claims to retain the bill of lading in order to secure the contract price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute, but, until acceptance of the draft, or payment, or tender of the price, is conditional only, and until such acceptance, or payment, or tender, the property in the goods does not pass to the purchaser; and so it was decided in Turner *v.* Trustees of Liverpool Docks, 6 Ex. 543; 20 L. J. (Ex.) 393; Shepherd *v.* Harrison, Law Rep. 4 Q. B. 196; Ogg *v.* Shuter, *supra.* But if the bill of lading has been dealt with only to secure the contract price, there is neither principle nor authority for holding that in such a case the goods shipped for the purpose of completing the contract do not on payment or tender by the purchaser of the contract price vest in him. When this occurs there is a performance of the condition subject to which the appropriation was made, and everything which, according to the intention of the parties, is necessary to transfer the property is done; and in my opinion, under such circumstances, the property does on payment or tender of the price pass to the purchaser.

Apply these principles to the present case. Pappa did not attempt to make use of the power of disposition which he had under the bill of lading for the purpose of entirely withdrawing the cargo from the contract. He dealt with it only for the purpose of securing payment of the price. It is expressly stated in the special case that Mr. Corkji, who acted for Pappa, discounted the said bill of exchange at the agency of the defendants' bank, and with the bill of exchange handed them the bills of lading, saying that they were to be sent to Constantinople and given up to the plaintiff on payment of the bill of exchange at maturity.

Under these circumstances there was an appropriation by the vendors of the cargo subject only to payment of the price. This was tendered, and as it is conceded that the defendants were wrong in claiming anything more, the plaintiff, the purchaser, had done or offered to do all that was incumbent on him to make the appropriation absolute, and the property vested in him.

Brett, L. J., concurred that the judgment of the Exchequer Division must be affirmed. *Judgment affirmed.*

JOSEPH J. THOMPSON AND JOHN PETTY v. JOHN V. CONOVER

New Jersey Court of Errors and Appeals, June Term, 1865.

[*Reported in* 32 *New Jersey Law*, 466.]

Green, C. Conover, the plaintiff below, in March, 1861, sold to Cornelius Petty his crop of corn, consisting of about six hundred bushels — the white corn at sixty-five cents a bushel, and the yellow at sixty-three cents. At the time of the sale the corn was unshelled. It was to be shelled by the vendor, to be delivered by him at the mill of the vendee, and to be paid for when it was all delivered. On the fifteenth of March, the vendor delivered two hundred and seventy-two bushels of white corn, which was charged in his book at that date.

On the same day, a judgment by confession was entered, and an execution issued against Cornelius Petty, the vendee, by virtue of which, on the sixteenth of March, the sheriff levied upon the property of the vendee, including the corn delivered by Conover the day before, and closed the mill. On the eighteenth of March, the balance of the corn was shelled and ready for delivery. Conover sent sixty-eight bushels to the mill, which the vendee declined to accept, saying he did not take any more corn, and told the teamsters to go home with it. On the twenty-eighth of March, the corn in the mill was sold by the sheriff, by virtue of his levy. The vendor thereupon rescinded the contract for the sale of the corn, and brought an action of trover and conversion against the sheriff and the plaintiff in execution, for the corn delivered on the fifteenth of March.

To maintain his action, the plaintiff must show that the corn, which was delivered on the fifteenth of March, still remained the property of the vendor, and was, consequently, not subject to the levy of the execution. Was it his property, or had the title passed to the vendee?

The decision of this question involves two inquiries:

1. Was the contract an entirety?
2. If it was, and the vendor had a right to rescind, did the rescind-

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The contract partakes of the character both of an entire and of a severable contract. For although the subject of the contract consists of several entire things, to which certain values are affixed, so that the several value of each may be ascertained, yet the terms of the contract indicate that neither party contemplated the vendee's taking part without taking the whole of the articles contracted for. The prices of the two kinds of corn were fixed, so that the value of the corn delivered could be readily ascertained. Yet the contract was for the sale of the whole crop. And although the charging of the corn delivered by Conover in his book of account, on the day of its delivery, and before the delivery of the entire crop, may tend to throw some doubts upon this view of the contract, yet the contract must be regarded upon the evidence as an entirety, which the vendor had a right to rescind, upon the failure of the vendee to receive the entire crop. So the vendor had a right, upon the failure or disability of the vendee, by reason of the levy, to pay for the corn on delivery of the entire crop, to rescind the contract and to refuse to deliver the balance of the corn, whether the vendee was willing to accept it or not. But the question still remains, had the vendor a right, upon the rescinding of the contract, to recover back the corn which had been delivered to the vendee, and been levied upon by the sheriff.

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I understand the law to be well settled, that when the vendor has performed everything that is required of him as to a portion of the things sold, but something still remains to be done as to the rest, the portion in regard to which the vendor has performed all his duty, becomes the property of the vendee, but the portion in respect to which something is yet to be done, still belongs to the vendor, and it makes no difference as to the operation of this rule, whether the contract is an entirety or not. Story on Sales, 299, and cases cited in note 1.

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The corn which was shelled and delivered by the vendor at the mill of the vendee, on the fifteenth of March, passed to the vendee at that time. If it had been destroyed by fire, it would have been his loss, not the loss of the *vendor.* There was no express stipulation in the contract, that the title should not pass till the whole crop was delivered and paid for. It was the ordinary case of a sale and delivery of goods, to be paid for when all was delivered or on short credit. If the vendor had intended that the property should not pass until the purchase money was paid, he should so have stipulated.

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But the corn having been delivered without any condition of this character, a *bona fide* purchaser or execution creditor of the vendee may hold the property against the claim of the vendor. The vendor might have delivered all his crop on the same day, and demanded immediate payment, and upon its being refused, might have reclaimed the corn. This would have brought the case directly within the doctrine of Palmer *v.* Hand, 13 Johns. R. 434.

But the vendor chose to give credit for the purchase money till the entire crop was delivered, relying on the solvency and good faith of the vendee. He suffered the title to pass without the payment of the price, and has thus become a sufferer.

I am of opinion that the plaintiff had no property in the goods, at the time of the levy or sale under the execution, which will enable him to maintain an action against the plaintiff in execution for the recovery of the goods.

The judgment must be reversed.[1]

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JAMES W. BAILEY v. WILLIAM H. HERVEY & ANOTHER.

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SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY 11–JUNE 19, 1883.

[*Reported in* 135 *Massachusetts*, 172.]

TORT for conversion.

The defendants delivered goods to the plaintiff under a written agreement, which recited that the plaintiff had "hired and received" the goods from the defendants, for which the plaintiff agreed to pay the defendants certain sums of money as "rent" at stated times, and "the balance," at a certain rate per month, "until paid;" that, upon default in making such payments, the plaintiff's right to retain the goods should cease; and that title to the goods should vest in the plaintiff only upon performance of all the conditions of the agreement. The plaintiff made sundry payments on account of said contract, amounting in the whole to $128. After failure by the plaintiff to make payments according to the agreement, the defendants brought an action against him for rent, attached his property by trustee process, and entered the action in court, and the plaintiff was defaulted. The defendants then took possession of the goods, and afterwards prosecuted his action against the plaintiff to judgment, for $100.71 and costs, and took out an execution, upon which he collected a small sum of money from the trustee.

If, upon these facts, the plaintiff was entitled to maintain his action, judgment was to be entered for him in the sum of $100 and costs; otherwise, judgment for the defendants.[2]

J. Cutler, for the plaintiff.

J. B. Richardson, for the defendants.

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[1] Holland's Assignee v. Cincinnati Co., 97 Ky. 454, *acc.*

See also, Neal v. Boggan, 97 Ala. 611; Power v. Wells, Cowp. 818; Emanuel v. Dane, 3 Camp. 299; Indian Cont. Act. sec. 121.

[2] The statement of facts has been abbreviated.

C. Allen, J. By the terms of the written agreement, the plaintiff was bound at all events to pay to the defendants the full amount at which the goods were valued, and upon such payment the title was to vest in him. This payment, therefore, constitutes the agreed price of the goods, and it is a misnomer to call it rent. The defendants would have no right to exact payment in full of the money, and also to reclaim the goods. When the plaintiff discontinued his payments on account, what was the legal position of the defendants? If it be assumed that they might, at their option, either reclaim the goods as their own property, without any obligation to account for their proceeds or value to the plaintiff. or that they might collect the price in full, it is plain that they were not entitled to do both. They could not treat the transaction as a valid sale and an invalid one at the same time. If they reclaimed their property, it must be on the ground that they elected to treat the transaction as no sale. If they brought an action for the price, they would thereby affirm it as a sale. Two inconsistent courses being open to them, they must elect which they would pursue; and, electing one, they are debarred from the other. Reclaiming the goods would show an election to forego the right to recover the price. But, instead of reclaiming the goods in the first instance, they brought an action against Bailey for the price, made an attachment of his property by trustee process, entered their action in court, and he was defaulted. They were thereupon entitled to judgment against him. Under this state of things, the action was continued to a later term of court, and after the lapse of several months, and after the commencement of the second subsequent term of court, the defendants, without discontinuing their action, or giving any notice to Bailey of an intention to abandon that remedy, took possession of the goods; and, after this had been done, they proceeded in their action to judgment, and took out execution, upon which they collected a small sum from the trustee. They had thus made a decisive election to treat the transaction as a sale, before reclaiming the goods; and, under such an election, the title passed to Bailey. Butler *v.* Hildreth, 5 Met. 49; Arnold *v.* Richmond Iron Works, 1 Gray, 434, 440; Heryford *v.* Davis, 102 U. S. 235, 246.

For these reasons, a majority of the court is of opinion that there must be

Judgment for the plaintiff.[1]

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[1] Parke Co. *v.* White River Co., 101 Cal. 37; Holt Mfg. Co. *v.* Ewing, 109 Cal. 353; Hine *v.* Roberts, 48 Conn. 267; Crompton *v.* Beach, 62 Conn. 25; Campbell Press Co. *v.* Henkle, 8 Mackey, 95; Smith *v.* Gilmore, 7 D. C. App. 192; Richards *v.* Schreiber, 98 Ia. 422; Button *v.* Trader, 75 Mich. 295; Alden *v.* Dyer, 92 Minn. 134; Dowagiac Mfg. Co. *v.* Mahon, 101 N. W. Rep. 903, 905 (N. Dak.), *acc.* See also Smith *v.* Barber, 153 Ind. 322.

Jones *v.* Snider, 99 Ga. 276; Dederick *v.* Wolfe, 68 Miss. 500; McPherson *v.* Acme Lumber Co., 70 Miss. 649; Campbell Press Co. *v.* Rockaway Pub. Co., 56 N. J. L. 676, *contra.* See also Thomason *v.* Lewis, 103 Ala. 426; Fuller *v.* Byrne, 102 Mich. 461; Matthews *v.* Lucia, 55 Vt. 308.

Suing for the price and attaching or levying upon property sold under a conditional sale has been held to bar the seller from asserting title to the property. Tanner Engine

ELLA AND NELLIE DUKE *v.* W. C. SHACKLEFORD.

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Mississippi Supreme Court, January, 1879.

[*Reported in* 56 *Mississippi*, 552.]

On December 7, 1876, W. C. Shackleford sold to Mary C. Dellahite an engine, boiler, saw, and gearing, for $725, of which $500 was paid cash, and for the balance the following note given: —

> "225. On or before the 1st day of January, 1878, I promise to pay W. C. Shackleford, or bearer, two hundred and twenty-five dollars, bearing 10 per cent interest after maturity; being balance due on engine, boiler, cut-off saw, and gearing sold me this day by the said W. C. Shackleford; title to said machinery being retained by the said Shackleford until the amount is paid in full.
>
> "It is expressly understood that said machinery is to be moved and put up near Garner's Station, on the M. & T. R. R.
>
> Mary C. Dellahite.
>
> "Coffeeville, Miss., Decr. 7, 1876."

The machinery was put up at Garner's Station. The note was not paid at maturity; and Shackleford, without tendering the $500, brought replevin for the property. The land on which the saw-mill stood was sold to the Dukes, before the suit was brought, who purchased with notice of Shackleford's rights, and so the suit was against them; and they bring up the case from a judgment for the recovery of the machinery.

J. J. Slack, for the plaintiffs in error.

George H. Lester, for the defendant in error.

Chalmers, J., delivered the opinion of the court.[1]

By the terms of the written contract, the title of the property re-

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Co. *v.* Hall, 89 Ala. 628; Montgomery Iron Works *v.* Smith, 98 Ala. 644; Fuller *v.* Eames, 108 Ala. 464; Albright *v.* Meredith, 58 Ohio St. 194.

If the seller under a conditional sale after breach by the buyer reclaims the property, it is generally held that the seller cannot thereafter sue for the price or any unsatisfied portion of it. Lamond *v.* Davall, 9 Q. B. 1030; Dowdell *v.* Empire Furniture Co., 84 Ala. 316, 318; Aultman *v.* Fletcher, 110 Ala. 452; Rodgers *v.* Bachman, 109 Cal. 552; Green *v.* Sinker, 135 Ind. 434; Perkins *v.* Grobben, 116 Mich. 172; McBryan *v.* Universal Elevator Co., 130 Mich. 111; Minneapolis Works *v.* Hally, 27 Minn. 495; Aultman *v.* Olson, 43 Minn. 409 (*cf.* Third Bank *v.* Armstrong, 25 Minn. 530); Earle *v.* Robinson, 91 Hun, 363; aff'd without opinion, 157 N. Y. 683; Campbell Press Co. *v.* Hickok, 140 Pa. 260; Seanor *v.* McLaughlin, 165 Pa. 150; Tufts *v.* Brace, 103 Wis. 341; Sawyer *v.* Pringle, 18 Ont. App. 218. But see Van Allen *v.* Francis, 123 Cal. 474; Tufts *v.* D'Arcambal, 85 Mich. 185, 190; Van Den Bosch *v.* Bouwman, 101 N. W. Rep. 832 (Mich.); Brewer *v.* Ford, 54 Hun, 116. See also Mechem on Sales, § 621.

[1] A portion of the opinion overruling a dictum in Ketchum *v.* Brennan, 53 Miss. 596, is omitted.

mained in the vendor until payment in full of the note given for the deferred payment. The effect of the contract, therefore, was to leave the right of property in the seller, and to give the right of possession, until default made in payment, to the purchaser. Coupled with this right of possession was also the right in the purchaser to obtain title by payment of the price. But the period of payment having arrived, and default having been made, his right of possession terminated, and the vendor, who had all the while remained owner, became entitled to reclaim the custody of his property. In order to assert this right, it was only necessary for him to make demand for the restoration of the property or payment of the price; and this he did. It was not necessary that he should pay back, or tender, the money received as the cash payment. This is only necessary in cases of disaffirmance and rescission of a sale on condition subsequent. But this was a sale on condition precedent; that is, there was to be no sale, properly so called, no change of title, until the full price should be paid; and the law annexes to such a sale a right in the seller to recover possession of his property upon default made, even against subsequent *bona fide* purchasers for value without notice. In reclaiming his property, therefore, the seller is not rescinding the contract, but is enforcing it; and hence there is no obligation to tender back any thing. He is simply asserting his legal rights, in strict accordance with the express stipulations of the contract. What rights, if any, the vendee in such a contract might have in a court of chancery is not before us. Ketchum & Cummings *v.* Brennan, 53 Miss. 597; Story on Sales (3d ed.), sect. 313 and note 2; Benj. on Sales (Perkins's ed.), sect. 320, and note; Baker *v.* Hall, 15 Ind. 277; Dunbar *v.* Rawles, 18 Ind. 225; Sumner *v.* McFarlan, 15 Kan. 600; Zoutchman *v.* Roberts, 109 Mass. 53; Sage *v.* Sleutz, 23 Ohio, 1; Little *v.* Paige, 44 Mo. 412; Duncan *v.* Stone, 45 Vt. 118; Davis *v.* Emery, 11 N. H. 230; Bauendahl *v.* Horr, 7 Blatchf. 548; West *v.* Bolton, 4 Vt. 558.

The cases specially cited are all cases where partial payments had been made.

Affirmed.[1]

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[1] As to the forfeiture of payments already made, see 32 L. R. A. 469; Dodge *v.* Carter, 140 Cal. 663; Griffin *v.* Ferris, 76 Conn. 221; Herbert *v.* Rhodes-Burford Co., 106 Ill. App. 583.

See also analogous cases in regard to real estate, 1. Ames Eq. Jur. 339 *n.*, 341 *n.*

JAMES BRIDGFORD, RESPONDENT, *v.* LEMUEL H. CROCKER, SURVIVOR, ETC., APPELLANT.

NEW YORK COURT OF APPEALS, FEBRUARY 15–23, 1875.

[*Reported in* 60 *New York*, 627.]

THIS was an action, among other things, upon a check drawn by defendants' firm, and transferred to plaintiff by the payee, upon a contract for the sale, by the former, to Gavin & Kelly, of 500 head of cattle. The check was given to Gavin to purchase cattle for defendants. The trial court held, that, under the circumstances, plaintiff could not recover, unless, upon proof, that defendants assented to the use made of the check; and submitted this question to the jury. The court here held, that the evidence was sufficient to warrant such submission.

Gavin & Kelly received all of the cattle, except 126 head; they paid plaintiff, including the check, more than sufficient to pay for the cattle delivered. Plaintiff claimed damages for the refusal to receive the residue, and the court held they were entitled, as damages, to the difference between the market-value, at the time Gavin was to receive them, and the contract-price. It appeared that plaintiff, after holding them until spring, sold them at an enhanced price. Defendants claimed the benefit of the sale. *Held*, that the ruling of the court was correct; that plaintiff had the election either to tender the cattle and recover the contract-price, or to keep the cattle as his own, and recover his damages, to be determined in accordance with the rulings of the court (Dustan *v.* Andrews, 10 Bosw. 130, questioned); and that it mattered not, and could not be taken into consideration what plaintiff received upon a subsequent sale of the cattle; if the cattle rose in the market, after the failure to perform, the plaintiff, not the defendants, was entitled to the benefit of the enhanced value.

E. C. Sprague for the appellant.

George Wadsworth for the respondent.

GROVER, J., reads for affirmance.

All concur.

Judgment affirmed.[1]

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[1] Warren *v.* Buckminster, 24 N. H. 336. See also Strickland *v.* McCulloch, 8 N. S. Wales, 324.

J. FREDERICK ACKERMAN, APPELLANT, *v.* R. FULTON RUBENS, RESPONDENT.

NEW YORK COURT OF APPEALS, MAY 2–JUNE 11, 1901.

[*Reported in* 167 *New York*, 405.]

ON the 28th of July, 1897, at the city of New York, the plaintiff sold his yacht *Iola* to the defendant for the sum of $2,250, by an executory contract which impliedly provided that the title should not pass until the purchase price should have been fully paid. The defendant refused to complete his purchase, whereupon the plaintiff gave him written notice that he should sell the yacht "either by public sale at auction, or private negotiation, whichever in my judgment will result in obtaining the most favorable price, and in the event of any deficiency in the sum so obtained and the contract price as agreed upon as per contract of July 28, 1897, namely, $2,250, I shall hold you for such deficiency." The defendant paid no attention to this notice and had no further communication with the plaintiff at any time on the subject of selling the yacht.

The plaintiff promptly placed the vessel in the hands of an experienced yachtsman for sale, but after due effort no sale could be made, although she was advertised in a prominent New York daily newspaper every Sunday during the months of August and September. Thereupon the plaintiff placed her in the hands of a public auctioneer for sale at auction, and on the 29th of September gave the defendant personal notice in writing that she would be sold at auction on the 6th of October, 1897, at one o'clock P. M., at the store of the auctioneer, No. 29 Burling Slip, in the city of New York. In the advertisement of the auctioneer she was fully and accurately described, and notice was given that she could be "seen at Atlantic Yacht Club Basin, foot of 55th street, Brooklyn." At the time and place named she was sold at auction in the usual way to an agent of the plaintiff for $1,100, which was the highest, but not the only, bid, as a stranger had run her up to $1,050. The expenses of the sale were $90, of which $40 was for advertising, hand bills and postage, and $50 was for the services of the auctioneer. The plaintiff credited the net proceeds of the sale upon the purchase price and sued the defendant for the balance, amounting to $1,240. . . . The trial court, upon motion of the defendant, directed a verdict for the plaintiff for nominal damages only, and an exception was duly taken. The jury rendered a verdict for six cents, and the judgment entered accordingly having been affirmed by the Appellate Division, the plaintiff came here.

Charles D. Ridgway for appellant.
Percival S. Jones and *Henry J. McCormick* for respondent.

. . . .

VANN, J. When the vendee of personal property, under an executory contract of sale, refuses to complete his purchase, the vendor may keep the article for him and sue for the entire purchase price; or he may keep the property as his own and sue for the difference between the market value and the contract price; or he may sell the property for the highest sum he can get, and after crediting the net amount received, sue for the balance of the purchase money. (Moore *v.* Potter, 155 N. Y. 481; Dustan *v.* McAndrew, 44 N. Y. 72.)[1]

While the courts below recognized this rule they did not apply it, for they held that the sale at auction was no sale at all, because a man cannot sell to himself. This would be true of an attempt to make a private sale to one's self, but it is not true of a sale at public auction, fairly conducted by a licensed auctioneer, and made at a reasonable time and place, after adequate opportunity to see the property, due advertisement to the public and personal notice to the vendee, when the real purpose is to ascertain the value of the property. The law is satisfied with a fair sale, made in good faith, according to established business methods, with no attempt to take advantage of the vendee. Such, as the jury might have found, was the sale under consideration. The primary object of the sale was not to pass title from the vendor, but to lessen the loss of the vendee. The subject of the sale had no market value, and the amount for which it could be sold depended largely upon taste and fancy. A public competitive sale by outcry to the highest bidder, duly advertised and made upon notice to the vendee, is a safer method of measuring the damages than a sale by private negotiation, which has been held sufficient. (Van Brocklen *v.* Smeallie, 140 N. Y. 70.) A fair public sale, in the absence of other evidence, is competent evidence of value. The plaintiff did not conduct the sale himself, but placed the yacht in the hands of a public auctioneer for sale without reservation, on account of whom it might concern. While the auctioneer was his agent he could not lawfully control him so as to prevent an honest sale. The defendant had notice and an opportunity to protect himself, yet he asked for no postponement, made no request, gave no instructions and did not even appear at the sale. If the plaintiff's agent had refrained from bidding, the property would have gone to a stranger for a less sum than it finally brought, and yet, in that event, even according to the defendant's theory, the sale would have been valid. The fact that the plaintiff outbid all competitors did not render the sale invalid, for he had a right to bid, provided he took no advantage by trying to prevent others from bidding or by disregarding any reasonable request of the defendant, or in any other way. If he had acted as auctioneer, or in collusion with the auctioneer, or there was any evidence of furtive effort on his part, or anything to challenge the fairness of the sale, the action of the trial court in virtually withdrawing the case from the jury might have been justified, but the mere fact that he was the highest bidder at a public sale, the fairness of which is not questioned in any other respect, did not warrant the direction for nominal damages only. The object of the sale was to measure the damages caused by the default of the defendant, and they were diminished instead of being increased by the action of the plaintiff.

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[1] Habeler *v.* Rogers, 131 Fed. Rep. 43, 45 (C. C. A.); Magnes *v.* Sioux City Seed Co., 14 Col. App. 219, 225; Bagley *v.* Findlay, 82 Ill. 524; Ames *v.* Moir, 130 Ill. 582, 591; Comstock *v.* Price, 103 Ill. App. 19, 21; Bell *v.* Offutt, 10 Bush. 639; Ozark Lumber Co. *v.* Chicago Lumber Co., 51 Mo. App. 555, 561; Van Brocklen *v.* Smeallie, 140 N. Y. 70, 75; Levy *v.* Glassberg, 92 N. Y. Supp. 50; Shawhan *v.* Van Nest, 25 Ohio St. 490; Ballentine *v.* Robinson, 46 Pa. 177; Pratt *v.* S. Freeman & Sons Mfg. Co., 115 Wis. 648, 654, *acc.* See also Putnam *v.* Glidden, 159 Mass. 47, 49; Gordon *v.* Norris, 49 N. H. 376.

We forbear further discussion, because the question is no longer open in this court, as it was involved in a case recently decided by us upon careful consideration after full discussion by counsel. (Moore *v.* Potter, 155 N. Y. 481.) In that case, as in this, the property was sold at auction to a representative of the vendor, and the point was distinctly made on the argument before us that as the vendor was the real purchaser, "the sale was colorable only and absolutely without effect upon the rights of the parties." While we did not discuss the question in our opinion, it was necessarily involved, was passed upon in consultation and decided. Both upon principle and authority we think that the amount for which the yacht was struck off to the vendor at an auction sale fairly conducted, upon notice to the vendee, with no suspicion of fraud or undue advantage, was lawful evidence of the value of the yacht and presented a case for the consideration of the jury. The judgment should, therefore, be reversed and a new trial granted, with costs to abide the event.[1]

HAIGHT, J. (dissenting). The rule of damages for a breach by the buyer of a contract for the sale of personal property is well settled. The seller may store the property for the buyer and sue for the purchase price; or may sell the property as *agent* for the vendee and recover any deficiency resulting; or may keep the property as his own and recover the difference between the contract price and the market value at the time and place of delivery. If he sells as agent he may sell either at public or private sale, but it must be a sale made in good faith and in such manner as to produce most nearly the full value of the property. Selling as agent he cannot sell to himself. Selling involves contracting and a person cannot contract with himself and bind others thereby. If he could sell to himself publicly he could privately, and thus be able to perpetrate a fraud or an injustice which might be difficult to detect or prove. (Van Brocklen *v.* Smeallie, 140 N. Y. 70, 75; Pollen *v.* Le Roy, 30 N. Y. 549, 557; Dustan *v.*

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[1] Strickland *v.* McCulloch, 8 N. S. Wales, 324; *conf.* Straus *v.* Labsap, 59 Mo. App. 260.

McAndrew, 44 N. Y. 78; Hayden *v.* Demets, 53 N. Y. 426; Bain *v.* Brown, 56 N. Y. 285.)

. . . .

I think the judgment should be affirmed.

Parker, Ch. J., Bartlett and Martin, JJ., concur with Vann, J.; Gray and Werner, JJ., concur with Haight, J.

Judgment reversed, etc.[1]

FRANK E. PUTNAM *v.* CHARLES J. GLIDDEN.

Supreme Judicial Court of Massachusetts, January 13–May 16, 1893.

[*Reported in* 159 *Massachusetts*, 47.]

Contract to recover for the keeping, care, etc., of one pair of horses, from June 16, 1890, to October 17, 1891. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, on agreed facts, in substance as follows.

On June 16, 1890, the plaintiff, who was then the owner of the horses, had negotiations with the defendant in relation to a sale of them, by which they were delivered by the plaintiff at the defendant's stable in Lowell.

The plaintiff contended that the negotiations so made, and the delivery, amounted to an absolute sale.

The defendant contended that the sale was subject to the approval of his veterinary surgeon, who was to examine the horses and report whether or not they were sound.

On June 17 the defendant returned the horses to the plaintiff's stable, contending that his veterinary surgeon reported one of the horses to be unsound, and that he had a right to return them under the contract. The plaintiff on the next day delivered to the defendant the following notice in writing:

"You are hereby notified that the pair of horses sold by me to you on Monday, the 16th day of June current, and on that day delivered to you, for the sum of eight hundred dollars, and which were returned by you to my stable on Tuesday, the 17th day of June current, are still at my stable, but as your property and not as my own; that said horses are subject to your order and control; that any expense I am at in keeping said horses and for medical attendance on one of them on account of an injury received by it after they were delivered to you and while in your possession, I shall charge to you and seek to recover the same of you in addition to the agreed price of eight hundred dollars.

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[1] The statement of facts has been slightly abbreviated, and a portion of the dissenting opinion in which Moore *v.* Potter, 155 N. Y. 481, is explained, has been omitted.

"You are further requested to remove said horses from my premises, and are hereby notified that the same are at my stable at your risk, and that I shall not be responsible for any accident or injury to them."

The plaintiff brought an action of contract against the defendant for the purchase price of the horses under the sale referred to, on June 21, 1890, and the cause came to trial in the Superior Court for the County of Middlesex, at the September term, 1891, when a verdict and judgment were rendered for the plaintiff for the contract price, and the defendant paid the amount of said judgment and costs; and on said October 17 the defendant called for the horses at the plaintiff's stable, and the plaintiff delivered them to the defendant.

The action above mentioned was solely to recover the contract price, and during the time the plaintiff kept the horses they were not used by him.

If upon the above facts the plaintiff was entitled to recover for keeping the horses during the above mentioned period, then judgment was to be entered for the sum of five hundred and thirty-two dollars. If the plaintiff was entitled to recover for the care and keeping during such time only as would enable the plaintiff to resell the horses to advantage, then it was agreed that twenty-one days from and after June 17, 1890, would give the plaintiff a reasonable time in which to make the sale, and judgment was to be entered for the sum of thirty-five dollars; otherwise, judgment was to be entered for the defendant.

J. C. Burke, for the defendant.

F. W. Qua, for the plaintiff.

KNOWLTON, J. On the agreed statement of facts in this case the question is whether the law implies a contract on the part of the defendant to pay for the keeping of the horses. The burden of proof is on the plaintiff, and no inferences of fact can be drawn in his favor. Old Colony Railroad *v.* Wilder, 137 Mass. 536.

It has been said that, when a vendee returns or declines to receive property sold him, the vendor has his choice "of either one of three methods to indemnify himself: (1.) He may store or retain the property for the vendee, and sue him for the entire purchase price; (2.) He may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such resale; or (3.) He may keep the property as his own, and recover the difference between the market price at the time and place of delivery, and the contract price." Dustan *v.* McAndrew, 44 N. Y. 72, 78. Haines *v.* Tucker, 50 N. H. 307. Girard *v.* Taggart, 5 S. & R. 19. Rosenbaums *v.* Weeden, 18 Gratt. 785. Holland *v.* Rea, 48 Mich. 218, 224. Cook *v.* Brandeis, 3 Met. (Ky.) 555. Bagley *v.* Findlay, 82 Ill. 524.

Where the vendee contends that the property is not his, and treats it as belonging to the vendor, and the vendor elects to keep it for the vendee and sue for the entire contract price, there is no implied contract on the part of the vendee to pay the vendor the expense of keeping it. Whiting *v.* Sullivan, 7 Mass. 107. Earle *v.* Coburn, 130 Mass. 596. In such cases, when there is a controversy about the title, the election of the vendor to take care of the property is often more for his own benefit, in view of the risk that the main question in dispute may be decided against him, than for the benefit of the vendee, and the attitude of the vendee is equivalent to an express prohibition of the keeping on his account and at his expense. If the vendor wishes to avoid the expense of keeping, and at the same time to avail himself of the value of the property, he may sell under an implied agency for the vendee, and sue for the balance above what he obtains after paying the reasonable expenses.

In the present case the plaintiff elected to sue for the entire contract price, and, in the opinion of a majority of the court, there is no principle of law which permits him now to maintain a second suit for the expense of keeping the horses, either during the whole time while the litigation was pending, or for that part of it which would have been required to enable him properly to dispose of the horses, if he had chosen to sell them on the defendant's account, and, after applying the proceeds, to sue for the balance due him.

Judgment for the defendant.[1]

WILLIAM WRIGLEY Jr., ET AL. *v.* GEORGE M. CORNELIUS, ET AL.

ILLINOIS SUPREME COURT, JUNE 13, 1896.

[*Reported in* 162 *Illinois*, 92.]

Mr. JUSTICE CRAIG delivered the opinion of the court:[2]

This was an action of assumpsit, brought by appellees in the county court of Cook county, against appellants, to recover a certain sum of money alleged to be due on account of the failure of appellants to accept and pay for 2426 World's Fair pictures which appellees had sold appellants in the spring of 1893, at a certain stipulated price. On a trial of the cause in the county court the plaintiffs recovered the amount claimed to be due, and appellants appealed to the Appellate Court, where the judgment was affirmed.

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[1] Hyde *v.* Lindsay, 29 Can. Sup. Ct. 594, *contra.*

See also Rubin *v.* Sturtevant, 80 Fed. Rep. 930, 932 (C. C. A.).

Reasonable expenses incurred in making a resale may be deducted from the gross price realized. Hill *v.* McKay, 94 Cal. 5; Barnes *v.* Bluthenthal, 101 Ga. 598; Ridgley *v.* Mooney, 16 Ind. App. 362; Ingram *v.* Wackernagel, 83 Ia. 82; Mattingly *v.* Mathews, 14 Ky. L. Rep. 300; Tripp *v.* Forsaith Machine Co., 69 N. H. 233, 235; Pollen *v.* Le Roy, 30 N. Y. 549; Lewis *v.* Greider, 51 N. Y. 231; Sawyer *v.* Dean, 114 N. Y. 481; White *v.* Matador Land Co., 75 Tex. 465; Chapman *v.* Larin, 4 Can. Sup. Ct. 349; but not compensation for the seller's services. Penn *v.* Smith, 93 Ala. 476; Gehl *v.* Milwaukee Produce Co., 105 Wis. 573. See also Brunswick Grocery Co. *v.* Lamar, 116 Ga. 1.

[2] A portion of the opinion is omitted.

It is claimed by appellees they sold 10,000 World's Fair pictures to appellants, at fifteen cents each, on the 10th day of April, 1893. Of these, 7574 were delivered and paid for, but the balance, 2426, appellants refused to accept. Upon appellants' refusal appellees sold the pictures at five and one-half cents each, — the best price they could obtain, — and brought this action to recover the difference between the contract price and the amount received. On the other hand, the appellants claim that they only ordered 5000 pictures but finally received 7574, and deny the making of a contract for 10,000.

At the request of appellees the court gave to the jury the following instruction:

"If you believe, from the evidence, that defendants agreed to receive and pay for 10,000 pictures, and that before all of said pictures had been delivered defendants refused to receive the residue of said pictures, and told plaintiffs that they might do what they pleased with the residue of said pictures, then plaintiffs might re-sell the residue of said pictures without giving defendants any notice of the sale."

The law is well settled that where the vendee refuses to receive goods purchased, the vendor may re-sell the goods and sue for the difference between the contract price and the amount received upon a re-sale. There may be, and doubtless are, cases where the vendor would be required to give the vendee notice before making a sale. But the conduct of the vendee may be such that notice will be waived. Where, as was the case here, there is an absolute refusal on behalf of the vendee to receive the goods, and the vendor is notified to do what he may choose with them, no notice of a re-sale will be required. The law never requires any person to do a useless act, and why should notice be given by the vendor when he has been told by the vendee to dispose of the goods in any manner he may choose?

In Ullmann *v.* Kent, 60 Ill. 271, in the discussion of the question of notice, the court said (p. 274): "If a sale is desired and is the best, upon the failure of the vendee to comply, and notice to him is the positive requirement of the law, what shall the seller do if the buyer abscond or is temporarily absent or his locality is unknown? The instances would be numerous in which a notice would be impracticable and could not be given. . . . There is no necessity for the rule. It would greatly embarrass trade; would subserve no good purpose; would impose always an unnecessary and sometimes an impossible duty upon the seller, and would afford no protection to the buyer. The safest, wisest, and most honest rule is, that parties should be left to the consequences flowing from their contracts. It is both reasonable and right that a party guilty of a breach of contract should pay damages therefor, if any have accrued."

In Maulding *v.* Steele, 105 Ill. 644, the court, in approving the doctrine announced, said (p. 647): "This court held in the case of Ullmann *v.* Kent, 60 Ill. 271, that on the sale of chattels, and the purchaser refused to receive and pay for them, the vendor might re-sell the goods and recover the difference in the price, if there was a loss on re-sale, without notice to the purchaser that a re-sale would be made, — and this decision was made on a review of the authorities, American and English, the weight of which establishes that doctrine."

In Plumb *v.* Campbell, 129 Ill. 101, the Supreme Court said (p. 110): "We think, however, that the Appellate Court decided correctly in holding that on appellant's theory of the case, under the facts, no notice of appellee's intention to sell was required. (Ullmann *v.* Kent, 60 Ill. 271.) The proof tends to show, and we must presume that the fact is established, that after the expiration of twenty days from the delivery of the bonds to appellant he was requested by appellee to comply with the terms of the contract and that he declined to do so. No further notice to him was necessary. Appellee might then legally sell, and hold appellant liable for the loss sustained." See, also, Morris *v.* Wibaux, 159 Ill. 627.

In New York the courts hold that while notice of re-sale may be properly given it is not essential. Van Brocklen *v.* Smeallie, 140 N. Y. 70; Pollen *v.* Leroy, 30 id. 549.

We find no substantial error in the record, and the judgment of the Appellate Court will be affirmed.

Judgment affirmed.[1]

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[1] Magnes *v.* Sioux City Seed Co., 14 Col. App. 219; Clore *v.* Robinson, 18 Ky. L. Rep. 851; Mann *v.* National Oil Co., 87 Hun, 558; Waples *v.* Overtaker, 77 Tex. 7 (Executed Sale), *acc.* See also McLean *v.* Slum, 4 Bing. 722; Acebal *v.* Levy, 10 Bing. 376; Ingram *v.* Wackernagel, 83 Ia. 82.

Davis Ore Co. *v.* Atlanta Guano Co., 109 Ga. 607; Redmond *v.* Smock, 28 Ind. 365; Ridgley *v.* Mooney, 16 Ind. App. 362; Dill *v.* Mumford, 19 Ind. App. 609; Nelson *v.* Hirsch, 102 Mo. App. 498; Woldert *v.* Arledge, 4 Tex. Civ. App. 692; Rosenbaums *v.* Weeden, 18 Gratt. 785, 794; Pratt *v.* S. Freeman & Sons Mfg. Co., 115 Wis. 648, *contra.* See also Holland *v.* Rea, 48 Mich. 218.

Though it is well to give notice of the time and place of sale, such notice is not indispensable. Holland *v.* Rea, 48 Mich. 218; Pollen *v.* Le Roy, 30 N. Y. 549; Van Brocklen *v.* Smeallie, 140 N. Y. 70; Gashell *v.* Morris, 7 W. & S. 22, Rosenbaums *v.* Weeden, 18 Gratt. 785, 794; American Leather Co. *v.* Chalkley, 101 Va. 458; Pratt *v.* S. Freeman & Sons Mfg. Co., 115 Wis. 648. But see Hickock *v.* Hoyt, 33 Conn. 553.

RHODES *v.* MOONEY.

OHIO SUPREME COURT, JANUARY TERM, 1885.

[*Reported in* 43 *Ohio St.* 421.]

THE Jackson Iron Company sold to E. K. Chamberlain one hundred tons of iron at a specified price, to be paid in cash on delivery of Rhodes & Co.'s warehouse receipt. The receipt of Rhodes & Co. stipulated that they were to deliver the iron on return of such receipt. E. K. Chamberlain failing, on tender of the receipt to pay, the Jackson Iron Company brought suit against him for the contract price, alleging that it sold and delivered the iron to E. K. Chamberlain. The Jackson Iron Company has retained the receipt at all times.

After verdict in favor of the Jackson Iron Company for the contract price, $4.896.73 and costs, E. K. Chamberlain made an assignment of all his property to John B. Mooney, for the benefit of creditors, and the creditors of E. K. Chamberlain met and unanimously selected J. A. Smith as trustee in the matter of the assignment, eighteen creditors being present, and the Jackson Iron Company, whose claim was stated as $4,800, voting as an unsecured creditor.

Judgment was subsequently rendered on the verdict, and thereupon John B. Mooney demanded the iron of Rhodes & Co. On refusal, John B. Mooney brought suit against Rhodes & Co. for damages as upon a conversion of the iron.[1]

The case was tried to a jury, and the court charged that by the recovery of the judgment the lien upon the iron was lost. The jury accordingly returned a verdict for the plaintiff and judgment was rendered thereon. The case now comes up on petition in error.

F. J. Wing, for plaintiff in error.

V. P. Kline, *J. A. Smith* and *Arnold Green*, for defendants in error.

McILVAINE, C. J. On an agreement for the sale of goods to be paid for on delivery, when payment on tender of goods is refused, the vendor can not be deprived of the right of possession against his consent, until payment is made or tendered. Perhaps no one will dispute this proposition.

After tender of the goods and refusal to pay, the vendor may bring his action against the vendee, and recover the contract price, although the right of possession still remains in him.

Granting that the election of the vendor to sue the vendee on the contract for the purchase price, vests in the vendee the right of property, it is nevertheless true, under the contract, that the right of possession remains in the vendor in the nature of a pledge to secure the payment of the purchase-money, and after judgment, the goods may be seized in execution, as the property of the vendee. I can see no objection to such proceeding by execution at law. But, at all events, if interests be subsequently acquired in the property from the vendee, which would preclude the seizure of the property in the hands of the vendor, as the property of the vendee, it is beyond doubt that equity would take hold of the property, and apply it to the payment of the purchase-money.

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[1] The statement of facts has been abbreviated.

Whether the right of the vendor to have the goods sold and remaining in his possession applied to the payment of the purchase-money be at law or in equity, I am satisfied that the right of possession for the purpose of security can not be taken away without his consent.

Beyond doubt, in this case, the vendor, the Jackson Iron Company, did not deliver the goods to the purchaser, Chamberlain. It is true, he tendered the warehouse receipt, according to contract, and demanded payment. Payment being refused, the vendor retained the receipt. The goods were held by Rhodes & Co., warehouse-men, as bailees of the vendor. This relation was not changed.

It is conceded that the Jackson Iron Company recovered a judgment against Chamberlain for the full contract price. After judgment, Chamberlain assigned for the benefit of creditors to Mooney, the plaintiff in the original action, who brought this suit against Rhodes & Co., the bailees of the Jackson Iron Company, for the recovery of the goods. The question in the case was, whether Mooney, as assignee of Chamberlain, or Rhodes & Co., as bailees of the Jackson Iron Company, were entitled to the possession of the goods.

The case below turned upon a single fact. The Jackson Iron Company, in its action against Chamberlain for the purchase price, averred in its petition that the goods had been sold and *delivered.* It would undoubtedly have been sufficient to have averred that the goods had been sold and *tendered*, but, inasmuch as payment was refused by Chamberlain, the possession of the goods had been retained by the plaintiff, who was ready and willing to deliver, upon payment of the price.

In this case, I admit the averment of *delivery*, in the petition in the former case, was entitled to weight as an *admission* of the vendor that there had been an actual delivery to the plaintiff's assignor. But I deny that admission was conclusive between the parties to this suit. Beyond all question it was *untrue.* I can find no element of estoppel in the admission as against the defendants in this case. Neither the plaintiff nor his assignor was misled by the averment.

On the trial below the case was tried on the theory that in an action by a vendor for full purchase price, an averment of the delivery of goods is conclusive, and that the subsequent retention of the goods by the vendor as security for the purchase-money is wrongful, although by the contract of sale such retention is stipulated for. In this there was error, for which the judgment below should be reversed.

Judgment reversed, and cause remanded to the court of common pleas for a new trial.[1]

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McELWEE ET AL. *v.* METROPOLITAN LUMBER COMPANY

Circuit Court of Appeals for the Sixth Circuit,
July 2, 1895.

[*Reported in* 69 *Federal Reporter*, 302.[2]]

In error to the Circuit Court of the United States for the Northern Division of the Western District of Michigan. The facts were as follows: —

The Metropolitan Lumber Company made a contract in May, 1892, with S. B. Barker & Co. for the sale to them of all the product of its mill during the season of 1892. It was agreed that the amount of lumber manufactured each month should be determined by inspectors on the first day of the succeeding month, and that S. B. Barker & Co. should give their notes due in ninety days for the price, less the freight from the Metropolitan Company's mill in Michigan to Chicago. It was also agreed that, if S. B. Barker & Co. did not desire the lumber shipped as fast as made, the Metropolitan Company would renew S. B. Barker & Co.'s notes for the price so long as the lumber remained in its possession, not exceeding ninety days. At the close of the season, on November 12, 1892, a considerable quantity of lumber remained in the possession of the Metropolitan Company, for which notes were outstanding, having been discounted by the Metropolitan Company.

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It was claimed that, shortly after the close of the season of 1892, in consideration of S. B. Barker & Co.'s executing their note for the lumber, made between November 1st and 12th, before the end of that month, the Metropolitan Company had agreed to turn over absolutely to S. B. Barker & Co. all its right and title to the lumber on hand, and thereafter held such lumber as bailee of S. B. Barker & Co. In January, 1893, S. B. Barker & Co. requested renewals of such notes, under the clause in the contract providing therefor, and new notes were given, maturing in May, June, and July. On May 30th S. B. Barker & Co. failed, and the Metropolitan Company at once asserted a right to retain the lumber remaining in its possession.

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[1] See also Tuthill *v.* Skidmore, 124 N. Y. 148.

[2] Also reported in 37 U. S. App. 266 and 16 C. C. A. 232.

The plaintiffs, McElwee & Carney, claiming to have bought the lumber from S. B. Barker & Co., replevied it and brought this action. The jury found for the defendant, but many exceptions were taken by the plaintiffs to the charge of the trial judge and to his refusal to charge as requested. Further facts appear in the opinion.

F. O. Clark and *Hanchett & Hanchett*, for plaintiffs in error.

F. D. Mead and *Ball & Ball*, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

Though the agreement was originally executory, being for the sale of lumber to be manufactured, yet, when the product of a particular month was completed, and it had been inspected and measured, there was a complete bargain and sale of the lumber thus designated. That particular lumber became appropriated to the contract, and the vendee under the agreement was obliged to make his promissory note to the vendor for the price, payable 90 days after date. The element necessary to a perfect and complete sale was supplied by the appropriation of a particular lot of lumber to the contract. In the absence of a contrary intention, clearly expressed by other parts of the contract, the right of property and of possession would vest in the buyer upon the execution of his promissory note payable to the seller. The provision for a final inspection at Escanaba after the delivery had begun was merely for the correction of errors before final settlement, and does not operate to defeat the presumption that title passed when the lumber was first inspected and accepted and conditional payment made. Macomber *v.* Parker, 13 Pick. 183; Cotton Press Co. *v.* Stanard, 44 Mo. 71. To say that title remained with the vendor after the lumber had been appropriated to the contract and accepted by the buyer, and after the negotiable notes of the vendee had been delivered in settlement, would leave the vendor liable for loss by fire or other casualty, and the vendee without security for the payment he had made. The clause concerning the risk, from fire, of lumber carried over from the season of 1892, was not interpreted by the defendant in error as leaving the risk with the defendant during the season; for the insurance carried in its own name was, by its own procurement, made payable to Barker & Co., to the extent of their interest. It may be added that, at the date when the right of plaintiffs in error accrued, this insurance had been transferred to Barker & Co. as owners, and was being carried by them. Neither did the provision that the vendor should deliver at Chicago prevent the title from passing before such delivery. Undoubtedly, the general rule is that if the seller obligates himself as a part of his contract to deliver the property to the buyer at some specified place, title will not pass until such delivery. The Venus, 8 Cranch, 275; Sneathen *v.* Grubbs, 88 Pa. St. 147; Benj. Sales, §§ 325, 377; Com. *v.* Greenfield, 121 Mass. 40. "Slight evidence," says Mr. Benjamin, "is, however, accepted as sufficient to show that title passes immediately on the sale, though the seller is to make a delivery. The question, at last, is one of intent, to be ascertained by a consideration of all the circumstances." Benj. Sales, § 329. Here the lumber cut, inspected, and measured was completely identified. Nothing more remained to be done to put it in a deliverable condition. It was then paid for. The delivery might be delayed by the neglect of the seller, or for the convenience of the buyer. In paying for the lumber, the price of the freight was deducted. Under such circumstances, it would be difficult to say that, if the lumber should be destroyed without fault of the seller, the loss would not fall on the buyer. Terry *v.* Wheeler, 25 N. Y. 520, is much in point. That was a case of the sale of lumber which was selected by the buyer, and measured and piled in the yard of the seller, and the price was paid. The seller, however, agreed, as part of the contract, to deliver the lumber free of charge on board of the cars, no time being specified. The lumber was destroyed by fire on the day of sale, and the buyer sued to recover his purchase money. Selden, J., said:

"No case has been referred to by counsel, nor have I discovered any, in which, where the article sold was perfectly identified and paid for, it was held that a stipulation of the seller to deliver at a particular place prevented the title from passing. If the payment was to be made on or after the delivery, at a particular place, it might fairly be inferred that the contract was executory, until such delivery; but where the sale appears to be absolute, the identity of the thing fixed, and the price for it paid, I see no room for an inference that the property remains the seller's merely because he has engaged to transport it to a given point. I think in such case the property passes at the time of the contract, and that in carrying it the seller acts as bailee and not as owner." Hobbs *v.* Carr, 127 Mass. 532; Weld *v.* Came, 98 Mass. 152; Lingham *v.* Eggleston, 27 Mich. 324; Underhill *v.* Booming Co., 40 Mich. 660; Booming Co. *v.* Underhill, 43 Mich. 629, 5 N. W. 1073; Steam Mill Co. *v.* Brown, 57 Me. 9; Hatch *v.* Oil Co., 100 U. S. 135; Dyer *v.* Libby, 61 Me. 45.

The passage of title does not militate against the existence of a vendor's lien. Such a lien arises upon the vesting of the title in the vendee, and is a mere right of the vendor to retain possession until the price is paid. If the title remains with the vendor, there is no lien; and this was explicitly stated to the jury, who distinctly found in their general verdict that the appellee had a vendor's lien. If such a lien existed when appellants replevied the lumber involved, it arose in consequence of facts occurring after the vendee gave his original notes. The agreement to give credit for 90 days after each instalment of lumber was placed in a deliverable condition, and had been inspected and estimated, was wholly inconsistent with any right of the vendor to retain possession until the price was paid. The duty of immediate delivery, credit having been given, was wholly inconsistent with a right to hold as security for the purchase price.

"Selling goods on a credit means ex vi terminorum that the buyer is to take them in his possession, and the vendor is to trust to the buyer's promise for the payment of the price at a future time." Benj. Sales (Corb. Ed.), § 1182.

The doctrine is well stated in the leading English cases of Bloxam *v.* Sanders, 4 Barn. & C. 941, and Bloxam *v.* Morley, Id. 951, by Bayley, J., who thus stated the general principles concerning the lien of a vendor of goods:

"The vendor's right in respect of his price is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion. If goods are sold on credit, and nothing is agreed on as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him; but his right of possession is not absolute; it is liable to be defeated if he becomes insolvent before he obtains possession. Tooke *v.* Hollingworth, 5 Term R. 215. If the seller has dispatched the goods to the buyer, and insolvency occur, he has a right, in virtue of his original ownership, to stop them in transitu. Why? Because the property is vested in the buyer so as to subject him to the risk of any accident. But he has not an indefeasible right to the possession, and his insolvency, without payment of the price, defeats the right. The buyer, or those who stand in his place, may still obtain the right of possession if they will pay or tender the price; or they may still act on their right of property, if anything unwarrantable is done to that right. If, for instance, the original vendor sell when he ought not, they may bring a special action against him for the damage they sustain by such wrongful sale, and recover damages to the extent of that injury; but they can maintain no action in which the right of property and the right of possession are both requisite, unless they have both those rights."

Thus, after the execution to the vendor of the promissory notes of the vendee, the title or right of property and the right of possession to the lumber embraced within each monthly settlement were vested in Barker & Co. The actual, manual possession was with the Metropolitan Lumber Company, which was under obligation to deliver to the buyer as delivery should be required. Delivery could not be refused unless one of two things should occur before the actual possession was surrendered, namely, insolvency of the buyer or nonpayment of the price when the credit expired. In case of the happening of either of these contingencies before the actual possession of the lumber passed from the seller to the buyer, the vendor's lien, which had been waived by a sale on a credit, would revive, and the vendor might lawfully retain his possession until the price was paid. Even if goods have been delivered to a carrier consigned to the vendee, and insolvency occurs before they reach the actual possession of the buyer, the vendor may exercise the right of stoppage in transitu to recover his possession, and thereby revive his lien. The right of stoppage in transitu is but an equitable extension or enlargement of the vendor's lien, and is not an independent or distinct right. 2 Benj. Sales (Corb. Ed.), §§ 1229–1245; Loeb *v.* Peters, 63 Ala. 249; Babcock *v.* Bonnell, 80 N. Y. 244. In the very well considered case of White *v.* Welsh, 38 Pa. St. 420, it was said by the court that:

"Judges do not ordinarily distinguish between the retainer of goods by a vendor and their stoppage in transitu on account of the insolvency of the vendee, because these terms refer to the same right, only at different stages of perfection and execution of the contract of sale. If a vendor has a right to stop in transitu, a fortiori he has a right of retainer before any transit has commenced." "The rule is," said the court, "that so long as the vendor has the actual possession of the goods, or as long as they are in the custody of his agents, and while they are in transit from him to the vendee, he has a right to refuse or countermand the final delivery, if the vendee be in failing circumstances."

Unless, therefore, the actual possession had been surrendered before the alleged change in the contract, to be hereafter considered, the vendor's lien would revive, in case insolvency occurred before delivery or the period of credit expired and the price was unpaid. The effect upon the vendor's right of the expiration of the period of credit while the actual possession is with the vendor is thus stated:

"When goods have been sold on credit, and the purchaser permits them to remain in the vendor's possession till the credit has expired, the vendor's lien, which was waived by the grant of credit, revives upon the expiration of the term, even though the buyer may not be insolvent." Benj. Sales (Corb. Ed.), § 1227.[1]

This revesting of the lien is not affected by the fact that the seller had received conditional payment by promissory notes or bills of exchange, nor by the fact that such notes or bills had been negotiated so that they were outstanding when they matured, or unmatured and outstanding when the insolvency occurred. Benj. Sales (Corb. Ed.), §§ 1130–1185, and note 4; Valpy *v.* Oakeley, 16 Q. B. 941; Griffiths *v.* Perry, 1 El. & El. 680; Grice *v.* Richardson, L. R. 3 App. Cas. 319; White *v.* Welsh, 38 Pa. St. 420; Wanamaker *v.* Yerkes, 70 Pa. St. 443; Arnold *v.* Delano, 4 Cush. 33; Townley *v.* Crump, 4 Adol. & E.

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[1] Leahy *v.* Lobdell, 80 Fed. Rep. 665, 667 (C. C. A.); Robinson *v.* Morgan, 65 Vt. 37, *acc.*

58.[1] The liability of defendant in error as indorser on such notes as had been negotiated operated to continue the relation of an unpaid vendor. The right of retention is not a right of recision, and it is why? not essential to the revival of the lien that the notes of the purchaser shall be delivered up or ready for delivery, though in Arnold *v.* Delano, cited above, it seems to have been so regarded. If, after the revival of the vendor's lien by expiration of the credit, the seller extended further credit by taking renewal notes, payable at a future date, the revived lien would be waived, unless there was some agreement that this further credit should not have that effect, and that the seller should hold the property as security for the renewal notes. This state of things seems to have been contemplated by the parties; for, by one of the clauses of the original contract, a provision was made for renewals or extensions for such time as the lumber in the actual possession of the vendor when an extension was granted should "remain in the possession" of the lumber company, "not exceeding ninety days." The reasonable construction to be placed upon this provision is that the revived lien, resulting from the expiration of the original credit, should not be waived by renewal of purchase notes and an extension of credit. Before such extension, the buyer undoubtedly had the right of property and right of possession. After such renewals, all right of possession till the renewal notes were paid was lost. Independently of the agreement that extended credit should not waive the lien which had been revived by expiration of original credit, the insolvency which occurred during the running of the renewal notes would operate to revive the suspended lien, and, between vendor and vendee, or a subvendee standing on no higher ground than the vendee, the defendant in error had a right to hold the possession till the renewal notes were paid. The authorities already cited fully sustain this position. Aside from all questions arising on the alleged modification of November 14, 1892, and all questions of estoppel, the rights of the defendant in error, in the actual possession of lumber which had not been paid for, would not be affected by a sale to a third person. Such a subvendee would buy subject to the right of the vendor to hold possession as security for renewal notes; and, without regard to this special agreement, a subvendee would take subject to the possibility that before possession was obtained the lien might be revived by insolvency of the vendee or expiration of the stipulated credit. These considerations lead us to the conclusion that the rights of the plaintiffs in error, as subvendees, must, as the learned judge who presided at nisi prius instructed the jury, depend either upon questions of estoppel or upon the legal effect of the modification in the contract as defeating any right of lien in the vendor. The construction given the original contract that the title did not vest in the purchaser till delivery at Chicago, though erroneous, was harmless. It is a matter of no moment to plaintiffs in error whether the defendant in error had a right of retention by reason of the fact that it had not parted with the title or because it had a vendor's lien. In either case, plaintiffs in error must fail in this action.

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[1] Brewer Lumber Co. *v.* Boston & Albany R. Co., 179 Mass. 228, *acc.*

This brings us to the legal effect of the alleged modifications of November 14, 1892. [The requests for rulings on this point made on behalf of the plaintiffs] imply that a mere agreement by which the title and right of possession vested in Barker & Co. would operate to prevent the subsequent attachment of a vendor's lien as a result of renewals, or as a consequence of insolvency before payment. Neither presents any question of estoppel operating to prevent the vendor from setting up a lien against subvendees. On this subject the jury were in substance and effect instructed that the plaintiffs could not recover unless it was found that the modification gave to Barker & Co. not only the title and the right of possession, but also an unqualified right to sell and transfer the lumber to third persons, and that this right of sale had been exercised in favor of plaintiffs. The charge more than once assumed, and in distinct terms instructed the jury, that there had been no change of possession; that the possession at time of insolvency was with the vendor.

The objection most earnestly insisted on to this charge is that the court drew no distinction between an actual and constructive possession by the vendee; that it ignored the possibility that the vendor may, by agreement, make a constructive delivery to the vendee, and remain in possession as agent or bailee of the vendee. Though this question is now much pressed, it is noticeable that there is no distinct recognition of the question, either in the charge or requests for charge. The only way in which it can now be made the subject of an assignment of error is by the suggestion that the court assumed that there had been no constructive transfer of possession because the actual possession remained with the defendant in error. There is no evidence in this record which would justify a finding that there was an agreement that, after the modifications of November 14th, the vendors should no longer remain in possession as vendors, but should thereafter hold as agent or bailee for Barker & Co. Upon the contrary, the construction placed upon the agreement, after the alleged modifications, by both parties, was wholly inconsistent with any change in the character in which the vendor remained in the actual possession. The claim of Barker & Co. for an extension of credit was made upon the clause providing for renewals while the vendors remained in possession, and the whole correspondence was based upon the theory that the lumber would stand as a security for the renewal notes. On the evidence before the jury, it was not error to assume, as the trial judge did, that at the occurrence of the vendee's insolvency, there had been no delivery to the vendee, either actual or constructive. Neither do we think that it would follow, if there was such evidence, that a mere agreement, express or implied, by an unpaid vendor, to hold possession as bailee or agent for the vendee, would operate as such a delivery to the vendee as to prevent the revivor of the vendor's lien if the vendee should fail before the actual possession was lost. It is to be borne in mind that this right of the vendor springs out of the relation of the parties and the natural equity that the vendor shall not be compelled to complete a contract by delivery when the vendee has not paid the price, or by insolvency becomes unable to carry out his side of the agreement. As put by Bayley, B., in Miles *v.* Gorton, 2 Cromp. & M. 511:

"Although everything may have been done so as to divest the property out of the vendor, and so as to throw upon the vendee all risk attendant upon the goods, still there results to the vendor out of the original contract a right to retain the goods until the payment of the price."

The case of Barrett *v.* Goddard, where the opinion was by Justice Story on circuit, and reported as No. 1046, Fed. Cas., is much relied upon by plaintiffs in error. That case is, however, exceptional, and is founded for the most part on Hurry *v.* Mangles, 1 Camp. 452, where the rights of a subvendee had intervened, who had bought and paid for the goods, and then paid rent to the vendor as warehouseman. In Miles *v.* Gorton, 2 Cromp. & M. 506, Hurry *v.* Mangles was distinguished, upon the ground that the vendor, by receiving rent from a subvendee, had delivered the goods to the subvendee, and thereafter held as agent for the subvendee and not as agent for the vendee. The other cases cited by Justice Story are cases where the question was one of delivery to the vendee under the statute of frauds, and are applicable only in respect of questions upon the formation of the contract. There is a clear distinction between a delivery which will suffice to take a case without the statute of frauds, and an agreement of a vendor to hold in the character of bailee for the vendee, as a delivery sufficient to divest the vendor's lien or prevent its revival on insolvency or expiration of period of credit. Benj. Sales (Corb. Ed.), §§ 1131–1134, 1187; Miles *v.* Gorton, 2 Cromp. & M. 504; Hurry *v.* Mangles, 1 Camp. 452; Tanner *v.* Scovell, 14 Mees. & W. 28–37; Townley *v.* Crump, 4 Adol. & E. 58; Grice *v.* Richardson, L. R. 3 App. Cas. 319. The case last cited is an opinion of the House of Lords, and was decided as late as 1877. The doctrine of Miles *v.* Gorton, heretofore cited, was distinctly affirmed. In that case it appeared that the vendors were warehousemen, and made an arrangement with the purchasers that they should pay warehouse rent, and the sâle was on a credit. It was held — First, that unless actual possession of goods sold has been delivered to the purchaser, the vendor is not deprived of his right of lien as against the assignee of the purchaser in the event of insolvency; second, that, as the goods remained in the possession of the vendors, and no actual delivery had been made to the purchaser, the vendors' lien revived upon the insolvency of the vendee, notwithstanding the vendors had become bailees for the vendee. The case was argued by Mr. Benjamin, the learned author of the work on Sales of Personal Property, in favor of the view announced by the House of Lords. Other English cases bearing upon the question are: Dodsley *v.* Varley, 12 Adol. & E. 632; Valpy *v.* Oakeley, 16 Q. B. 941; McEwan *v.* Smith, 2 H. L. Cas. 309.

Entertaining these views, it is clear that, if the defendant in error is debarred from asserting a vendor's lien upon the insolvency of the vendee, it must be because the plaintiffs in error have acquired rights as subpurchasers which the vendor is estopped to deny or contravene by the assertion of a lien. What are these rights, and what is their origin? As mere subpurchasers of lumber in the actual possession of the vendor, they only acquire the right and interest of the vendee. If, at the time they bought, the vendor had no lien, no right of retention, then they would acquire the right to demand delivery. But the right of a vendee who has bought on a credit is not an absolute right to demand delivery. The right is dependent upon the preservation of his credit, and, if he becomes insolvent before he obtains actual possession, the lien of the vendor revives, and the insolvent vendee must pay the purchase price before he can deprive the vendor of the goods remaining in his possession. So, if the vendor, for any reason, remain in the actual possession until the period of credit has expired, his lien revives. Now, a subvendee buys only this defeasible right of the vendee; and, if he does not obtain the actual possession or obtain from the vendor an actual attornment to him, as in Hurry *v.* Mangles, cited heretofore, and the credit given the vendee expires while the vendor holds the actual possession, or the vendee becomes insolvent, he cannot, in the absence of some estoppel, deprive the unpaid vendor of his actual possession.[1] The rights of subvendees have most often been under consideration in cases involving the doctrine of stoppage in transitu. But the principle is the same where transit has not begun. It was well said in White *v.* Welsh, 38 Pa. St. 420, that, "if a vendor has a right of stoppage in transitu, a fortiori he has a right of retainer before any transit has begun." Now the right of stoppage in transitu, special legislation out of the way, can only be defeated by the transfer of a bill of lading to an indorsee who bona fide gave value for it. Benj. Sales (Corb. Ed.), § 1285; Lickbarrow *v.* Mason, 1 Smith, Lead. Cas. (Ed. 1879) 753. It will not be defeated by a mere assignment while in transit, or by an attachment by creditors of vendee. Benj. Sales (Corb. Ed.), § 1242; Mississippi Mills *v.* Union & Planters' Bank, 9 Lea, 318; White *v.* Mitchell, 38 Mich. 390; Harris *v.* Pratt, 17 N. Y. 249; Umber Co. *v.* O'Brien, 123

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[1] Robinson *v.* Morgan, 65 Vt. 37, *acc.*

Mass. 12–44; Calahan *v.* Babcock, 21 Ohio St 281; Stanton *v.* Eager, 16 Pick. 476; Wood *v.* Yeatman, 15 B. Mon. 273; Loeb *v.* Peters, 63 Ala. 243. No subsale during transit will defeat the right, unless the bill of lading be transferred. In the late case of Kemp *v.* Falk, L. R. 7 App. Cas. 573–582, it was said by Lord Blackburn that "no sale, even if the sale had actually been made with payment, would put an end to the right of stoppage in transitu."

[The court, after examination of the evidence, found that no notice of any sales had been given to the defendants until after the bankruptcy, that the lumber which the plaintiffs claimed had been contracted for by the plaintiffs and the Hines Lumber Company, that the contracts had not specified the property sold except by statement of a given number of feet of lumber on the defendant's docks, and that to obviate the difficulty in regard to title, the Hines Lumber Company, after demand for the lumber had been made and refused, assigned its contract right to the plaintiffs, the amount of lumber on the docks being apparently less than enough to satisfy both contracts. On these facts the court held that even assuming that the assignment operated to vest title in the whole in the plaintiffs, the title was not thus vested until after the insolvency of Barker & Co., and the lien had then attached. The court further held that there was nothing in the modified agreement made on November 14 which would estop the defendant from asserting its lien.] [1]

GEORGE B. CRUMMEY *v.* SAMUEL W. RAUDENBUSH.

MINNESOTA SUPREME COURT, NOVEMBER 10–DECEMBER 7, 1893.

[*Reported in* 55 *Minnesota*, 426.]

MITCHELL, J. Stated according to its legal effect, the contract, upon which this action was brought, was an executory one for the sale of a piano by defendant to plaintiff, a part of the price being paid at the date of the contract, and the balance to be paid in quarterly installments from and after the date of the delivery of the piano. The action is for damages for a refusal to supply the piano according to the contract. It is not alleged that the balance of the price has ever been paid or tendered, the plaintiff standing on the terms of the contract that it was to be furnished on credit. Much of the answer consists of entirely irrelevant matters, the only defense alleged being that since the making of the contract the plaintiff had become, and still is, insolvent, and the only important question in the case is whether the defendant has established a defense justifying his refusal to deliver the piano on that ground.

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[1] The statement of facts has been much abbreviated and portions of the opinion omitted.

Where a vendor contracts to sell personal property on credit, he thereby agrees to waive his lien for the purchase money; but he does so on the implied condition that the vendee shall keep his credit good. If, therefore, before payment, and while the vendor still retains possession of the property, he discovers that the vendee is insolvent, he may hold the goods as security for the price. The insolvency of the vendee does not rescind the contract, and is not of itself a ground for rescission. It merely entitles the vendor to demand payment in cash before parting with possession of the property. Courts have differed as to the name to be given to this right, but they all recognize its existence. Like the analogous right of stoppage *in transitu*, it grows out of the vendor's original ownership and dominion, and is founded on the equitable principle that one man's property ought not to go to pay another man's debt. The right is not limited to cases where the insolvency of the vendee occurred after the date of the contract, but exists also even where the insolvency existed at that time, but was not discovered by the vendor until afterwards; and, as the presumption of both reason and law is that, where a vendor sold goods on credit, he believed that the purchaser was solvent and able to pay, the burden is on the vendee to prove that the vendor had knowledge of the insolvency at the time, and entered into the contract with that knowledge. The right is not affected by the fact that part of the price has been paid; and it makes no difference whether the sale was of a specific article appropriated to the contract, or, as in this case, a contract to supply an article of a certain description. The term "insolvent" is not used in any technical sense. It is not necessary that the vendee should have been adjudged a bankrupt or insolvent, or have made an assignment of his property. Insolvency, as applied to this branch of law, means a general inability to pay one's debts or to meet one's financial engagements. Passing to the facts of this case, an examination of the evidence satisfies us that it amply justified the trial court in finding that the plaintiff was insolvent in the fullest sense of the term. It follows that defendant had a right to refuse to deliver the property without payment in full of the price, provided he properly asserted that right, and had not in some way waived it.[1]

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[1] In Akeley *v.* Mississippi Boom Co., 64 Minn. 108, 113, Mitchell, J., speaking of a carrier's lien said: "All the authorities are agreed that a lien is waived or lost by any contract or course of conduct inconsistent with the existence of a lien. A common example of such a waiver is where credit is given by contract to the shipper for the price of transportation beyond the time when the property is to be delivered and placed out of the carrier's con-

The contract was made in April, 1889. The evidence is practically undisputed that for some two years afterwards the defendant was not only able and ready to furnish the piano, but repeatedly urged the plaintiff to come and select an instrument, but that he failed to do so, giving as a reason his inability to meet the payments. Finally, in the winter or early spring of 1893, after defendant had ceased to represent that make of piano in the trade, and hence no longer kept it in stock, the plaintiff for the first time formally demanded the delivery of the instrument within a specified time. Failing in some efforts to induce plaintiff to accept a piano of another kind, the defendant required some assurance that, if he procured a piano of the kind called for by the contract, the plaintiff would be ready to pay for it in cash, or give a mortgage on the instrument to secure the purchase price. The plaintiff positively refused to agree to do either, and insisted on the terms of the original contract for the delivery of the property on credit, which defendant as positively refused to do.

The evidence would fully justify the conclusion that the defendant was always willing to furnish the piano if plaintiff would pay the price in cash, or secure it by mortgage on the property, and that his refusal merely went to the extent of refusing to furnish it on credit without security.

But at no time during the negotiations did defendant assign the insolvency of the plaintiff as his reason for demanding cash or security, or give any special reason for doing so, except that when demanding the mortgage he said it was the custom of the trade. On this ground plaintiff's counsel invoke the doctrine that if a person, when called upon to deliver, places his right to retain the goods upon a ground inconsistent with a claim by virtue of a specific lien, this is a waiver of the lien; and that on the trial he will not be permitted to rest his refusal on a different and distinct ground from that on which he claimed to retain the property at the time of the demand. An examination of the authorities on the subject, from the early case of Boardman *v.* Sill, 1 Camp. 410, down, satisfies us that they all proceed upon principles essentially of equitable estoppel, and limit the application of the doctrine invoked by counsel to cases where the refusal to deliver the property was put on grounds inconsistent with the existence of a lien, or on grounds entirely independent of it, with-

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trol. The Bird of Paradise, 5 Wall. 545; Hutchinson, Carr. §§ 483–487. And if the lien is thus waived the insolvency of the shipper, or his default in payment at the expiration of the credit, occurring while the goods still remain in the possession of the carrier, will not reinstate it. The Bird of Paradise, *supra;* Au Sable R. R. Co. *v.* Sanborn, 36 Mich. 358. The law seems to be otherwise in the case of a vendor who sells on credit. Crummey *v.* Raudenbush, 55 Minn. 426, 56 N. W. 1113. Why this distinction is made in favor of a vendor may not be entirely clear on principle, although it is usually placed upon the ground of the vendor's original ownership of the property. But the law seems to be well settled as we have stated it."

out mentioning a lien. Thus it has been repeatedly held that a lien is not waived by mere omission to assert it as the ground of refusal, or by a general refusal to surrender the goods, without specifying the ground of it, except in certain cases, where the lien was unknown to the person making the demand, and that fact was known to the person on whom the demand was made. In such cases, if the ground of the refusal is one that can be removed, the other party ought in fairness to have an opportunity to do so. But no such state of facts exists in this case. While defendant did not specify his vendor's lien by reason of plaintiff's insolvency as the ground of his refusal, yet he never placed his refusal on any ground inconsistent with or independent of it. On the contrary, from first to last, what he insisted on was payment of, or security for, the price of the property; and the ground of his refusal was the refusal of plaintiff to give either. True, at the last, he announced his positive refusal to furnish the piano unless plaintiff would agree to give a chattel mortgage on it, — a thing which he had no legal right to insist on; but it is very evident that this demand on defendant's part was merely an alternative for payment in cash, which he had a right to demand, but which plaintiff had refused. The plaintiff probably had a right to be informed, as he was, that the property was held for the purchase money, for that was a matter which he could remedy by payment, but it would have availed him nothing to be informed that defendant's right to retain the property for the price was based on his insolvency, for that was a fact which he could not have changed. We can see nothing in defendant's acts of omission or commission that amounted to a waiver of his title, or which should estop him from now asserting it.

The rulings of the trial court on the admissibility of evidence as to plaintiff's insolvency were not always correct, or even consistent; but the only error of which plaintiff could complain is that, in one instance, the defendant was allowed to give his opinion that plaintiff was insolvent.

We think, however, that this was error without prejudice, for the reason that the other evidence, such as plaintiff's own admission of inability to pay; the inability of others, after search and inquiry, to find any property belonging to him; and that he was not in any business in this state, of which he had practically ceased to be a resident, — was such as, in the absence of any rebutting evidence, to require a finding that he was insolvent.

Order affirmed.

WILSON AMES *v.* ROBERT MOIR ET AL

ILLINOIS SUPREME COURT, OCTOBER 31, 1889.

[*Reported in* 130 *Illinois*, 582.]

MR. JUSTICE CRAIG[1] delivered the opinion of the Court:

This was an action of assumpsit, brought by Robert Moir & Co., in the Superior Court of Cook County, against Wilson Ames, to recover the price of one hundred barrels of highwines sold by the plaintiffs to the defendant on the 9th day of June, 1870. The action was brought upon a contract in writing, which was as follows:

"CHICAGO, June 9, 1870.

"I have this day bought of Robert Moir & Co. one hundred (100) barrels highwines, 'iron bound,' at one dollar seven cents ($1.07) per proof gallon. The conditions of sale are as follows: The buyer can call from 1st July to 20th of same month by giving three days' notice, and if not called for by the 20th July, the seller has the privilege of delivering up to the end of July by giving three days' notice, to be delivered in fifty barrel lots. To insure the fulfillment of this contract, a margin of $300 will be put up by both parties.

"WILSON AMES."

This instrument of writing, after it was executed by Ames on the day it bears date, was at once delivered to the agents of Moir & Co., and accepted by them. On the same day, a margin of $300 was put up by each party, as provided in the agreement. It also appears, that on the 15th day of July, 1870, Ames notified the agents of Moir & Co. to deliver the highwines. Upon receipt of the notice, the highwines were, on July 18, delivered by Moir & Co., and accepted by Ames, but Ames has never paid for the goods.

After the highwines had been delivered, late in the afternoon of July 18, Ames absented himself from his place of business, and could not be found by the agents of Moir & Co. to make a demand of payment for the highwines. They directed the porter in charge of Ames' warehouse to take care of the goods until morning, when they would call for the pay. When the agents called in the morning, Ames was nowhere to be found, and they found that he had shipped fifty barrels of the highwines for New York, and the remaining fifty barrels were loaded on cars ready for shipment. Phillips & Carmichael immediately replevied the fifty barrels which were found on cars in Chicago, and went on to Detroit, Michigan, where they overhauled the other fifty barrels, and they were also replevied. Phillips & Carmichael sold the wines thus replevied to Shufeldt & Co. at ninety-seven cents per gallon, the market price at that time, and deposited the proceeds in bank to await the result of the replevin suits. It appears that between the time the wines were delivered, late in the afternoon of July 18, and the time the agents reached Ames' store next morning, Ames had sent all the wines to the Michigan Central depot, shipped them, obtained bills of lading, which were attached to drafts on the consignee in New York, — one for $2800, and the other for $2900, — which drafts he discounted at the National Bank of Commerce on the security of the bills of lading. The replevin suits were defended by the National Bank of Commerce, and the defense interposed, that the bank was the pledgee of the highwines from Ames, in good faith, and without notice of Moir & Co.'s rights, was, in the end, sustained (see Michigan Central Railroad Co. *v.* Phillips, 60 Ill. 190), and the money realized on the sale of the highwines to Shufeldt & Co. was turned over to the National Bank of Commerce in payment of the drafts.

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[1] Portions of the opinion relating to the effect of the statute of limitations and bankruptcy are omitted.

In view of the fact that the wines were thus replevied and sold by the agents of Moir & Co., it is insisted that Moir & Co. elected to rescind the contract under which the highwines were sold to Ames, and having so elected, they can not now maintain an action upon it. It may be conceded that a contract for the sale of goods can not be rescinded and at the same time an action be maintained upon it for the contract price of the goods. But we do not understand that the contract in this case was rescinded, or that any effort whatever was made to rescind the contract. When the wines were delivered, Moir & Co. were entitled to payment. The delivery and payment were concurrent acts, and Moir & Co. were not bound to part with the absolute possession of the goods until they received the price named in the contract. In other words, they had a lien on the goods for the purchase money, which they were under no obligations to relinquish until payment was made. In Canadian Bank *v.* McCrea, 106 Ill. 281, this court held, that where goods are placed by the vendor in the hands of the purchaser in expectation that he will immediately pay the price, and he fails to do so, the vendor is at liberty to regard the delivery as conditional, and may at once reclaim the goods. But by holding the possession of the goods, or reclaiming them after the purchaser refuses to pay, the contract of sale is not thereby rescinded. The vendor merely retains possession to enforce his lien as vendor.

What are the rights of a vendor of goods where the vendee refuses to pay upon delivery or an offer to deliver goods? This question arose in Bagley *v.* Findlay, 82 Ill. 525, and this court held that the vendor had three remedies: First, the vendor may store the goods for the vendee, give notice that he has done so, and then recover the full contract price; second, he may keep the goods, and recover the excess of the contract price over and above the market price of the goods at the time and place of delivery; third, the vendor may sell the goods to the best advantage, and recover of the vendee the loss, if the goods fail to bring the contract price. The same rule is laid down in Benjamin on Sales (2d ed.), sec. 88. Here, the possession of the goods was fraudulently obtained, with the view to ship them out of the State, and not pay the purchase money agreed to be paid. As against Ames, Moir & Co. had the right to replevy the goods, not for the purpose of rescinding the contract, but for the purpose of asserting the vendor's lien and holding the possession of the goods until Ames should pay for the same. It turned out, however, that the action of replevin was unavailing, as the goods had, by the act of Ames, passed into the custody of innocent purchasers before they were reached by the writ of replevin, and the proceeds of the goods were used in payment of the advances of the National Bank of Commerce. Benjamin on Sales, section 735 (2d ed.), says: "The vendor's remedy, after a re-sale made in the absence of an express reservation of the right, is assumpsit on the original contract, which was not rescinded by the re-sale." This was the course pursued here, and we regard it correct.

We have been referred, in the argument, to Kellogg *v.* Turpie, 93 Ill. 265, and Doane *v.* Lockwood, 115 id. 490, and also to cases decided in the courts of other States, where it has been held that the rescission of a contract of sale, where there was fraud in the contract, was inconsistent with a subsequent action on the contract, — that if the contract was rescinded by the vendor on the ground of fraud in the contract, a subsequent action on the contract itself could not be maintained. We concur fully in the law as laid down in these cases, but they have no application to the facts of this case. As heretofore stated, the commencement of the action of replevin was not a rescission of the contract by Moir & Co., but it was a proceeding to enforce the vendor's lien. To place the wines in that position the vendors had the right to hold them in until the vendee should pay for them.

Judgment affirmed.[1]

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[1] See also Allyn *v.* Willis, 65 Tex. 65.

SECTION III.

O.K.

STOPPAGE IN TRANSITU.

WISEMAN *v.* VANDEPUTT.

– in equity first–

IN CHANCERY, HILARY TERM, 1690.

[*Reported in 2 Vernon, 203.*]

THE plaintiffs being assignees under a statute of bankruptcy taken out against the Bonnells, brought their bill for a discovery and relief, touching two cases of silk at first consigned by Altoniti and Antinori to the Bonnells, then considerable merchants in London; but before the ship set sail from Leghorn, news came that the Bonnells were failed, and thereupon Altoniti and Antinori alter the consignment of the silks, and consign them to the defendant.

Upon the first hearing, the court ordered all letters, papers, &c., to be produced, and that the parties proceed to a trial in trover, to see whether the first consignment, notwithstanding the altering thereof, and new consignment made, before the ship sailed, vested the property of those silks in the Bonnells; and upon the trial, and verdict being given for the plaintiffs, the cause now came on upon the equity reserved.

Held {

The court declared the plaintiffs ought not to have had so much as a discovery, much less any relief in this court in regard that the silks were the proper goods of the two Florentines, and not of the Bonnells, nor the produce of their effects; and therefore, they having paid no money for the goods, if the Italians could by any means get their goods again into their hands, or prevent their coming into the hands of the bankrupts, it was but lawful for them so to do, and very allowable in equity.

Pl. {

And it was so ruled in the like case between Wigfall and Motteux, &c., and lately between Hitchcox and Sedgwick in case of a purchase, without notice of bankruptcy. Therefore decreed an account, if anything due from the Italians to the Bonnells, that should be paid the plaintiffs, but they should not have the value of the silks by virtue of the consignment or verdict, and put the Italians to come in as creditors under the Statute of Bankrupts.

Comment: No title passed as yet, ∴ Δs did not have to rely on stoppage in transitu.

BURGHALL *v.* HOWARD.

OK

IN GUILDHALL, AFTER HILARY, 1759.

[*Reported in* 1 *H. Blackstone*, 365, *note*.]

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ONE Burghall at London gave an order to Bromley at Liverpool to send him a quantity of cheese. Bromley accordingly shipped a ton of cheese on board a ship there, whereof Howard the defendant was master, who signed a bill of lading to deliver it in good condition to Burghall in London. The ship arrived in the Thames, but Burghall having become a bankrupt, the defendant was ordered on behalf of Bromley not to deliver the goods, and accordingly refused, though the freight was tendered. It appeared by the plaintiff's witnesses that no particular ship was mentioned, whereby the cheese should be sent, in which case the shipper was to be at the risk of the peril of the seas. The action was on the case upon the custom of the realm against the defendant as a carrier.

LORD MANSFIELD was of opinion that the plaintiffs had no foundation to recover, and said he had known it several times ruled in Chancery, that where the consignee becomes a bankrupt, and no part of the price had been paid, that it was lawful for the consignor to seize the goods before they come to the hands of the consignee or his assignees; and that this was ruled, not upon principles of equity only, but the laws of property. *The plaintiffs were nonsuited.*

D'AQUILA *v.* LAMBERT.

OK

IN CHANCERY, JUNE 9, 1761.

[*Reported in* 1 *Ambler*, 399.]

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THE plaintiff, being a merchant at Leghorn, bought a large quantity of goods, by direction of defendant Israeli, who resided in England, and consigned them to him, and drew bills of exchange for the money. The bills were accepted by Israeli, but were protested for non-payment, on Israeli's becoming insolvent, and making a composition with his creditors, and assigning his effects in trust for them.

The goods arrived at the port of London, and the agent for the consignor, and the agent for the creditors, severally applied to the captain for the goods, but he refused to deliver them till the right was settled.

Bill by plaintiff to have the goods delivered.

LORD NORTHINGTON, C. This is a question of extent and consequence in trade. If it had been *res integra*, I should have required a more extensive argument, and taken time to consider; but it is not a case of difficulty. Has been settled by several determinations, which have been universally approved of by merchants. The plaintiff is substantially to be considered as a merchant selling goods to Israeli. The case of Wilkinson is in point. It was determined, on solid reasons, that the goods of one man should not be applied in payment of another man's debts. *Goods to be delivered to plaintiff.*

hip to 595

LICKBARROW *v.* MASON.

In the King's Bench, November 9, 1787.

In the Exchequer Chamber, February 11, 1790.

In the House of Lords, Trinity Term, 1793.

In the King's Bench, July 2, 1794.

[*Reported in* 2 *Term Reports*, 63; 1 *H. Blackstone*, 357; 2 *ib.* 211. 6 *East*, 20, *note*; 5 *Term Reports*, 683.]

Trover for a cargo of corn. Plea, the general issue. The plaintiffs, at the trial before Buller, J., at the Guildhall Sittings after last Easter Term, gave in evidence that Turing and Son, merchants at Middlebourg in the province of Zealand, on the 22d July, 1786, shipped the goods in question on board the "Endeavor" for Liverpool by the order and directions, and on the account of Freeman of Rotterdam. That Holmes, as master of the ship, signed four several bills of lading for the goods in the usual form unto order or to assigns; two of which were indorsed by Turing and Son in blank, and sent on the 22d July, 1786, by them to Freeman, together with an invoice of the goods, who afterwards received them; another of the bills of lading was retained by Turing and Son, and the remaining one was kept by Holmes. On the 25th July, 1786, Turing and Son drew four several bills of exchange upon Freeman, amounting in the whole to £477 in respect of the price of the goods, which were afterwards accepted by Freeman. On the 25th of July, 1786, Freeman sent to the plaintiffs the two bills of lading, together with the invoice which he had received from Turing and Son, in the same state in which he received them, in order that the goods might be taken possession of and sold by them on Freeman's account; and on the same day Freeman drew three sets of bills of exchange to the amount of £520 on the plaintiffs, who accepted them, and have since duly paid them. The plaintiffs are creditors of Freeman to the amount of £542. On the 15th August, 1786, and before the four bills of exchange drawn by Turing and Son on Freeman became due, Freeman became a bankrupt: those bills were regularly protested, and Turing and Son have since been obliged, as drawers, to take them up and pay them. The price of the goods so shipped by Turing and Son is wholly unpaid. Turing and Son, hearing of Freeman's bankruptcy on the 21st of August, 1786, indorsed the bill of lading, so retained by them, to the defendants, and transmitted it to them, with an invoice of the goods, authorizing them to obtain possession of the goods on account of and for the use and benefit of Turing and Son, which the defendants received on the 28th August, 1786. On the arrival of the vessel with the goods at Liverpool on the 28th August, 1786, the defendants applied to Holmes for the goods, producing the bill of lading, who thereupon delivered them, and the defendants took possession of them for and on account of, and to and for the use and benefit of Turing and Son. The defendants sold the goods on account of Turing and Son, the proceeds whereof amounted to £557. Before the bringing of this action the plaintiffs demanded the goods of the defendants, and tendered to them the freight and charges; but neither the defendants or Freeman have paid or offered to pay the plaintiffs for the goods. To this evidence the defendants demurred; and the plaintiffs joined in demurrer.

Erskine, in support of the demurrer; *Manly*, against it.

Shepherd, in support of the demurrer; *Bearcroft*, contra.

Ashhurst, J. As this was a mercantile question of very great importance to the public, and had never received a solemn decision in a court of law, we were for that reason desirous of having the matter argued a second time, rather than on account of any great doubts which we entertained on the first argument. We may lay it down as a broad general principle, that, wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. If that be so, it will be a strong and leading clew to the decision of the present case. It has been argued, that it would be very hard on a consignor, who has received no consideration for his goods, if he should be obliged to deliver them up in case of the insolvency of the consignee, and come in as a creditor under his commission for what he can get. That is certainly true; but it is a hardship which he brings upon himself. When a man sells goods, he sells them on the credit of the buyer: if he deliver the goods, the property is altered, and he cannot recover them back again, though the vendee immediately become a bankrupt. But where the delivery is to be at a distant place, as between the vendor and vendee, the contract is ambulatory till delivery; and therefore, in case of the insolvency of the vendee in the mean time, the vendor may stop the goods *in transitu*. But, as between the vendor and third persons, the delivery of a bill of lading is a delivery of the goods themselves; if not, it would enable the consignee to make the bill of lading an instrument of fraud. The assignee of a bill of lading trusts to the indorsement; the instrument is in its nature transferable; in this respect therefore this is similar to the case of a bill of exchange. If the consignor had intended to restrain the negotiability of it, he should have confined the delivery of the goods to the vendee only: but he has made it an indorsable instrument. So it is like a bill of exchange; in which case, as between the drawer and the payee the consideration may be gone into, yet it cannot between the drawer and an indorsee; and the reason is, because it would be enabling either of the original parties to assist in a fraud. The rule is founded purely on principles of law, and not on the custom of merchants. The custom of merchants only establishes that such an instrument may be indorsed; but the effect of that indorsement is a question of law, which is, that as between the original parties the consideration may be inquired into; though when third persons are concerned, it cannot. This is also the case with respect to a bill of lading. Though the bill of lading in this case was at first indorsed in blank, it is precisely the same as if it had been originally indorsed to this person; for when it was filled up with his name, it was the same as if made to him only. Then what was said by Lord Mansfield in the case of Wright and Campbell, 4 Burr. 2046, goes the full length of this doctrine: "If the goods be *bona fide* sold by the factor at sea (as they may be where no other delivery can be given), it will be good notwithstanding the Statute 21 Jac. 1, c. 19. The vendee shall hold them by virtue of the bill of sale, though no actual possession is delivered: and the owner can never dispute with the vendee, because the goods were sold *bona fide* and by the owner's own authority." Now in this case the goods were transferred by the authority of the vendor, because he gave the vendee a power to transfer them; and being sold by his authority, the property is altered. And I am of opinion that this right of the assignee could not be divested by any subsequent circumstances.

Buller, J. This case has been very fully, very elaborately, and very ably argued, both now and in the last term; and though the former arguments on the part of the defendant did not convince my mind, yet they staggered me so much that I wished to hear a second argument. Before I consider the effect of the several authorities which have been cited, I will take notice of one circumstance in this case which is peculiar to it; not for the purpose of founding my judgment upon it, but because I would not have it supposed in any future case that it passed unnoticed, or that it may not hereafter have any effect which it ought to have. In this case it is stated that there were four bills of lading: it appears by the books treating on this subject, that according to the common course of merchants there are only three; one of which is delivered to the captain of the vessel, another is transmitted to the consignee, and the third is retained by the consignor himself as a testimony against the captain in case of any loose dealing. Now, if it be at present the established course among merchants to have only three bills of lading, the circumstance of there being a fourth in this case might, if the case had not been taken out of the hands of the jury by the demurrer, have been proper for their consideration. I am aware that that circumstance appears in the bill, on which is written, "In witness the master hath affirmed to four bills of lading, all of this tenor and date." But we all know that it is not the practice either of persons in trade or in the profession to examine very minutely the words of an instrument, which is partly printed and partly written; and if we only look at the substance of such an instrument, this may be the means of enabling the consignee to commit a fraud on an innocent person. Then how stood the consignee in this case; he had two of the bills of lading, and the captain must have a third; so that the assignee could not imagine that the consignor had it in his power to order a delivery to any other person. But I mean to lay this circumstance entirely out of my consideration in the present case, which I think turns wholly on the general question: and I make the question even more general than was made at the bar, namely, whether a bill of lading is by law a transfer of the property? This question has been argued upon authorities; and before I take notice of any particular objections which have been made, I will consider those authorities. The principal one relied on by the defendants is that of Snee and Prescot, 1 Atk. 245; now, sitting in a court of law, I should think it quite sufficient to say that that was a determination in a court of equity, and founded on equitable principles. The leading maxim in that court is, that he who seeks equity must first do equity. I am not disposed to find fault with that determination as a case in equity; but it is not sufficient to decide such a question as that now before us. Lord Hardwicke has, with his usual caution, enumerated every circumstance which existed in the case: and indeed he has been so particular, that if the printed note of it be accurate, which I doubt, it is not an authority for any case which is not precisely similar to it. The only point of law in that case is upon the forms of the bills of lading; and Lord Hardwicke thought there was a distinction between bills of lading indorsed in blank, and those indorsed to particular persons: but it was properly admitted at the bar that that distinction cannot now be supported. Thus the matter stood till within these thirty years; since that time the commercial law of this country has taken a very different turn from what it did before. We find in Snee and Prescot that Lord Hardwicke himself was proceeding with great caution, not establishing any general principle, but decreeing on all the circumstances of the case put together. Before that period we find that in courts of law all the evidence in mercantile cases was thrown together: they were left generally to a jury, and they produced no established principle. From that time we all know the great study has been to find some certain general principles, which shall be known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future. Most of us have heard these principles stated, reasoned upon, enlarged, and explained, till we have been lost in admiration at the strength and stretch of the human understanding. And I should be very sorry to find myself under a necessity of differing from any case on this subject which has been decided by Lord Mansfield, who may be truly said to be the founder of the commercial law of this country. I hope to show, before I have finished my judgment, that there has been no inconsistency in any of his determinations; but if there had, if I could not reconcile an opinion which he had delivered at Nisi Prius with his judgment in this court, I should not hesitate to adopt the latter in preference to the former: and it is but just to say that no judge ever sat here more ready than he was to correct an opinion suddenly given at Nisi Prius. First, as to the case of Wright and Campbell, that was a very solemn opinion delivered in this court. In my opinion, that is one of the best cases that we have in the law on mercantile subjects. There are four points in that case, which Lord Mansfield has stated so extremely clear that they cannot be mistaken. The first is, what is the case as between the owner of the goods and the factor; the second, as between the consignor and the assignee of the factor with notice; thirdly, as between the same parties without notice; and fourthly, as to the nature of a bill of sale of goods at sea in general. It is to be recollected that the case of Wright and Campbell was decided by the judge at Nisi Prius upon the ground that the bill of lading transferred the whole property at law; and when it came before this court on a motion for a new trial, Lord Mansfield confirmed that opinion; but a new trial was granted on a suspicion of fraud: therefore it is fair to infer, that if there had been no fraud, the delivery of the bill of lading would have been final. If there be fraud, it is the same as if the question were tried between the consignor and the original consignee. According to a note of Wright and Campbell, which I took in court, Lord Mansfield said, that since the case in Lord Raymond (Evans *v.* Marlett, 1 Lord Ray. 271), it had always been held that the delivery of a bill of lading transferred the property at law; if so, every exception to that rule arises from equitable considerations which have been adopted in courts of law. The next case is that of Savignac and Cuff, 2 T. R. 66, the note of which is too loose to be depended upon: but there is a circumstance in that case, which might afford ample ground for the decision; for I cannot suppose that Lord Mansfield had forgotten the doctrine which he laid down in this court in Wright and Campbell. There he observed very minutely on what did not appear at the trial, that no letters were produced, and that no price was fixed for the goods: but in Savignac and Cuff, the plaintiff had not only the bills of lading and the invoice, but he had also the letters of advice, from which the real transaction must have appeared; and if it appeared to him that Selvetti had not been paid for the goods, that might have been a ground for the determination. The case of Hunter and Beal does not come up to the point now in dispute; it only determines what is admitted, that, as between the vendor and vendee, the property is not altered till delivery of the goods. With respect to the case of Stokes and La Riviere, 2 T. R. 75, perhaps there may be some doubt about the facts of it: however, it was determined upon a different ground; for the goods were in the hands of an agent for both parties: that case therefore does not impeach the doc trine laid down in Wright and Campbell. It has been argued at the bar, that it is impossible for the holder of a bill of lading to bring an action on it against the consignor: perhaps that argument is well founded: no special action on the bill of lading has ever been brought; for if the bill of lading transfer the property, an action of trover against the captain for non-delivery, or against any other person who seizes the goods, is the proper form of action. If an action be brought by a vendor against a vendee, between whom a bill of lading has passed, the proper action is for goods sold and delivered. Then it has been said that no case has yet decided that a bill of lading does transfer the property: but in answer to that it is to be observed, that all the cases upon the subject, Evans *v.* Martlett, Wright *v.* Campbell, and Caldwell *v.* Ball, 1 T. R. 205, and the universal understanding of mankind, preclude that question. The cases between the consignor and consignee have been founded merely on principles of equity, and have followed up the principle of Snee and Prescot; for if a man has bought goods, and has not paid for them, and cannot pay for them, it is not equitable that he should prevent the consignor from getting his goods back again, if he can do it before they are in fact delivered. There is no weight in the argument of hardship on the vendor: at any rate that is a bad argument in a court of law; but in fact there is no hardship on him, because he has parted with the legal title to the consignee. An argument was used with respect to the difficulty of determining at what time a bill of lading shall be said to transfer the property, especially in a case where the goods were never sent out of the merchant's warehouse at all: the answer is, that under those circumstances a bill of lading could not possibly exist, if the transaction were a fair one; for a bill of lading is an acknowledgment by the captain, of having received the goods on board his ship: therefore it would be a fraud in the captain to sign such a bill of lading, if he had not received goods on board; and the consignee would be entitled to his action against the captain for the fraud. As the plaintiff in this case has paid a valuable consideration for the goods, and there is no color for imputing fraud or notice to him, I am of opinion that he is entitled to the judgment of the court.

Judgment for the plaintiff.[1]

The defendants in the original action, having brought a writ of error in the Exchequer Chamber, after two arguments, the following judgment of that court was there delivered by

LORD LOUGHBOROUGH. This case comes before the court on a demurrer to the evidence; the general question therefore is, Whether the facts offered in evidence by the plaintiffs in the action are sufficient to warrant a verdict in their favor?[2] . . .

The defendants, in this case, are not stake-holders, but they are in effect the same as Turings, and the possession they have got is the possession of Turings. The plaintiffs claim under Freeman, but though they derive a title under him they do not represent him, so as to be answerable for his engagements, nor are they affected by any notice of those circumstances which would bar the claim of him or of his assignees. If they have acquired a legal right they have acquired it honestly, and if they have trusted to a bad title they are innocent sufferers. The question then is, Whether the plaintiffs have a superior legal title to that right which on principles of natural justice, the original holder of goods not paid for has to maintain that possession of them which he actually holds at the time of the demand?

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[1] GROSE, J., delivered a brief concurring opinion.

[2] Lord LOUGHBOROUGH here stated the facts of the case.

The argument on the part of the plaintiffs asserts that the indorsement of the bill of lading by the Turings is an assignment of the property in the goods to Freeman, in the same manner as the indorsement of a bill of exchange is an assignment of the debt. That Freeman could assign over that property, and that by delivery of the bill of lading to the plaintiffs for a valuable consideration, they have a just right to the property conveyed by it, not affected by any claim of the Turings, of which they had no notice. On the part of the defendant it is argued, that the bill of lading is not in its nature a negotiable instrument; that it more resembles a chose in action; that the indorsement of it is not an assignment that conveys any interest, but a mere authority to the consignee to receive the goods mentioned in the bill; and therefore it cannot be made a security by the consignee for money advanced to him; but the person who accepted it must stand in the place of the consignee, and cannot gain a better title than he had to give. As these propositions on either side seem to be stated too loosely, and as it is of great importance that the nature of an instrument so frequent in commerce as a bill of lading, should be clearly defined, I think it necessary to state my ideas of its nature and effect:

A bill of lading is the written evidence of a contract for the carriage and delivery of goods sent by sea for a certain freight. The contract in legal language is a contract of bailment. 2 Lord Raym. 912. In the usual form of the contract the undertaking is to deliver to the order or assigns of the shipper. By the delivery on board the ship-master acquires a special property to support that possession which he holds in the right of another, and to enable him to perform his undertaking. The general property remains with the shipper of the goods until he has disposed of it by some act sufficient in law to transfer property. The indorsement of the bill of lading is simply a direction of the delivery of the goods. When this indorsement is in blank the holder of the bill of lading may receive the goods, and his receipt will discharge the ship-master; but the holder of the bill, if it came into his hands casually, without any just title, can acquire no property in the goods. A special indorsement defines the person appointed to receive the goods; his receipt or order would, I conceive, be a sufficient discharge to the ship-master; and in this respect I hold the bill of lading to be assignable. But what is it that the indorsement of the bill of lading assigns to the holder or the indorsee? a right to receive the goods and to discharge the ship-master, as having performed his undertaking. If any further effect be allowed to it, the possession of a bill of lading would have greater force than the actual possession of the goods. Possession of goods is *prima facie* evidence of title; but that possession may be precarious, as of a deposit; it may be criminal, as of a thing stolen; it may be qualified, as of things in the custody of a servant, carrier or a factor. Mere possession without a just title gives no property; and the person to whom such possession is transferred by delivery, must take his hazard of the title of his author. The indorsement of a bill of lading, differs from the assignment of a chose in action, that is to say, of an obligation, as much as debts differ from effects. Goods in pawn, goods bought before delivery, goods in a warehouse, or on shipboard, may all be assigned. The order to deliver is an assignment of the thing itself, which ought to be delivered on demand, and the right to sue if the demand is refused, is attached to the thing. The case in 1 Lord Raym. 271, was well determined on the principal point, that the consignee might maintain an action for the goods, because he had either a special property in them, or a right of action on the contract; and I assent to the dictum, that he might assign over his right. But the question remains, What right passes by the first indorsement, or by the assignment of it? An assignment of goods in pawn, or of goods bought but not delivered, cannot transmit a right to take the one without redemption and the other without the payment of the price. As the indorsement of a bill of lading is an assignment of the goods themselves, it differs essentially from the indorsement of a bill of exchange; which is the assignment of a debt due to the payee, and which, by the custom of trade, passes the whole interest in the debt so completely, that the holder of the bill for a valuable consideration, without notice, is not affected even by the crime of the person from whom he received the bill.

Bills of lading differ essentially from bills of exchange in another respect.

Bills of exchange can only be used for one given purpose, namely, to extend credit by a speedy transfer of the debt, which one person owes another, to a third person. Bills of lading may be assigned for as many different purposes as goods may be delivered. They may be indorsed to the true owner of the goods by the freighter, who acts merely as his servant. They may be indorsed to a factor to sell for the owner. They may be indorsed by the seller of the goods to the buyer. They are not drawn in any certain form. They sometimes do, and sometimes do not express on whose account and risk the goods are shipped. They often, especially in time of war, express a false account and risk. They seldom, if ever, bear upon the face of them, any indication of the purpose of the indorsement. To such an instrument, so various in its use, it seems impossible to apply the same rules as govern the indorsement of bills of exchange. The silence of all authors treating of commercial law is a strong argument that no general usage has made them negotiable as bills. Some evidence appears to have been given in other cases, that the received opinion of merchants was against their being so negotiable. And unless there was a clear, established general usage to place the assignment of a bill of lading upon the same footing as the indorsement of a bill of exchange, that country which should first adopt such a law, would lose its credit with the rest of the commercial world. For the immediate consequence would be, to prefer the interest of the resident factors and their creditors, to the fair claim of the foreign consignor. It would not be much less pernicious to its internal commerce; for every case of this nature is founded in a breach of confidence, always attended with a suspicion of collusion, and leads to a dangerous and false credit, at the hazard and expense of the fair trader. If bills of lading are not negotiable as bills of exchange, and yet are assignable, what is the consequence? That the assignee by indorsement must inquire under what title the bills have come to the hands of the person from whom he takes them. Is this more difficult than to inquire into the title by which goods are sold or assigned? In the case of Hartop *v.* Hoare, 2 Stra. 1187; 1 Wils. 8, jewels deposited with a goldsmith were pawned by him at a banker's. Was there any imputation, even of neglect, in a banker trusting to the apparent possession of jewels by a goldsmith? Yet they were the property of another, and the banker suffered the loss. It is received law, that a factor may sell, but cannot pawn the goods of his consignor. Patterson *v.* Tash, 2 Str. 1178. The person therefore who took an assignment of goods from a factor in security, could not retain them against the claim of the consignor; and yet in this case, the factor might have sold them and embezzled the money. It has been argued, that it is necessary in commerce to raise money on goods at sea, and this can only be done by assigning the bills of lading. Is it then nothing that an assignee of a bill of lading gains by the indorsement? He has all the right the indorser could give him; a title to the possession of the goods when they arrive. He has a safe security, if he has dealt with an honest man. And it seems as if it could be of little utility to trade, to extend credit by affording a facility to raise money by unfair dealing. Money will be raised on goods at sea, though bills of lading should not be negotiable, in every case where there is a fair ground of credit: but a man of doubtful character will not find it so easy to raise money at the risk of others.

The conclusions which follow from this reasoning, if it be just, are, 1st. That an order to direct the delivery of goods indorsed on a bill of lading, is not equivalent nor even analogous to the assignment of an order to pay money, by the indorsement of a bill of exchange. 2dly, That the negotiability of bills and promissory notes is founded on the custom of merchants, and positive law; but as there is no positive law, neither can any custom of merchants apply to such an instrument as a bill of lading. 3dly, That it is therefore not negotiable as a bill, but assignable; and passes such right, and no better as the person assigning had in it.

This last proposition I confirm by the consideration, that actual delivery of the goods does not of itself transfer an absolute ownership in them, without a title of property; and that the indorsement of a bill of lading, as it cannot in any case transfer more right than the actual delivery, cannot in every case pass the property; and I therefore infer that the mere indorsement can in no case convey an absolute property. It may however be said, that admitting an indorsement of a bill of lading does not in all cases import a transfer of the property of the goods consigned, yet where the goods when delivered would belong to the indorsee of the bill, and the indorsement accompanies a title of property, it ought in law to bind the consignor, at least with respect to the interest of third parties. This argument has, I confess, a very specious appearance. The whole difficulty of the case rests upon it; and I am not surprised at the impression it has made, having long felt the force of it myself. A fair trader, it is said, is deceived by the misplaced confidence of the consignor. The purchaser sees a title to the delivery of the goods placed in the hands of a man who offers them to sale. Goods not arrived are every day sold without any suspicion of distress, on speculations of the fairest nature. The purchaser places no credit in the consignee, but in the indorsement produced to him, which is the act of the consignor. The first consideration which affects this argument is, that it proves too much, and is inconsistent with the admission. But let us examine what the legal right of the vendor is, and whether, with respect to him, the assignee of a bill of lading stands on a better ground than the consignee from whom he received it. I state it to be a clear proposition, that the vendor of goods not paid for, may retain the possession against the vendee; not by aid of any equity, but on grounds of law. Our oldest books consider the payment of the price (day not being given) as a condition precedent implied in the contract of sale; and that the vendee cannot take the goods, nor sue for them without tender of the price. If day had been given for payment, and the vendee could support an action of trover against the vendor, the price unpaid must be deducted from the damages, in the same manner as if he had brought an action on the contract, for the non-delivery. Snee *v.* Prescot, 1 Atk. 245. The sale is not executed before delivery; and in the simplicity of former times, a delivery into the actual possession of the vendee or his servant was always supposed. In the variety and extent of dealing which the increase of commerce has introduced, the delivery may be presumed from circumstances, so as to vest a property in the vendee. A destination of the goods by the vendor to the use of the vendee; the marking them, or making them up to be delivered; the removing them for the purpose of being delivered, may *all* entitle the vendee to act as owner, to assign, and to maintain an action against a third person, into whose hands they have come. But the title of the vendor is never entirely divested, till the goods have come into the possession of the vendee. He has therefore a complete right, for just cause, to retract the intended delivery, and to stop the goods *in transitu.* The cases determined in our courts of law have confirmed this doctrine, and the same law obtains in other countries.

In an action tried before me at Guildhall, after the last Trinity Term, it appeared in evidence that one Bowering had bought a cask of indigo of Verrulez & Co., at Amsterdam, which was sent from the warehouse of the seller, and shipped on board a vessel commanded by one Tulloh, by the appointment of Bowering. The bills of lading were made out, and signed by Tulloh, to deliver to Bowering or order, who immediately indorsed one of them to his correspondent in London, and sent it by the post. Verrulez, having information of Bowering's insolvency before the ship sailed from the Texel, summoned Tulloh the ship-master before the court at Amsterdam, who ordered him to sign other bills of lading, to the order of Verrulez. Upon the arrival of the ship in London, the ship-master delivered the goods, according to the last bills, to the order of Verrulez. This case, as to the practice of merchants, deserves particular attention; for the judges of the court at Amsterdam are merchants of the most extensive dealings, and they are assisted by very eminent lawyers. The cases in our law, which I have taken some pains to collect and examine, are very clear upon this point. Snee *v.* Prescot, though in a court of equity, is professedly determined on legal grounds by Lord Hardwicke, who was well versed in the principles of law; and it is an authority, not only in support of the right of the owner unpaid, to retain against the consignee, but against those claiming under the consignee by assignment for valuable consideration, and without notice. But the case of Fearon *v.* Bowers, 1 H. Bl. 364, n., tried before Lord Chief Justice Lee, is a case at law, and it is to the same effect as Snee *v.* Prescot. So also is the case of the Assignees of Burghall *v.* Howard, 1 H. Bl. 365, n., before Lord Mansfield. The right of the consignor to stop the goods is here considered as a legal right. It will make no difference in the case, whether the right is considered as springing from the original property not yet transferred by delivery, or as a right to retain the things as a pledge for the price unpaid. In all the cases cited in the course of the argument, the right of the consignor to stop the goods is admitted as against the consignee. But it is contended, that the right ceases as against a person claiming under the consignee for a valuable consideration, and without notice that the price is unpaid. To support this position it is necessary to maintain that the right of the consignor is not a perfect legal right in the thing itself, but that it is only founded upon a personal exception to the consignee, which would preclude his demand as contrary to good faith and unconscionable. If the consignor had no legal title, the question between him and the *bona fide* purchaser from the consignee would turn on very nice considerations of equity. But a legal lien, as well as a right of property, precludes these considerations; and the admitted right of the consignor to stop the goods *in transitu* as against the consignee, can only rest upon his original title as owner, not divested, or upon a legal title to hold the possession of the goods till the price is paid, as a pledge for the price. It has been asserted in the course of the argument, that the right of the consignor has by judicial determinations been treated as a mere equitable claim in cases between him and the consignee. To examine the force of this assertion, it is necessary to take a review of the several determinations:

The first is the case of Wright *v.* Campbell, 4 Burr. 2046, on which the chief stress is laid. The first observation that occurs upon that case is, that nothing was determined by it. A case was reserved by the judge at *Nisi Prius*, on the argument of which the court thought the facts imperfectly stated, and directed a new trial. That case cannot therefore be urged as a decision upon the point. But it is quoted as containing, in the report of it, an opinion of Lord Mansfield, that the right of the consignor to stop the goods, cannot be set up against a third person claiming under an indorsement for value and without notice. The authority of such an opinion, though no decision had followed upon it, would deservedly be very great, from the high respect due to the experience and wisdom of so great a judge. But I am not able to discover that his opinion was delivered to that extent, and I assent to the opinion as it was delivered, and very correctly applied to the case then in question. Lord Mansfield is there speaking of the consignment of goods to a factor to sell for the owner; and he very truly observes: 1st, That as against the factor, the owner may retain the goods; 2dly, That a person into whose hands the factor has passed the consignment with notice, is exactly in the same situation with the factor himself; 3dly, That a *bona fide* purchaser from the factor shall have a right to the delivery of the goods, because they were sold *bona fide*, and by the owner's own authority. If the owner of the goods intrust another to sell them for him, and to receive the price, there is no doubt but that he has bound himself to deliver the goods to the purchaser; and that would hold equally, if the goods had never been removed from his warehouse. The question on the right of the consignor to stop and retain the goods, can never occur where the factor has acted strictly according to the orders of his principal, and where, consequently, he has bound him by his contract. There would be no possible ground for argument in the case now before the court, if the plaintiffs in the action could maintain that Turings & Co. had sold to them by the intervention of Freeman, and were therefore bound *ex contractu* to deliver the goods. Lord Mansfield's opinion upon the direct question of the right of the consignor to stop the goods against a third party, who has obtained an indorsement of the bill of lading, is quoted in favor of the consignor, as delivered in two cases at *Nisi Prius:* Savignac *v.* Cuff, 2 Term Rep. B. R. 66, in 1778, and Stokes *v.* La Riviere, 2 Term Rep. B. R. 75, in 1785. Observations are made on these cases, that they were governed by particular circumstances; and undoubtedly when there is not an accurate and agreed state of them, no great stress can be laid on the authority. The case of Caldwell *v.* Ball, 1 Term Rep. B. R. 205, is improperly quoted on the part of the plaintiffs in the action, because the question there was on the priority of consignments, and the right of the consignor did not come under consideration. The case of Hibbert *v.* Carter, 1 Term Rep. B. R. 745, was also cited on the same side, not as having decided any question upon the consignor's right to stop the goods, but as establishing a position, that by the indorsement of the bill of lading, the property was so completely transferred to the indorsee, that the shipper of the goods had no longer an insurable interest in them. The bill of lading in that case had been indorsed to a creditor of the shipper; and undoubtedly if the fact had been as it was at first supposed, that the cargo had been accepted in payment of the debt, the conclusion would have been just; for the property of the goods, and the risk, would have completely passed from the shipper to the indorsee; it would have amounted to a sale executed for a consideration paid. But it is not to be inferred from that case, that an indorsement of a bill of lading, the goods remaining at the risk of the shipper, transfers the property so that a policy of insurance upon them in his name would be void. The greater part of the consignments from the West Indies, and all countries where the balance of trade is in favor of England, are made to a creditor of the shipper; but they are no discharge of the debt by indorsement of the bill of lading; the expense of insurance, freight, duties, are all charged to the shipper, and the net proceeds alone can be applied to the discharge of his debt. That case therefore has no application to the present question. And from all the cases that have been collected, it does not appear that there has ever been a decision against the legal right of the consignor to stop the goods *in transitu*, before the case now brought before this court. When a point in law which is of general concern in the daily business of the world is directly decided, the event of it fixes the public attention, directs the opinion, and regulates the practice of those who are interested. But where no such decision has in fact occurred, it is impossible to fix any standard of opinion, upon loose reports of incidental arguments. The rule therefore which the court is to lay down in this case will have the effect, not to disturb, but to settle the notions of the commercial part of this country, on a point of very great importance, as it regards the security and good faith of their transactions. For these reasons, we think the judgment of the Court of King's Bench ought to be reversed.

The judgment of the Exchequer Chamber was reversed in the House of Lords, and a *venire facias de novo* directed to be awarded. The ground of the reversal was that the demurrer to evidence appeared to be informal on the record MS. On the principal question the following opinion was delivered before the House by —

Buller, J. Before I consider what is the law arising on this case I shall endeavor to ascertain what the case itself is. It appears that the two bills of lading were indorsed in blank by Turing, and sent so indorsed in the same state by Freeman to the plaintiffs, in order that the goods might, on their arrival at Liverpool, be taken possession of and sold by the plaintiffs on Freeman's account. I shall first consider what is the effect of a blank indorsement; and secondly, I will examine whether the words, "to be sold by the plaintiffs on Freeman's account," make any difference in the case. As to the first, I am of opinion that a blank indorsement has precisely the same effect that an indorsement to deliver to the plaintiffs would have. In the case of bills of exchange the effect of a blank indorsement is too universally known to be doubted; and therefore on that head I shall only mention the case of Russel *v.* Langstaffe, Douglas, 496, where a man indorsed his name on copper-plate check, made in the form of promissory notes, but in blank, *i. e.*, without any sum, date, or time of payment; and the court held, that the indorsement on a blank note is a letter of credit for an indefinite sum; and the defendant was liable for the sum afterwards inserted in the note, whatever it might be. In the case of bills of lading, it has been admitted at your Lordship's bar, and was so in the Court of King's Bench, that a blank indorsement has the same effect as an indorsement filled up to deliver to a particular person by name. In the case of Snee *v.* Prescot, Lord Hardwicke thought that there was a distinction between a bill of lading indorsed in blank, and one that was filled up, and upon that ground part of his decree was founded But that I conceive to be a clear mistake. And it appears from the case of Savignac *v.* Cuff (of which case I know nothing but from what has been quoted by the counsel, and that case having occurred before the unfortunate year 1780, no further account can be obtained), that though Lord Mansfield at first thought that there was a distinction between bills of lading indorsed in blank and otherwise, yet he afterwards abandoned that ground. In Salomons *v.* Nissen, Mich. 1788, 2 Term Rep. 674, the bill of lading was to order or assigns, and the indorsement in blank; but the court held it to be clear that the property passed. He who delivers a bill of lading indorsed in blank to another not only puts it in the power of the person to whom it is delivered, but gives him authority to fill it up as he pleases; and it has the same effect as if it were filled up with an order to deliver to him. The next point to be considered is, what difference do the words, "to be sold by the plaintiffs on Freeman's account," make in the present case. It has been argued that they prove the plaintiffs to be factors only. But it is to be observed that these words are not found in the bill of lading itself; and therefore they cannot alter the nature and construction of it. I say they were not in the bill of lading itself; for it is expressly stated that the bill of lading was sent by Freeman in the same state in which it was received, and in that there is no restriction or qualification whatever; but it appeared by some other evidence, I suppose by some letter of advice, that the goods were so sent, to be sold by the plaintiffs on Freeman's account. Supposing that the plaintiffs are to be considered as *factors*, yet if the bill of lading, as I shall contend presently, passes the legal property in the goods, the circumstance of the plaintiffs being liable to render an account to Freeman for those goods afterwards will not put Turing in a better condition in this cause. For a factor has not only a right to keep goods till he is paid all that he has advanced or expended on account of the particular goods, but also till he is paid the balance of his general account. The truth of the case, as I consider it, is that Freeman transferred the legal property of the goods to the plaintiffs, who were to sell them, and pay themselves the £520 advanced in bills out of the produce, and so be accountable to Freeman for the remainder, if there were any. But if the goods had not sold for so much as £520 Freeman would still have remained debtor to the plaintiffs for the difference; and so far only they were sold on Freeman's account. But I hold that a factor, who has the legal property in goods, can never have that property taken from him, till he is paid the uttermost farthing which is due to him. Kruger *v.* Wilcocks, Ambl. 252. This brings me to the two great questions in the cause, which are undoubtedly of as much importance to trade as any questions which ever can arise. The first is, Whether at law the property of goods at sea passes by the indorsement of a bill of lading? The second, Whether the defendant, who stands in the place of the original owner, had a right to stop the goods *in transitu?* And as to the first, every authority which can be adduced from the earliest period of time down to the present hour agree that at law the property does pass as absolutely and as effectually as if the goods had been actually delivered into the hands of the consignee. In 1690 it was so decided in the case of Wiseman *v.* Vandeputt, 2 Vern. 203. In 1697, the court determined again, in Evans *v.* Marlett, that the property passes by the bill of lading. That case is reported in 1 Ld. Ray. 271, and in 12 Mod. 156, and both books agree in the points decided. Lord Raymond states it to be, that if goods by a bill of lading are consigned to A, A is the owner, and must bring the action; but if the bill be special, to be delivered to A to the use of B, B ought to bring the action; but if the bill be general to A, and the invoice only shows that they are on account of B (which I take to be the present case), A ought always to bring the action; for the property is in him, and B has only a trust. And Holt, C. J., says the consignee of a bill of lading has such a property as that he may assign it over; and Shower said it had been so adjudged in the Exchequer. In 12 Mod. it is said that the court held that the invoice signified nothing; but that the consignment in a bill of lading gives the property, except where it is for the account of another, that is, where on the face of the bill it imports to be for another. In Wright *v.* Campbell, in 1767, 4 Burr. 2046, Lord Mansfield said, "If the goods are *bona fide* sold by the factor at sea (as they may be where no other delivery can be given), it will be good notwithstanding the Stat. 21 Jac. I. The vendee shall hold them by virtue of the bill of sale, though no actual possession be delivered; and the owner can never dispute with the vendee, because the goods were sold *bona fide*, and by the owner's own authority." His Lordship added (though that is not stated in the printed report), that the doctrine in Lord Raymond was right, that the property of goods at sea was transferable. In Fearon *v.* Bowers, in 1753, Lord C. J. Lee held that a bill of lading transferred the property, and a right to assign that property by indorsement; but that the captain was discharged by a delivery under either bill. In Snee *v.* Prescot, in 1743, 1 Atk. 245, Lord Hardwicke says, where a factor, by the order of his principal, buys goods with his own money and makes the bill of lading absolutely in the principal's name, to have the goods delivered to the principal, in such case the factor cannot countermand the bill of lading, but it passes the property of the goods fully and irrevocably in the principal. Then he distinguishes the case of blank indorsement, in which he was clearly wrong. He admits, too, that if upon a bill of lading between merchants residing in different countries, the goods be shipped and consigned to the principal expressly in the body of the bill of lading, that vests the property in the consignee. In Caldwell *v.* Ball, in 1786, 1 Term Rep. 205, the court held that the indorsement of the bill of lading was an immediate transfer of the legal interest in the cargo. In Hibbert *v.* Carter, in 1787, 1 Term Rep. 745, the court held again that the indorsement and delivery of the bill of lading to a creditor *prima facie* conveyed the whole property in the goods from the time of its delivery. The case of Godfrey *v.* Furze, 3 P. Wms. 185, was quoted on behalf of the defendant. A merchant at Bilboa sent goods from thence to B, a merchant in London, for the use of B, and drew bills on B for the money. The goods arrived in London, which B received, but did not pay the money, and died insolvent. The merchant beyond sea brought his bill against the executors of the merchant in London, praying that the goods might be accounted for to him, and insisting that he had a lien on them till paid. Lord Chancellor says, when a merchant beyond sea consigns goods to a merchant in London on account of the latter, and draws bills on him for such goods, though the money be not paid, yet the property of the goods vests in the merchant in London, who is credited for them, and consequently they are liable to his debts. But where a merchant beyond sea consigns goods to a factor in London, who receives them, the factor in this case, being only a servant or agent for the merchant beyond sea, can have no property in such goods, neither will they be affected by his bankruptcy. The whole of this case is clear law; but it makes for the plaintiffs and not for the defendants. The first point is this very case; for the bill of lading here is generally to the plaintiffs, and therefore on their account; and in such case, though the money be not paid, the property vests in the consignee. And this is so laid down without regard to the question, whether the goods were received by the consignee or not. The next point there stated is, what is the law in the case of a pure factor, without any demand of his own. Lord King says he would have no property. This expression is used as between consignor and consignee, and obviously means no more than that, in the case put, the consignor may reclaim the property from the consignee. The reason given by Lord King is, because in this case the factor is only a servant or agent for the merchant beyond sea. I agree if he be merely a servant or agent, that part of the case also is good law, and the principal may retain the property. But then it remains to be proved that a man who is in advance or under acceptances on account of the goods is simply and merely a servant or agent; for which no authority has been, or, as I believe, can be produced. Here the bills were drawn by Freeman upon the plaintiffs upon the same day, and at the same time, as he sent the goods to them; and therefore this must, by fair and necessary intendment, be taken to be one entire transaction; and that the bills were drawn on account of the goods, unless the contrary appear. So far from the contrary appearing here, when it was thought proper to allege on this demurrer that the price of the goods was not paid, it is expressly so stated; for the demurrer says, that the price of the goods is now due to Turing and Son. But it finds that the other bills were afterwards paid by the plaintiffs; and consequently they have paid for the goods in question. As between the principal and mere factor, who has neither advanced nor engaged in anything for his principal, the principal has a right at all times to take back his goods at will; whether they be actually in the factor's possession, or only on their passage, makes no difference; the principal may countermand his order; and though the property remain in the factor, till such countermand, yet from that moment the property revests in the principal, and he may maintain trover. But in the present case the plaintiffs are not that mere agent or servant; they have advanced £520 on the credit of those goods which at a rising market were worth only £557, and they have besides, as I conceive, the legal property in the goods under the bill of lading. But it was contended at the bar, that the property never passed out of Turing; and to prove it Hob. 41, was cited. In answer to this I must beg leave to say, that the position in Hobart does not apply; because there no day of payment was given; it was a bargain for ready money; but here a month was given for payment. And in Noy's Maxims, 87, this is laid down: "If a man do agree for a price of wares, he may not carry them away before he hath paid for them, if he have not a day expressly given to him to pay for them." Thorpe *v.* Thorpe, Rep. temp. Holt, 96, and Brice *v.* James, Rep. temp. Ld. Mansfield, S. P. So. Dy. 30 and 76. And in Shep. Touch, 222, it is laid down, that if one sell me a horse or any other thing for money, or any other valuable consideration, and the same thing is to be delivered to me at a day certain, and by our agreement a day is set for the payment of the money, it is a good bargain and sale to alter the property thereof; and I may have an action for the thing, and the seller for his money. Thus stand the authorities on the point of legal property;

and from hence it appears that for upwards of 100 years past it has been the universal doctrine of Westminster Hall that by a bill of lading, and by the assignment of it, the legal property does pass. And, as I conceive, there is no judgment nor even a dictum, if properly understood, which impeaches this long string of cases; on the contrary, if any argument can be drawn by analogy from older cases on the vesting of property, they all tend to the same conclusion. If these cases be law, and if the legal property be vested in the plaintiffs, that, as it seems to me, puts a total end to the present case; for then it will be incumbent on the defendants to show that they have superior equity which bears down the letter of the law, and which entitles them to retain the goods against the legal right of the plaintiffs, or they have no case at all. I find myself justified in saying that the legal title, if in the plaintiffs, must decide this cause by the very words of the judgment now appealed against; for the noble Lord who pronounced that judgment emphatically observed in it, "that the plaintiffs claim under Freeman; but though they derive a title under him, they do not represent him, so as to be answerable for his engagements; nor are they affected by any notice of those circumstances which would bar the claims of him or his assignees." This doctrine, to which I fully subscribe, seems to me to be a clear answer to any supposed lien which Turing may have on the goods in question for the original price of them. But the second question made in the cause is that, however the legal property be decided, the defendants, who stand in the place of the original owner, had a right to stop the goods *in transitu*, and have a lien for the original price of them. Before I consider the authorities applicable to this part of the case, I will beg leave to make a few observations on the right of stopping goods *in transitu*, and on the nature and principle of liens. 1st. Neither of them are founded on property; but they necessarily suppose the property to be in some other person, and not in him who sets up either of these rights. They are qualified rights, which in given cases may be exercised over the property of another; and it is a contradiction in terms to say a man has a lien upon his own goods, or a right to stop his own goods *in transitu*. If the goods be his he has a right to the possession of them whether they be *in transitu* or not: he has a right to sell or dispose of them as he pleases, without the option of any other person: but he who has a lien only on goods has no right so to do; he can only retain them till the original price be paid; and therefore if goods are sold for £500 and by a change of the market, before they are delivered, they become next day worth £1,000, the vendor can only retain them till the £500 be paid, unless the bargain be absolutely rescinded by the vendee's refusing to pay the £500. 2dly. Liens at law exist only in cases where the party entitled to them has the possession of the goods; and if he once part with the possession after the lien attaches, the lien is gone. 3dly. The right of stopping *in transitu* is founded wholly on equitable principles, which have been adopted in courts of law; and as far as they have been adopted I agree they will bind at law as well as in equity. So late as the year 1690, this right, or privilege, or whatever it may be called, was unknown to the law. The first of these propositions is self-evident, and requires no argument to prove it. As to the second, which respects liens, it is known and unquestionable law, that if a carrier, a farrier, a tailor, or an inn-keeper, deliver up the goods, his lien is gone. So also is the case of a factor as to the particular goods: but by the general usage in trade he may retain for the balance of his account all goods in his hands, without regard to the time when or on what account he received them. In Snee *v.* Prescot, Lord Hardwicke says, that which not only applies to the case of liens, but to the right of stopping goods *in transitu* under circumstances similar to the case in judgment; for he says, where goods have been negotiated, and sold again, there it would be mischievous to say that the vendor or factor should have a lien upon the goods for the price; for then no dealer would know when he purchased goods safely. So in Lempriere *v.* Pasley, 2 Term R. 485, the court said it would be a great inconvenience to commerce if it were to be laid down as law, that a man could never take up money upon the credit of goods consigned till they actually arrived in port. There are other cases which in my judgment apply as strongly against the right of seizing *in transitu* to the extent contended for by the defendants; but before I go to them, with your Lordships' permission, I will state shortly the facts of the case of Snee *v.* Prescot, with a few more observations upon it. The doctrine of stopping *in transitu* owes its origin to courts of equity; and it is very material to observe that in that case, as well as many others which have followed it at law, the question is not as the counsel for the defendants would make it, whether the property vested under the bill of lading; for that was considered as being clear; but whether, on the insolvency of the consignee, who had not paid for the goods, the consignor could countermand the consignment, or in other words divest the property which was vested in the consignee. Snee and Baxter, assignees of John Tollet *v.* Prescott and others, 1 Atk. 245. Tollet, a merchant in London, shipped to Raguencau & Co., his factors at Leghorn, serges to sell, and to buy double the value in silks, for which the factors were to pay half in ready money of their own, which Tollet would repay by bills drawn on him. The silks were bought accordingly, and shipped on board Dawson's ship, marked "T.;" Dawson signed three bills of lading, to deliver at London to factors, consignors, or their order. The factors indorsed one bill of lading in blank, and sent it to Tollet, who filled up the same and pawned it. The bills drawn by the factors on Tollet were not paid, but Tollet became a bankrupt. The factors sent another bill of lading, properly indorsed, to Prescott, who offered to pay the pawnee, but he refused to deliver up the bill of lading; on which Prescott got possession of the goods from Dawson, under the last bill of lading. The assignees of Tollet brought the bill to redeem by paying the pawnee out of the money arising by sale, and to have the rest of the produce paid to them; and that the factors, although in possession of the goods, should be considered as general creditors only, and be driven to come in under the commission. Decreed, 1st, that the factors should be paid; 2d, the pawnees; and 3d, the surplus to the assignees. The decree was just and right in saying that the consignor, who never had been paid for the goods, and the pawnees, who had advanced money upon the goods, should both be paid out of the goods before the consignee or his assignees should derive any benefit from them. That was the whole of the decree; and if the circumstance of the consignor's interest being first provided for be thought to have any weight, I answer, 1st, That such provision was founded on what is now admitted to be an apparent mistake of the law, in supposing that there was a difference between a full and a blank indorsement. Lord Hardwicke considered the legal property in that case to remain in the consignor, and therefore gave him the preference. 2dly, That whatever might be the law, the mere fact of the consignor's being in possession was a sufficient reason for a court of equity to say, we will not take the possession from you till you have been paid what is due to you for the goods. Lord Hardwicke expressly said, this court will not say, as the factors have re-seized the goods, that they shall be taken out of their hands till payment of the half price which they have laid down upon them. He who seeks equity must do equity; and if he will not, he must not expect relief from a court of equity. It is in vain for a man to say in that court, I have the law with me, unless he will show that he has equity with him also. If he mean to rely on the law of his case, he must go to a court of law; and so a court of equity will always tell him under those circumstances. The case of Snee *v.* Prescot is miserably reported in the printed book: and it was the misfortune of Lord Hardwicke, and of the public in general, to have many of his determinations published in an incorrect and slovenly way; and perhaps, even he himself by being very diffuse has laid a foundation for doubts which otherwise would never have existed. I have quoted that case from a MS. note taken, as I collect, by Mr. John Cox, who was counsel in the cause; and it seems to me that on taking the whole of the case together, it is apparent that whatever might have been said on the law of the case in a most elaborate opinion, Lord Hardwicke decided on the equity alone arising out of all the particular circumstances of it, without meaning to settle the principles of law, on which the present case depends. In one part of his judgment he says, that in strictness of law the property vested in Tollet at the time of the purchase; but however that may be, says he, this court will not compel the factors to deliver the goods without being disbursed what they have laid out. He begins by saying, the demand is as harsh as can possibly come into a court of equity. And in another part of his judgment he says, suppose the legal property in these goods was vested in the bankrupt, and that the assignees had recovered, yet this court would not suffer them to take out execution for the whole value, but would oblige them to account. But further, as to the right of seizing or stopping the goods *in transitu*, I hold that no man who has not equity on his side can have that right. I will say with confidence, that no case or authority till the present judgment can be produced to show that he has. But on the other hand, in a very able judgment delivered by my brother Ashhurst in the case of Lempriere *v.* Pasley, in 1788, 2 Term Rep. 485, he laid it down as a clear principle that as between a person who has an equitable lien, and a third person who purchases a thing for a valuable consideration and without notice, the prior equitable lien shall not overreach the title of the vendee. This is founded on plain and obvious reason; for he who has bought a thing for a fair and valuable consideration, and without notice of any right or claim by any other person, instead of having equity against him has equity in his favor; and if he have law and equity both with him, he cannot be beat by a man who has equal equity only. Again, in a very solemn opinion delivered in this house by the learned and respectable judge who has often had the honor of delivering the sentiments of the judges to your Lordships when you are pleased to require it, so lately as the 14th May, 1790, in the case of Kinloch *v.* Craig, 3 Term R. 787, it was laid down that the right of stopping goods *in transitu* never occurred but as between vendor and vendee; for that he relied on the case of Wright *v.* Campbell, 4 Burr. 2050. Nothing remains in order to make that case a direct and conclusive authority for the present, but to show that this is not the case of vendor and vendee. The terms *vendor* and *vendee* necessarily mean the two parties to a particular contract: those who deal together, and between whom there is a privity in the disposition of the thing about which we are talking. If A sell a horse to B, and B afterwards sell him to C, and C to D, and so on through the alphabet, each man who buys the horse is at the time of buying him a vendee; but it would be strange to speak of A and D together as vendor and vendee; for A never sold to D, nor did D ever buy of A. These terms are correlatives, and never have been applied, or ever can be applied in any other sense than to the persons who bought, and sold to, each other. The defendants, or Turing, in whose behalf, and under whose name and authority they have acted, never sold these goods to the plaintiffs; the plaintiffs never were the vendees of either of them. Neither do the plaintiffs (if I may be permitted to repeat again the forcible words of the noble judge who pronounced the judgment in question) represent Freeman, so as to be answerable for his engagements, or stand affected by any notice of those circumstances which would bar the claim of Freeman or his assignees. These reasons, which I could not have expressed with equal clearness without recurring to the words of the two great authorities by whom they were used, and to whom I always bow with reverence, in my humble judgment put an end to all questions about the right of seizing *in transitu*. Two other cases were mentioned at the bar which deserve some attention. One is the case of the assignees of Burghall *v.* Howard, 1 H. Blac. 365 n., before Lord Mansfield at Guildhall in 1759, where the only point decided by Lord Mansfield was, that if a consignee become a bankrupt, and no part of the price of the goods be paid, the consignor may seize the goods before they come to the hands of the consignee or his assignees. This was most clearly right; but it does not apply to the present case: for when he made use of the word *assignees*, he undoubtedly meant assignees under a commission of bankrupt, like those who were then before him, and not persons to whom the consignee sold the goods. For in that case it is stated that no part of the price of the goods was paid. The whole cause turns upon this point. In that case no part of the price of the goods was paid, and therefore the original owner might seize the goods. But in this case the plaintiffs had paid the price of the goods, or were under acceptances for them, which is the same thing; and therefore the original owner could not seize them again. But the note of that case says, Lord Mansfield added, "and this was ruled, not upon principles of equity only, but the laws of property." Do these words fairly import that the property was not altered by a bill of lading, or by the indorsement of it? That the liberty of stopping goods *in transitu* is originally founded on principles of equity, and that it has, in the case before him, been adopted by the law, and that it does affect property, are all true; and that is all that the words mean; not that the property did not pass by the bill of lading. The commercial law of this country was never better understood, or more correctly administered than by that great man. It was under his fostering hand that the trade and the commercial law of this country grew to its present amazing size; and when we find him in other instances adopting the language and opinion of Lord C. J. Holt, and saying that since the cases before him it had always been held that the delivery of a bill of lading transferred the property at law, and in the year 1767 deciding that very point, it does seem to me to be absolutely impossible to make a doubt of what was his opinion and meaning. All his determinations on the subject are uniform. Even the case of Savignac *v.* Cuff, of which we have no account, besides the loose and inaccurate note produced at the bar, as I understand it, goes upon the same principle. The note states that the counsel for the plaintiff relied on the property passing by the bill of lading; to which Lord Mansfield answered, the plaintiff has lost his lien, he standing in the place of the consignee. Lord Mansfield did not answer mercantile questions so: which, as stated, was no answer to the question made. But I think enough appears on that case to show the grounds of the decision, to make it consistent with the case of Wright and Campbell, and to prove it a material authority for the plaintiffs in this case. I collect from it that the plaintiff had notice by the letter of advice that Lingham had not paid for the goods; and if so, then, according to the case of Wright *v.* Campbell, he could only stand in Lingham's place. But the necessity of recurring to the question of notice strongly proves that if there had been no such notice, the plaintiff, who was the assignee of Lingham the consignee, would not have stood in Lingham's place, and the consignor could not have seized the goods *in transitu;* but that, having seized them, the plaintiff would have been entitled to recover the full value of them from him. This way of considering it makes that case a direct authority in point for the plaintiffs. There is another circumstance in that case material for consideration, because it shows how far only the right of seizing *in transitu* extends as between the consignor and consignee. The plaintiff in that action was considered as the consignee; the defendant, the consignor, had not received the full value for his goods, but the consignee had paid £150 on account of them. Upon the insolvency of the consignee the consignor seized the goods *in transitu*, but that was holden not to be justifiable, and therefore there was a verdict against him. That was an action of trover, which could not have been sustained but on the ground that the property was vested in the consignee, and could not be seized *in transitu* as against him. If the legal property had remained in the consignor, what objection could be stated in a court of law to the consignor's taking his own goods? But it was holden that he could not seize the goods; which could only be on the ground contended for by Mr. Wallace, the counsel for the plaintiff, that the property was in the consignee. But though the property were in the consignee, yet, as I stated to your Lordships in the outset, if the consignor had paid to the consignee all that he had advanced on account of the goods, the consignor would have had a right to the possession of the goods, even though they had got into the hands of the consignee; and upon paying or tendering that money and demanding the goods the property would have revested in him, and he might have maintained trover for them. But admitting that the consignee had the legal property, and was therefore entitled to a verdict, still the question remained what damages he should recover. And in ascertaining them regard was had to the true merits of the case, and the relative situation of each party. If the consignee had obtained the actual possession of the goods, he would have had no other equitable claim on them than for £150. He was entitled to no more; the defendant was liable to pay no more; and therefore the verdict was given for that sum. This case proceeded precisely upon the same principles as the case of Wiseman *v.* Vandeput; where, though it was determined that the legal property in the goods, before they arrived, was in the consignee, yet the Court of Chancery held that the consignee should not avail himself of that beyond what was due to him. But for what was due, the court directed an account; and if anything were due from the Italians to the Bonnells, that should be paid the plaintiffs. The plaintiffs in this cause are exactly in the situation of the plaintiffs in that case; for they have the legal property in the goods; and therefore if anything be due to them, even in equity, that must be paid before any person can take the goods from them; and £520 was due to them, and has not been paid. After these authorities, taking into consideration also that there is no case whatever in which it has been holden that goods can be stopped *in transitu* after they have been sold and paid for, or money advanced upon them *bona fide*, and without notice, I do not conceive that the case is open to any arguments of policy or convenience. But if it should be thought so, I beg leave to say, that in all mercantile transactions one great point to be kept uniformly in view is to make the circulation and negotiation of property as quick, as easy, and as certain as possible. If this judgment stand, no man will be safe either in buying, or in lending money upon goods at sea. That species of property will be locked up; and many a man, who could support himself with honor and credit if he could dispose of such property to supply a present occasion, would receive a check, which industry, caution, or attention could not surmount. If the goods are in all cases to be liable to the original owner for the price, what is there to be bought? There is nothing but the chance of the market, and that the buyer expects as his profit on purchasing the goods, without paying an extra price for it. But Turing has transferred the property to Freeman, in order that he might transfer it again, and has given him credit for the value of the goods. Freeman having transferred the goods again for value, I am of opinion that Turing had neither property, lien, or a right to seize *in transitu.* The great advantage which this country possesses over most if not all other parts of the known world, in point of foreign trade, consists in the extent of credit given on exports, and the ready advances made on imports. But amidst all these indulgences the wise merchant is not unmindful of his true interests and the security of his capital. I will beg leave to state, in as few words as possible, what is a very frequent occurrence in the city of London. A cargo of goods of the value of £2,000 is consigned to a merchant in London; and the moment they are shipped the merchant abroad draws upon his correspondent here to the value of that cargo; and by the first post or ship he sends him advice, and incloses the bill of lading. The bills, in most cases, arrive before the cargo; and then the merchant in London must resolve what part he will take. If he accept the bills, he becomes absolutely and unconditionally liable; if he refuse them, he disgraces his correspondent, and loses his custom directly. Yet to engage for £2,000 without any security from the drawer is a bold measure. The goods may be lost at sea; and then the merchant here is left to recover his money against the drawer as and when he may. The question then with the merchant is, how can I secure myself at all events? The answer is, I will insure, and then if the goods come safe I shall be repaid out of them, or if they be lost, I shall be repaid by the underwriters on the policy. But this cannot be done unless the property vest in him by the bill of lading; for otherwise his policy will be void for want of interest. And an insurance in the name of the foreign merchant would not answer the purpose. This is the case of the merchant who is wealthy, and has the £2,000 in his banker's hands, which he can part with, and not find any inconvenience in so doing. But there is another case to be considered, viz.: Suppose the merchant here has not got the £2,000, and cannot raise it before he has sold the goods? the same considerations arise in his mind as in the former case, with this additional circumstance, that the money must be procured before the bills become due. Then the question is, how can that be done? If he have the property in the goods, he can go to market with the bill of lading and the policy, as was done in Snee and Prescot; and upon that idea he has hitherto had no difficulty in doing so. But if he have not the property, nobody will buy of him, and then his trade is undone. But there is still a third case to be considered; for even the wary and opulent merchant often wishes to sell his goods whilst they are at sea. I will put the case, by way of example, that barilla is shipped for a merchant here at a time when there has been a dearth of that commodity, and it produces a profit of £25 per cent, whereas upon an average it does not produce above £12. The merchant has advices that there is a great quantity of that article in Spain intended for the British market, and when that arrives the market will be glutted, and the commodity much reduced in value. He wishes therefore to sell it immediately, whilst it is at sea, and before it arrives, and the profit which he gets by that is fair and honorable; but he cannot do it if he have not the property by the bill of lading. Besides a quick circulation is the life and soul of trade; and if the merchant cannot sell with safety to the buyer, that must necessarily be retarded. From the little experience which I acquired on this subject at Guildhall, I am confident that if the goods in question be retained from the plaintiff without repaying him what he has advanced on the credit of them, it will be mischievous to the trade and commerce of this country; and it seems to me that not only commercial interest, but plain justice and public policy forbid it. To sum up the whole in very few words, the legal property was in the plaintiff: the right of seizing *in transitu* is founded on equity: no case in equity has ever suffered a man to seize goods in opposition to one who has obtained a legal title, and has advanced money upon them; but Lord Hardwicke's opinion was clearly against it: and the law, where it adopts the reasoning and principle of a court of equity, never has and never ought to exceed the bounds of equity itself. I offer to your Lordships as my humble opinion, that the evidence given by the plaintiff, and confessed by the demurrer, is sufficient in law to maintain the action.

ASHHURST and GROSE, Justices, also delivered their opinions for reversing the judgment of the Exchequer Chamber.

EYRE, C. J., GOULD, J., HEATH, J., HOTHAM, B., PERRYN, B., and THOMSON, B., contra.

A *venire facias de novo* having been awarded by the King's Bench, a special verdict was found upon the second trial, containing in substance the same facts as before.

And then the jury found that by the custom of merchants, bills of lading, expressing goods or merchandises to have been shipped by any person or persons to be delivered to order or assigns, have been, and are, at any time after such goods have been shipped, and before the voyage performed, for which they have been or are shipped, negotiable and transferable by the shipper or shippers of such goods to any other person or persons, by such shipper or shippers indorsing such bills of lading with his, her, or their name or names, and delivering or transmitting the same so indorsed, or causing the same to be so delivered or transmitted to such other person or persons; and that by such indorsement and delivery or transmission, the property in such goods hath been, and is transferred and passed to such other person or persons. And that, by the custom of merchants, indorsements of bills of lading in blank — that is to say, by the shipper or shippers with their names only — have been, and are, and may be filled up by the person or persons to whom they are so delivered or transmitted as aforesaid, with words ordering the delivery of the goods or contents of such bills of lading to be made to such person or persons; and, according to the practice of merchants, the same, when filled up, have the same operation and effect as if the same had been made or done by such shipper or shippers when he, she, or they indorsed the same bills of lading with their names as aforesaid. But whether, &c.

The Court, understanding that it was intended that this case was to be carried up to the House of Lords, declined entering into a discussion of it, merely saying that they still retained the opinion delivered upon the former case. And they accordingly gave

Judgment for the plaintiffs.

BOHTLINGK *v.* INGLIS.

IN THE KING'S BENCH, FEBRUARY 11, 1803.

[*Reported in* 3 *East*, 381.]

LAWRENCE, J., delivered the judgment of the court (GROSE, LE BLANC, and LAWRENCE, JJ.)

The circumstances of the case as applicable to this point are shortly these: Crane, the bankrupt, a merchant in London, entered into an agreement with Usherwood, the master of a ship, for that ship going to Petersburg, and there receiving from the factors of the bankrupt a quantity of merchandise of various descriptions, and proceeding from thence to London, in consideration of certain freight to be paid per ton, half on the unloading, and the remainder in three months; for which goods the master was to sign the usual bills of lading, and Crane was fully to load the ship. In consequence of this agreement the ship sailed to Petersburg, and was loaded by Bohtlingk & Co. on the account and risk of Crane; and one part of the bill of lading directing the goods to be delivered to Crane or his assigns was sent to him; the

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other part, in consequence of the plaintiff's having information of Crane's insolvency, was afterwards sent to Mr. Schneider their agent, with directions not to deliver that part to Crane, unless he gave sufficient security for the amount of the goods. And the plaintiffs at the same time that they sent this part of the bill of lading to Schneider, informed Crane of their having so done, and required him, in case he did not give the security, to deliver to Schneider the bill of lading that had been sent to him, Crane. In fact Crane had become a bankrupt before the goods were delivered on board the ship in Russia, but after their purchase; and on the arrival of the ship in the Thames, Schneider demanded the goods of the master, who refused to deliver them to him, and delivered them to the defendants.

For the benefit of trade a rule has been introduced into the common law, enabling the consignor in case of the insolvency of the consignee to stop the goods consigned before they come into the possession of the consignee; which possession Mr. Justice Buller, in Ellis *v.* Hunt, says means an actual possession. That the possession of a carrier is not such a possession has been repeatedly determined; and the question now is, whether the possession of the master be anything more than the possession of a carrier, and not the actual possession of the bankrupt. And to this, it appears that Usherwood, the master, contracted with the bankrupt to proceed from hence to Petersburg, and to bring in his ship a cargo of goods, which Crane engaged should amount to the tonnage of the ship; which does not differ from a similar contract entered into by the consignor by the directions of the consignee at the loading port, for the conveyance of the goods from him to the vendee: in which case it would hardly be contended that a delivery by the consignor to the master of the ship for the purpose of carriage would be such a delivery to the vendee as to prevent the right of stoppage *in transitu.* In each case the freight would be to be paid by the consignee; in each case the ship would be hired by him; and there would be no difference, except that in this case the ship in consequence of the agreement goes from England to fetch the cargo; in the other case the vessel would bring it immediately from the loading port: both in the one case and in the other the contract is with the master for the carriage of goods from one place to another; and until the arrival of the goods at their port of destination and delivery to the consignee, *they are in their passage or transit from the consignor to the consignee.* If a man contract with the owner of a general ship to take goods, which are equal to half the tonnage of the ship, and the master complete the loading of his ship with the goods of others, there would be no question but that there might be such stoppage; and surely it will not be said that the right of stoppage depends on the quantity of the goods consigned. In support of the defendant's claim the case of Fowler *v.* M'Taggart, 1 East. 522, has been relied on. The more proper name of that case is Fowler *v.* Kymer *et al.*, which was tried before Mr. Justice Grose at Bristol; but that case is very distinguishable from this. There the bankrupts Hunter & Co. were in possession of a ship let to them for a term of three years, at £52 10*s.* per month, they finding stock and provisions for the ship, and paying the master; during which time they were to have the entire disposition of the ship and the complete control over her. The ship had been one voyage to Alexandria, and had the goods put on board of her, to carry them on another voyage to the place; not for the purpose of conveying them *from* the plaintiffs *to* the bankrupts, but that they might be sent by the bankrupts upon a mercantile adventure, for which they had bought them. There the delivery was complete; and the facts of that case differ widely from this, where Crane had no control over the ship, and had merely contracted with the master to employ his ship in fetching goods for him.

The case of Stokes *v.* La Riviere and Lawley, 3 T. R. 466, is much stronger than this. The plaintiff being a ribbon-weaver, Messrs. Duhem of Lisle who had just arrived in London applied to him for a quantity of ribbons, who on a favorable account by the defendants of their circumstances packed up goods to the amount of £186 8*s.* 9*d.*, and delivered them to the defendants to be forwarded to Lisle. These goods, with others purchased in like manner of Twigge, Ellis, & Edwards, gauze-weavers, to the amount of £650, were forwarded on or about the 12th of May to Messrs. Bine & Overman, the defendants' correspondents at Ostend, with directions to send them to the order of Messrs. Duhem. On the receipt of which goods, viz. on the 29th of May, Bine & Overman wrote to Duhems an acknowledgment, and that they waited their directions. On the 12th of June the Duhems stopped payment; and by an instrument signed the 13th of August consented to Twigge's taking back his gauzes, amounting to £419 18*s.* 2½*d.* But not having fulfilled some engagement with the defendants, and being considerably indebted to them, the defendants countermanded the orders they had given to Bine, Overman, & Co., as to the delivery of the goods, by letter of the 31st of May, and directed them to alter the marks, and to deliver them to their order; which was accordingly done, and they were afterwards disposed of in satisfaction of the defendants' demand: they contending that immediately upon the delivery of the goods by the plaintiff to them, the property vested in Messrs. Duhem, and that they, the defendants, had a right to retain them. This cause was tried at Guildhall on Saturday, the 18th of December, 1784, when Lord Mansfield said: "The fact I take to be this: The Duhems bought goods of the plaintiff, which were ordered to be delivered to the defendants to be shipped to Duhems, who are since become insolvent, after the goods were sent to a factor at Ostend. The defendants who have got them back again stand as they originally did. No point is more clear than that if goods are sold, and the price not paid, the seller may stop them *in transitu; I mean in every sort of passage to the hands of the buyers.* There have been a hundred cases of this sort. Ships in harbor, carriers, bills have been stopped. In short, where the goods are *in transitu* the seller has that proprietary lien. *The goods are in the hands of the defendants to be conveyed;* the owner may get them back again.

The case of Inglis and Usherwood, 1 East. 515, is perfectly consistent with the opinion we have formed. That case did not decide, as was supposed in the argument, that the transit was complete on the delivery of the goods on board the ship; for it was determined on the ground that the Russian laws authorized the taking of the goods, even if the delivery had been complete. In that case Lord Kenyon says: "Giving the plaintiff the full benefit of the argument that the delivery of the goods on board a chartered ship was a delivery to the bankrupt, still the Russian ordinance takes it out of the rule." Mr. Justice Grose uses more general expressions, from whence it may be inferred that he considered the ship as one, a delivery on board of which was a delivery to the defendant; but that it was not the true way in which his opinion is to be understood. The case of Fowler *v.* Kymer and M'Taggart had been cited, in reference to which he was speaking: and he is not to be taken as laying down any proposition beyond what was established by that case; and supposing the delivery to be similar to that in Fowler *v.* Kymer, he took the same ground that Lord Kenyon did, and decided that, notwithstanding such delivery, the goods by the law of Russia were *in transitu*. In the account of what I am stated to have said, I observe that, without naming the case, I recognized the authority of Fowler *v.* Kymer to the extent that case goes; namely, that if one purchase goods here to be sent abroad, and they are delivered on board a chartered ship in a port of this kingdom, such delivery is in effect a delivery to the vendee: and I gave it as my opinion, that if the delivery in the case then before us were a delivery, which in this country would have been a delivery to the vendee, still, according to the laws of Russia, the goods might be stopped. And my brother Le Blanc's opinion goes entirely on the laws of Russia; without inquiring how far the case then before the court was distinguishable from those cited in any other respect. For these reasons I am of opinion that the *postea* should be delivered to the plaintiffs; in which opinion my brothers Grose and Le Blanc concur. In the view we have of the subject it is not necessary to say anything on the other point, as to the admissibility in evidence of the opinion of the judges of the Russian custom-house; with respect to which we form no opinion.

Postea to the plaintiffs.[1]

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[1] The statement of the case and a portion of the opinion are omitted.

SPALDING *v.* RUDING.

IN CHANCERY, CORAM LORD LANGDALE, MARCH 24, 25, JULY 8, 1843.

[*Reported in* 6 *Beavan*, 376.]

THE plaintiffs were merchants residing at Stralsund. On the 17th of May, 1841, their agent, Mr. Schleicher, on their behalf, sold to James Williams Thomas a quantity of wheat at 35*s.* per quarter, free on board, the shipment to be made forthwith to London, at the current rate of freight, and the amount to be drawn for on Thomas at three months' date, payable in London, on handing invoice and bill of lading.

The plaintiffs accordingly, on the 1st of June, 1841, shipped at Stralsund, by the ship "Ceres," 714 quarters of wheat; a bill of lading was signed by Zillmer, the master of the ship, in the usual form; and the plaintiffs, having made out and signed an invoice of the wheat, sent the same with the bill of lading to Thomas, and, at the same time, drew upon him three bills for the amount in the whole of £1,264 2*s.*; and by letter requested Thomas to protect those bills.

Thomas received the bill of lading and invoice on the 8th of June, 1841, and he thereupon requested Ruding to accept for him a bill of exchange for £1,000, payable at three months after date, which Ruding agreed to do on receiving from Thomas a memorandum or letter signed by Thomas to this effect: —

LONDON, 9th June, 1841.

Messrs. J. C. RUDING AND SON.

GENTLEMEN, — In consideration of your having this day accepted my draft on you at three months' date for £1,000 on a cargo of wheat (viz. 3,825 scheffels), from Stralsund per the "Ceres," J. H. Zillmer, of which I have handed you the policy of insurance for £1,600 and a bill of lading, I authorize you to dispose of the same on my account, subject to your usual commission and charges, before such bill becomes due; or, I undertake to provide you with cash to the amount of your advance, should I wish you to hold it beyond that time.

JAMES W. THOMAS.

On the 1st of July, 1841, the ship "Ceres," with the wheat on board, arrived in the port of London. About this time, Mr. Thomas stopped payment. On the 2d of July, Schleicher, the agent of the plaintiffs, gave a verbal notice, and on the 3d of July, a written notice to Zillmer, the master of the "Ceres," not to part with the wheat, without the orders of the plaintiffs. On the 5th of July, a fiat of bankruptcy was issued against Thomas, and on the same day Schleicher again gave notice to the master not to part with the wheat, but being then informed

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that the bill of lading had been indorsed and delivered to Ruding as a security for moneys lent, he permitted the wheat to be delivered to Ruding, but on the same day gave him notice that the plaintiffs claimed to be entitled to the wheat and the proceeds thereof, and did not, by removing the stop placed upon the delivery to Ruding, abandon their claim, and that in case Ruding should be entitled by law to any part of such proceeds, the plaintiffs claimed the balance which should remain after satisfying such claim, if any, as Ruding might by law have.

Ruding claimed to be entitled to apply the proceeds of the wheat, not only in payment of the £1,000 bill which he had accepted, and the freight and other charges of the shipment, but also in satisfaction of the balance of a general account which he alleged to be subsisting between himself and Thomas. Under these circumstances, the plaintiffs offered to pay him £1,200 in satisfaction of his acceptance and the charges on the wheat, and requested to have the wheat thereupon delivered to them. This was on the 23d of July. Mr. Ruding refused to accept the money offered to him, or to deliver up the wheat, and he afterwards, on the 21st of August, 1841, sold it for £1,822, which he retained to his own use. Having subsequently, in December, 1841, declined to acknowledge that the plaintiffs had any claim whatever, this bill was filed on the 31st of December, 1841.

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The bill prayed that an account might be taken of the moneys which had come to the hands of the defendant Ruding, in respect of the wheat, and also of the moneys due to the same defendant on the security of the bill of lading. That the defendant might be allowed such last-mentioned moneys, and might pay to the plaintiffs the balance of the moneys arising from the wheat.

Mr. Pemberton Leigh and *Mr. Wood*, for the plaintiffs.

Mr. G. Turner and *Mr. Fisher*, for the defendant, Ruding.

Mr. Bichner, for the assignees of Thomas.

THE MASTER OF THE ROLLS. I apprehend it to be clear, that the indorsement and delivery of the bill of lading by Thomas, the consignee, to Ruding for valuable consideration, gave to Ruding the legal right to the delivery and possession of the goods. That right is not disputed by this bill, but the plaintiffs insist that under the contract subsisting between Thomas and Ruding, the right to the possession of the goods was vested in Ruding, only as a security for the repayment to him of his advance and charges, and that, subject to that security, the plaintiffs, in the consideration of a court of equity, retained their right to a stoppage *in transitu* against the assignee or indorsee of the bill of lading; it appears that in the case of Westzinthus, 5 B. & Adol. 817, the Court of Queen's Bench held, that in such a case a court of equity would hold such a transfer to be a pledge or mortgage only, and that the attempt to stop *in transitu* gave a right to the goods, in equity, subject only to the lien for the advance.

The propriety of that opinion was questioned, but, as it appears to me, without sufficient reason. As against Thomas, I think that the plaintiffs had a right to stop the goods *in transitu;* and, although the legal right to the goods was transferred with the bill of lading, yet I think that, in equity, the transfer took effect only to the extent of the consideration paid by the transferee, leaving in the plaintiffs an equitable interest in the surplus value.

In the argument for the defendants it was urged that they, in the character of factors for Thomas, had an interest of their own to retain the surplus value in satisfaction of a balance due to them from Thomas; and, secondly, that any interest of the plaintiffs, though of an equitable nature, might be made available in an action to be brought by them against the defendants in this cause; but the goods came to the hands of Ruding under a special contract, interfering with any general right which he might have as factor; and, even if the defendants were entitled to be considered as factors of Thomas, having a balance due to them, it does not appear to me that, as against the plaintiffs, the owners and shippers of the goods entitled to stop *in transitu*, they could, by virtue of the bill of lading, have a right to retain more than the consideration they paid for the advantage which the bill of lading gave them; and, as to the action, the legal right to the goods being clearly in the defendants, it does not appear to me that the plaintiffs could have obtained, at law, that relief which I think them entitled to here.

I am therefore of opinion that the plaintiffs are entitled to the decree which is asked by the bill, and that an account must be taken of the moneys received by the defendants in respect of the wheat in question, and of the moneys due to the defendants on the security of the bill of lading, and that the balance may be ascertained and paid to the plaintiffs by the defendants.[1]

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BERNDTSON *v.* STRANG.

IN CHANCERY, JUNE 27, 28, JULY 2, 1867.

[*Reported in Law Reports*, 4 *Equity*, 481.]

THIS was a suit for the purpose of establishing the right of the plaintiff, by virtue of the exercise of his right of stoppage *in transitu*, to a charge in equity upon the proceeds of certain timber sold by him to a firm in London, of whom the defendants were the assignees under a deed for the benefit of creditors.

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[1] This decision was affirmed by Lord Lyndhurst, 15 L. J. (Ch.) 374.

Chandler *v.* Fulton, 10 Tex. 2, *acc.*

In Missouri Pacific Ry. Co. *v.* Heidenheimer, 82 Tex. 195, 199, however, Tarlton, J., delivering the opinion of the court, said: "If the transfer of a bill of lading by way of pledge or mortgage, or as collateral security for a loan, does not absolutely defeat the right of stoppage in transitu, the seller cannot exert that right until he has discharged the debt secured by the transfer, as his right is subject to that of the mortgagee or pledgee."

The facts, which were not in dispute, were thus stated upon the bill: —

The plaintiff, who is a timber merchant of Gefle, in Sweden, through his Paris agent, Charles Von Kock, entered into a contract in February, 1863, for the sale to Messrs. Langton & Robinson, a London firm, of a quantity of timber. The contract, which was reduced into writing, and signed by Messrs. Langton & Robinson, after stating the quantities of timber and the prices, proceeded thus: —

> "And the said prices, *franco on bord*, payable by buyer's acceptance of seller's drafts at six months from date of bills of lading. Shipment to London. Sellers to provide ships to a freight not exceeding 53*s.* in full, per Petersburger standard, with two or three guineas of gratification per 100 Petersb. stand. in case of need. If ships cannot be chartered within this limit, the contract to be void."

It was subsequently agreed that, instead of Berndtson providing a ship for conveyance of the timber, Langton & Robinson should themselves charter a vessel to convey the timber from Gefle to London.

Messrs. Langton & Robinson accordingly chartered a ship, the "Maastrom," which proceeded to Gefle, and on the 22d of October, 1863, Berndtson shipped the timber on board of her. The price of the timber amounted to £1,589 12*s.* 6*d.*, and an advance of £153 8*s.* 2*d.* was made by Berndtson to the captain of the ship on account of the freight. These sums, together with three months' interest at 5 per cent on the advance, amounted to £1,744 19*s.*, and accordingly, in pursuance of the contract, Berndtson, on the 22d of October, 1863, drew a bill of exchange of that date for this amount upon Langton & Robinson, payable six months after date. At the same time, in order, as the bill alleged, to preserve his control over such timber, Berndtson caused the bill of lading to be drawn in his name as shipper of the timber, and the same was thereby made deliverable to the order or assigns of Berndtson dated 22d of October, 1863, and made the timber deliverable to Berndtson's order or assigns.[1]

Berndtson indorsed this bill of lading in blank, and caused it to be handed over to Langton & Robinson, in exchange for their acceptance of the bill of exchange for £1,744 19*s.* On receipt of the bill of lading Messrs. Langton & Robinson deposited it, together with a policy of insurance of the cargo of timber and other securities, with Messrs. Churchill & Sim, as a security for repayment of moneys due to them from Langton & Robinson.

The "Maastrom," with the timber on board, sailed for London, but met with disasters on her voyage, got stranded, and on the 16th of November, 1863, was forced in distress to put into the port of Copenhagen, where she remained for some months. On the 16th of February, 1864, Langton & Co. suspended payment, and subsequently, on the 9th of September, 1864, they executed a deed of assignment to the defendants, Strang, Sieveking, and Pack, as trustees for the benefit of their creditors. While the "Maastrom" was still lying in the port of Copenhagen, Berndtson caused the captain to be served with a notice, dated the 24th of March, 1864, to stop the timber *in transitu.*

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[1] In the report the bill of lading is given *verbatim.*

On the 26th of April, 1864, the "Maastrom" arrived in the Thames, whereupon a second notice of stoppage *in transitu* was served on board the ship and also on the shipbrokers, and on Messrs. Churchill & Sim.

The timber was taken possession of by Churchill & Sim as mortgagees, and a sum of £1,276 15*s.* 6*d.* was produced by the sale of it. The proceeds of the timber, with the moneys received under the policy, amounting in all to £1,570, had been paid into court by Messrs. Churchill & Sim, who had been satisfied out of their other securities.

The bill of exchange for £1,744 19*s.* was dishonored at maturity.

The proceeds of the timber having been claimed by the trustees of the creditors' deed executed by Langton & Robinson, this bill was filed by Berndtson, charging that, by the exercise of his right of stopping the timber *in transitu*, he was entitled in equity to a valid and subsisting charge for the money due in respect of the price of the timber, and praying relief upon this footing.

A dividend of 5*s.* in the pound on the whole amount of his claim on the estate had been paid to the plaintiff by the trustees of the creditors' deed without prejudice.

Mr. G. M. Giffard, Q. C., and *Mr. Kay*, Q. C., for the plaintiff.

Mr. Druce, Q. C., and *Mr. Freeling*, for the defendants.

SIR W. PAGE WOOD, V. C. The question in this case is, whether the plaintiff is entitled to such a declaration as was made in Spalding *v.* Ruding, 6 Beav. 376, of his equitable right of stoppage *in transitu* over certain timber sold by him, and for the price of which bills of exchange were drawn, which were unpaid at the time the consignees became insolvent: the question being whether, under all the circumstances of the case, the consignees having simply mortgaged the bills of lading, which brings the case so far within Spalding *v.* Ruding, the plaintiff is entitled to the surplus assets as against the defendants, who are the representatives, under a deed of composition, of the original consignees.

Spalding *v.* Ruding was, I think, the first case in this court in which this right was asserted as against property which had so far passed into the hands of the consignee that he was enabled by mortgage of the bills of lading to pass the interest in the goods to the extent of that mortgage; and there the right of stoppage *in transitu* was upheld as against the surplus.

The case, which was originally decided by Lord Langdale, and affirmed by Lord Lyndhurst, was no doubt, in some degree, an extension of what was supposed to be the right of the consignor. In some of the cases there were *dicta* which seemed to show that by the indorsement of the bill of lading in such a manner as to admit of a dealing with it, and by actual dealing with, or actual negotiation of such bill of lading to a *bona fide* transferee, the vendor's right to stop *in transitu* would be defeated. That was the great ground of argument in Spalding *v.* Ruding, *supra,* and I mention the case as showing the extent to which the right has been upheld, and that it is a right entirely distinguished from the right of property in the goods.

The plaintiff in this case sold to Messrs. Langton, who have become insolvent, certain timber under a contract of sale, specifying the price, "free on board, payable by buyer's acceptance of seller's drafts at six months from date of bills of lading. Shipment to London." It was also provided that the sellers were to provide ships.

A good deal was said about these words "free on board," but as regards the original contract it would be plain enough that there was no intention that the goods should be at their destination when they were free on board, as not only was London the place of destination, but the seller was to find the vessel, and undertook that the goods should be delivered in London. Although the property in the goods might well pass when the bill of lading was handed over in exchange for the accepted bills, still that does not determine the question as to the right to stoppage *in transitu,* the distinction being well established upon all the authorities, and especially referred to in Van Casteel *v.* Booker, where, during the argument, Mr. (now Baron) Martin, so far conceding against the interest of his client, says (2 Ex. 699): "The general rule is that if goods are shipped on board a chartered vessel the property vests in the consignee, subject to the right of stoppage *in transitu;* but if the goods are placed on board the purchaser's own ship, that is an absolute delivery — the same as if placed in his cart. The shipper may, however, protect himself by taking a bill of lading making the goods deliverable to his own order only; but in that case the property would pass as soon as he indorsed the bill of lading generally."

In the same way, Lord Chelmsford, in Schotsmans *v.* Lancashire and Yorkshire Railway Company, Law Rep. 2 Ch. 337, says in reference to the case of Mitchel *v.* Ede, 11 Ad. & E. 888: "It appears to me that this case was not decided upon the distinction between a general ship and one sent for the express purpose of receiving the sugar; for if it had been a question of stoppage *in transitu* upon a sale of the sugar to the defendants, and it had been delivered into the defendants' own vessel, sent out for the purpose, although the property in the goods would have passed, yet the effect of the delivery would have been restrained by the indorsement on the bill of lading, and the right to stop *in transitu* would have been preserved."

Much stress has been laid upon those words "free on board," as being an indication of the nature of the contract, — that the *transitus* was at an end when the goods were on board the purchaser's own ship But those words cannot have any such effect in a contract framed as this was, where the intention, as expressed by the contract, was. that there was to be no delivery on board the purchaser's own ship, as the vendor was to find a ship (although at the cost of the purchaser), and send the ship, with the cargo, to London, where the *transitus* would be at an end. That contract, however, was varied by parol, by the arrangement subsequently made, under which the vendor was no longer to find a ship, but was discharged from that part of his engagement. A ship chartered by the purchaser is sent out from London for the purpose of taking on board this cargo, subject, of course, to the payment of freight when the cargo should be delivered pursuant to the charter-party. That being so, the vendor takes the additional precaution, notwithstanding the purchaser charters the ship, of taking the bill of lading in this form: "Shipped by him (the vendor), to be delivered at the port of London, unto order or to assigns." The bill of lading having been taken in this form, the bills of exchange are drawn and accepted, and while the ship was on her voyage the bill of lading was indorsed in blank — a circumstance very strongly relied upon by Mr. Druce — and delivered to the purchaser in exchange for the accepted bills of exchange. No doubt the property in the goods would pass, but that does not determine the question whether the *transitus* was at an end. With the single exception that the bills of lading are made out in the name of the vendor to his order, or assigns, and then by him indorsed in blank, the case does not really differ from Bohtlingk *v.* Inglis, 3 East, 381, nor from Spalding *v.* Ruding, 6 Beav. 376, where the purchaser had the bill of lading handed over to him so as to vest the property in him.

Does, then, the shipping of goods, in the name of the vendor, and indorsing over the bill of lading, show an animus on the part of the vendor to part with his lien and abandon his right of stoppage *in transitu?* Now there are two *criteria*, as it appears to me, with respect to the stoppage *in transitu*, viz.: whether there is a *transitus* at all? and if so, where it is to end? If a man sends his own ship, and orders the goods to be delivered on board his own ship, and the contract is to deliver them free on board, then the ship is the place of delivery and the *transitus* is at end, just as much (as was said in Van Casteel *v.* Booker, 2 Ex. 691, as if the purchaser had sent his own cart, as distinguished from having the goods put into the cart of a carrier. Of course there is no further *transitus* after the goods are in the purchaser's own cart. There they are at home, in the hands of the purchaser, and there is an end of the whole delivery. The next thing to be looked to is, whether there is any intermediate person interposed between the vendor and the purchaser. Cases no doubt may arise, where the *transitus* may be at an end although some person may intervene between the period of actual delivery of the goods and the purchaser's acquisition of them. The purchaser, for instance, may require the goods to be placed on board a ship chartered by himself and about to sail on a roving voyage. In that case, when the goods are on board the ship everything is done; for the goods have been put in the place indicated by the purchaser, and there is an end of the *transitus*. But here, where the goods are to be delivered in London, the plaintiff, for greater security, takes the bill of lading in his own name, and, being content to part with the property in the goods, subject or not, as the case may be, to this right of stoppage *in transitu*, he hands over the bill of lading in exchange for the bill of exchange. In that ordinary case of chartering it appears to me that the captain or master is a person interposed between vendor and purchaser in such a way that the *transitus* is not at an end, and that the goods will not be parted with, and the consignee will not receive them into his possession, until the voyage is terminated and the freight paid according to the arrangement in the charterparty.

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Bohtlingk *v.* Inglis, 3 East, 381, which has been frequently cited, and never, as far as I can discover, with disapprobation, seems to have furnished the rule which was alluded to in argument in Van Casteel *v.* Booker, 2 Ex. 691, viz., that if the goods are delivered on board a chartered ship, the property vests in the consignee, subject to the right of stoppage *in transitu*. Mr. Justice Lawrence, in delivering the judgment of the court, says (3 East, 395): "For the benefit of trade, a rule has been introduced into the common law, enabling the consignor, in case of the insolvency of the consignee, to stop the goods consigned before they come into the possession of the consignee, which possession Buller, J., in Ellis *v.* Hunt, 3 T. R. 466, says, means an actual possession. That the possession of a carrier is not such a possession, has been repeatedly determined, and the question now is, whether the possession of the master be anything more than the possession of a carrier, and not the actual possession of the bankrupt. . . . It does not differ from a similar contract entered into by the consignor, by the directions of the consignee, at the loading port, for the conveyance of the goods from him to the vendee;" — in other words, it would be exactly like the original engagement in the present case, and the circumstance of the consignee being the person who provides the ship, makes really no substantial difference whatever — "in which case it would hardly be contended that a delivery by the consignor to the master of the ship for the purpose of carriage, would be such a delivery to the vendee as to prevent the right of stoppage *in transitu*. In each case the freight would be to be paid by the consignee; in each case the ship would be hired by him; and there would be no difference, except that in this case the ship, in consequence of the agreement, goes from England to fetch the cargo," — just as in the case now before me — "in the other case, the vessel would bring it immediately from the loading port: both in the one case and in the other the contract is with the master for the carriage of the goods from one place to another; and until the arrival of the goods at their port of destination, and delivery to the consignee, they are in their passage or transit from the consignor to the consignee."

The learned judge distinguishes the case from that of Fowler *v.* Ky mer (cited in Hodgson *v.* Loy, 7 T. R. 442), where the ship, being under the complete control of the bankrupt, had the goods put on board her, not for the purpose of conveying them from the consignors to the consignees, but that they might be sent by the consignees upon a mercantile adventure for which they had bought them, and there the delivery to the consignees, being at the place pointed out by them where the delivery should be, was held to be complete. Of course the place of delivery may be as well on board the ship as at the port of her destination. The case of Van Casteel *v.* Booker, 2 Ex. 691, does not appear to me to make any substantial difference. There it was the vendee's own ship, and, as was said by Parke, B., in the judgment, if the goods were put on board to be carried for and on the account and risk of the bankrupts, the delivery on board put an end to the right of stopping *in transitu;* but the vendor took the precaution which was held effectual in Turner *v.* Trustees of Liverpool Docks, 6 Ex. 543, of restraining the effect of that delivery by the indorsement on the bill of lading. The court there (Van Casteel *v.* Booker, 2 *ib.* 691), seems to have thrown out that this precaution stopped the effect of putting the goods on board the vendee's own ship, and indicated an intention not to part with the dominion over the goods, nor vest the absolute property in the bankrupts. The case before me is still stronger, as although the vendor has taken this precaution in order to guard himself against any possible contingency, still the ship is the instrument of transit, and in parting with these bills of lading in exchange for the bills of exchange, he is aware that the ship has been chartered for the purpose of delivering the goods at the port of London, and that the master of the ship was not the servant of the vendee, but an intermediate agent who, for hire, when the hire was paid, was to deliver the goods in London.

It appears to me, therefore, that until the goods reach London the *transitus* is not ended. Cowasjee *v.* Thompson, 5 Moo. P. C. 165, differs in every respect from this case. There a ship was sent out, goods were ordered for that ship, and the ship being the property of the person sending her out, the *transitus* was complete when the goods were delivered on board pursuant to order, nothing else being directed or intended by anybody. Again, in Schotsmans *v.* Lancashire and Yorkshire Railway Company, Law Rep. 2 Ch. 332, the ship was the ship of the vendee, and the vendor did not take the precaution of preserving his right of stoppage *in transitu* by making the goods deliverable to his order or assigns; the goods by the bill of lading being made deliverable to the purchaser or assigns. The whole case here appears to me to turn upon whether or not it is the man's own ship that receives the goods, or whether he has contracted with some one else *quâ* carrier to deliver the goods, so that, according to the ordinary rule as laid down in Bohtlingk *v.* Inglis, 3 East, 381, and continually referred to as settled law upon this subject, the *transitus* is only at an end when the carrier has arrived at the place of destination, and has delivered the goods.

I must, therefore, follow the decision in Spalding *v.* Ruding, 6 Beav. 376, and declare the plaintiff entitled out of the fund in court to the balance due upon the bill of exchange, with interest from the date of maturity.[1]

Ex Parte GOLDING, DAVIS, & CO., LIMITED.

In the Chancery Division, Court of Appeal, February 12, 1880.

[*Reported in* 13 *Chancery Division*, 628.]

This was an appeal from a decision of Mr. Registrar Pepys, acting as Chief Judge in Bankruptcy.

Knight & Son were merchants in London and at Liverpool. Golding, Davis, & Co., Limited, carried on business as manufacturers of alkali at Widnes.

On the 15th of November, 1877, Knight & Son entered into the following contract with the company: —

Messrs. Golding, Davis, & Co.

We have this day bought of you the following goods of good merchantable quality: Twelve hundred (1,200) drums 5/6 cwt. each, white 70% caustic soda, your own make, per Huson's sampling and test note. Delivery, 100 drums per month, January and December, 1878. Shipment, f. o. b. Liverpool. Price, £14 per ton. Discount, 2½% and com. 1%. Prompt 14 days after each delivery, or before delivery if required.

(Signed) Knight & Son.

On the same day Knight & Son entered into the following contract with D. Taylor & Sons, of London: —

Messrs. D. Taylor & Sons.

We have this day sold to you the undermentioned goods of good merchantable quality: 1,200 drums, 5/6 cwt. each, white 70% caustic soda, Golding, Davis, & Co.'s make, Huson Bros. sampling and test. Mode of delivery, f. o. b. Liverpool. Time of delivery, 100 drums per month, January and December, 1878, each month's delivery a separate contract. Price, £14 per ton. Discount, 2½%. Prompt 14 days after each delivery.

(Signed) Knight & Son.

The question in dispute on the present appeal related to the October delivery of 100 tons.

On the 28th of October, 1878, Knight & Son's London house wrote to their Liverpool branch, in pursuance of instructions which they had received from D. Taylor & Sons, as follows: —

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[1] On appeal the decree of Vice-Chancellor Wood was affirmed as to the point decided by him, though varied as to a point not discussed in the lower court. Berndtson *v.* Strang, L. R. 3 Ch. 588.

"We enclose bills of lading for Taylor's 100 drums, Golding's. Please get them shipped at once, as Taylor wants bills of lading dated October. They are to go by sail to New York."

On the 4th of November Knight & Son's Liverpool branch sent instructions to the company to ship the 100 drums at once on board the ship "Larnaca," for New York, then lying at Liverpool. The "Larnaca" was a general ship. The goods were accordingly shipped by the company on the 7th of November. The wharfinger's receipt for the goods stated that they were received for shipment on board the "Larnaca" on account of Knight & Son, Liverpool. This receipt was handed to the shipping-brokers of the ship, who then procured the signature of the master of the ship to the bill of lading.

The bill of lading stated that the goods were shipped by David Taylor & Sons, to be delivered at New York unto order or to assigns, he or they paying freight.

The sum payable by Taylor & Sons to Knight & Son for the goods was £370 10*s.* 3*d.*, and the sum payable by Knight & Son to the company was £366 14*s.* 3*d.* The bill of lading was handed by the shipping-brokers to Knight & Son's Liverpool branch on the afternoon of the 7th of November, and was sent by them the same evening by post to Knight & Son in London, by whom it was received on the morning of the 8th of November. Meanwhile, on the 7th of November, Knight & Son (the partners in the firm all residing in London) had suspended payment; but this fact was not known to their Liverpool branch until the morning of the 8th of November. On the same morning the company received a circular informing them of the suspension. The "Larnaca" was still in dock at Liverpool, and the goods had not been paid for either by Knight & Son or by Taylor & Sons. The company at once telegraphed to Knight & Son in London not to part with the bill of lading, and they also served a notice of stoppage *in transitu* on the master of the ship, the ship's agents, and the brokers for the ship. Knight & Son had placed their affairs in the hands of Mr. F. Cooper, an accountant in London, to whom the bill of lading was handed on the 8th of November. On the 13th of November Knight & Son filed a liquidation petition, and on the 14th of November Cooper was appointed receiver under the petition. On the 4th of December the creditors resolved upon a liquidation by arrangement, and appointed Cooper trustee. The price of caustic soda had fallen £3 per ton since November, 1877; and it was arranged between Cooper and the company that the contract with Taylor & Sons should be carried out, and that their purchase-money should be paid into a bank in the joint names of Cooper and the manager of the company, pending the decision of the court as to the validity of the notice to stop *in transitu.* This was done, and the goods were accordingly delivered in New York.

The Registrar held that the notice was of no effect, on the ground that, the bill of lading being in the name of Taylor & Sons, the property in the goods was transferred to them, and the *transitus* was at an end as between the company, the vendors, and Knight & Son, the purchasers, when the goods were placed on board the ship and the bill of lading was made out in the name of Taylor & Sons.

The company appealed.

De Gex, Q. C., and *E. Cooper Willis*, for the appellants.

Winslow, Q. C., and *F. W. Hollams*, for the trustee.

COTTON, L. J. We have to consider a case which is, perhaps, to some extent, new as regards the right of stoppage *in transitu*. Now, of course that right only exists during the transit. If it can be shown by any means that the transit is at an end, then that right is gone, and there would be no occasion to consider how far the right is interfered with or defeated by the claims or rights of third persons. I will first deal with the point whether, in this case, the transit was at an end when the notice was given.

As I understand it, the transit in such cases is while the goods are in the hands of a carrier for the purposes of the journey indicated under or by the contract between the original vendor and purchaser. That, I take it, is the meaning of the transit. When we look into the facts, what we find is this: that as between the original vendors, Golding, Davis, & Co., Limited, and the original purchasers, Knight & Son, Knight & Son gave directions, as they had a right to do, that the goods should be sent to Liverpool to be shipped on board a ship, which they named, for New York. The voyage, therefore, from the warehouse or works of Golding, Davis, & Co. to New York, was the journey or transit agreed upon or pointed out by the contract between the original vendors and the original purchasers. What we have to consider is whether, at the time when the right of stoppage was attempted to be exercised, the goods were on that transit.

It is undoubted that the transit might be put an end to by the purchaser who has the property in and the right to claim possession of the goods. But in the present case the goods were in the ship, where the shipowner and the captain were acting simply (subject to what I shall presently consider) as carriers for the purpose of completing the journey which had been indicated as between the vendors and the purchasers. But it is said (and that seems to have been the view of the Registrar) that the transit as between the original vendors and purchasers was ended. Now that must mean that there had been either a taking possession of the goods by the purchasers, or a sending of the goods on a new and different voyage; because, if it only means that when the goods should arrive at their destination, they would, under the circumstances existing at the time when the attempt was made to exercise the right to stop, go, not to the original purchaser, but to somebody else, that is the case whenever the original purchaser has handed over the right to receive the goods at the end of the voyage to somebody else. That would include every case of a transfer of a bill of lading. But it is clear that the transfer of a bill of lading, except for value, will never defeat the right of stoppage *in transitu*, and will never put an end to the transit by making the journey not a journey as between the vendor and the original purchaser, but a journey as between the vendor and somebody else. The real fact in the present case was that the original purchasers, Knight & Son, had entered into another contract, not to sell these particular goods, but a contract which they intended to supplement and make good by means of the goods which they would acquire under their contract with Golding, Davis, & Co. No doubt New York was the end of the journey indicated in the contract between Knight & Son and Taylor & Sons; but it did not on that account cease to be, and it was not on that account a bit the less the end of the journey contemplated as between Golding, Davis, & Co. and Knight & Son. The view which the Registrar took cannot, in my opinion, be maintained. The journey indicated by the contract between the original vendors and purchasers was still continuing, there had been no new or different journey indicated; and that entirely distinguishes the case from that which possibly was in the mind of the Registrar, where on the original purchase one journey had been contemplated, but in consequence of a contract between the original purchaser and the sub-purchaser he directs that the goods shall go to a different terminus. In such a case, of course the right of stoppage *in transitu* is at an end; because what is done is equivalent to the original purchaser taking possession of the goods and dealing with them by means of that possession. It was urged by Mr. Winslow that what occurred in the present case was equivalent to that; but, in my opinion, that view cannot be sustained. I think that what was done had just the same legal effect as if the bill of lading had been made out in the name of the original purchasers and had then been assigned by them to their sub-purchasers. There was nothing done by the purchasers to alter the destination agreed upon between them and the original vendors, no actual taking possession of the goods, and, in my opinion, there was nothing which can be considered as equivalent to their doing that and then starting the goods as from their possession on a different and new voyage.

Then, the *transitus* being still existing, and there being a right in the vendors to stop, unless something had interfered with that right, can it be said that the sub-sale has interfered with it? Now, I take it the principle is this: that the vendor cannot exercise his right to stop during the transit, if the interests or rights of any other persons which they have acquired for value will be defeated by his so doing. Except so far as it is necessary to give effect to interests which other persons have acquired for value, the vendor can exercise his right to stop *in transitu*. It has been decided that he can do so when the original purchaser has dealt with the goods by way of pledge. Here we have rather the converse of that case. There has been an absolute sale of the goods by the original purchaser, but the purchase-money has not been paid. Can the vendor make effectual his right of stoppage *in transitu* without defeating in any way the interest of the sub-purchaser? In my opinion he can. He can say, I claim a right to retain my vendor's lien. I will not defeat the right of the sub-purchaser, but what I claim is to defeat the right of the purchaser from me; that is, to intercept the purchase-money which he will get, so far as is necessary to pay me. That, in my opinion, he is entitled to do, not in any way thereby interfering with the rights of the sub-purchaser, but only, as against his own vendee, asserting his right to resume his vendor's lien and to obtain payment by means of an exercise of that right; interfering only with what would have been a benefit to the vendee, who would otherwise have got his purchase-money without paying for the goods, but in no way interfering with any right acquired by the sub-purchaser of the goods.

Appeal allowed. Appellants to receive the whole of the purchase-money due under their contract with Knight & Son out of the fund in the joint names.[1]

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Ex parte FALK. In re KIELL.

In the Chancery Division Court of Appeal, May 6, 13, 1880.

[*Reported in* 14 *Chancery Division*, 446.]

CHARLES FITCH KEMP, Appellant *v.* HERMANN EUGENE FALK, Respondent.

In the House of Lords, July 10, 1882.

[*Reported in* 7 *Appeal Cases*, 573.]

In March, 1878, Kiell bought on credit from Falk a cargo of salt, chartered the "Carpathian," and consigned the salt (which had been put on board by Falk) to Wiseman, Mitchell, & Co., of Calcutta. Through T. Wiseman & Co., of Glasgow, the agents of Wiseman, Mitchell, & Co., Kiell obtained an advance from the Bank of Scotland upon the security of the bills of lading which Kiell indorsed. In July, Wiseman, Mitchell, & Co. sold the cargo "to arrive." On the 20th of July, Kiell went into liquidation, and Falk, on the 27th, served on the shipowners in Liverpool notice to stop *in transitu*. The ship arrived at Calcutta on the 29th of July; part of the cargo was delivered to sub-purchasers on the 3d of August, and the remainder, after notice to stop *in transitu* had been served on the captain, on the 5th of August. Wiseman, Mitchell, & Co. remitted the proceeds of the subsales to the Bank of Scotland, who deducted the amount of their advance and paid the balance to the appellant, Kiell's trustee in bankruptcy. Falk having applied to the Court of Bankruptcy to order the trustee to pay over the balance, which was less than the amount for which Falk sold to Kiell, the registrar, sitting as chief judge, refused the application.[1]

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[1] James and Baggallay, L.JJ., delivered concurring opinions.

Bramwell, L. J. I think there was no effectual stoppage *in transitu* until the master of the ship was told by the vendor's agent to stop the goods. I think that what took place at Liverpool amounted only to telling some one to stop the goods, not to a stoppage *in transitu*, and I cannot think that any duty was imposed on the shipowners at Liverpool to stop the goods. It seems to me that it would be monstrous to hold that the telling somebody else to stop goods *in transitu* amounts to a stoppage *in transitu*. But I am of opinion that the notice given to the master of the ship on the 5th of August would have been effectual as a stoppage *in transitu* if there had been no sub-purchaser. The master was then in possession of goods as carrier; he had not performed the whole of his duty in that character, and he had not lost his lien on the goods for the freight. Mr. Benjamin was obliged ingeniously to invent a new contract between the master and the sub-purchaser constituted by the delivery orders. I am of opinion that there was no such new contract. With regard to the cases which have been referred to upon what is called constructive delivery, it seems to me that, if there is not a delivery of the whole of a cargo, it had better not be deemed a delivery of the whole. I cannot understand the case of Slubey *v.* Heyward, 2 H. Bl. 504, because it appears that the sub-purchaser had paid for the goods, and on what ground there could be a stoppage *in transitu* as against him I am at a loss to see. The note of the case is a very loose one. The court seems to have held that which, with great submission, appears to me a very doubtful proposition, that the carrier's duty had come to an end. As to Hammond *v.* Anderson, 1 B. & P. (N. R.) 69, there is not a word in the judgments about delivery of part of the cargo being a constructive delivery of the whole. What Sir James Mansfield, C. J., said was this: "On a former occasion the court decided that when part of the goods sold by an entire contract was taken possession of, the vendee had taken possession of the whole." But with regard to the case then before the court he said: "So much having been taken away, and the whole having been weighed by the bankrupt, it is insisted that the bankrupt had taken possession of the whole. . . . As to those bales which were sent away, the bankrupt had taken actual possession, and therefore no question can arise; and when it is admitted that he had taken possession of a part, how can it be said that he had not taken possession of the whole? The price was entire, and the whole to be paid for by one bill." The effect of the decision is shown by the short judgment of Rooke, J., who said: "The facts of the case are too strong to be got over. The whole of the goods was paid for by one bill; a general order was given for the delivery of the whole, and the purchaser under that order went and took away a part; how could he more effectually change the possession?" It was a delivery of the whole cargo, because the wharfinger was holding the whole for the purchaser as his bailee and with a duty to him. I think, therefore, that in the present case there was not an end of the *transitus* before the notice of stoppage was given to the master on the 5th of August. Then arises the question whether, there having been a sub-sale of the goods, the stoppage *in transitu* can prevail. In one sense it must be admitted that no right in the goods remained in Kiell after the sub-sale, though he might still have stopped them *in transitu* as against his sub-purchasers. If there is any reason at all in the thing, and I think there is — for suppose Kiell had not become a bankrupt, but had been insolvent, would there have been anything unreasonable in the law interfering and saying to him, Your sub-purchaser's purchase-money shall not get into your hands, but shall go to pay your vendor? — what difference can it make that the purchaser has become a bankrupt? If the right of stoppage *in transitu* is ever to be exercised, I can see nothing unreasonable in its being exercised in such a case against the sub-purchaser's purchase-money. But there is the decision in *Ex parte* Golding, Davis, & Co., 13 Ch. D. 628, which seems to me to be exactly in point. I am not going to shelter myself under the authority of that case. In my opinion it was rightly decided. What difference is there in principle between the case of a man selling goods on credit for £500 and these being then resold for £600, and the case of the purchaser pledging the goods for £600 with a right of sale by the pledgee? Why, if the vendor can stop the proceeds of sale in the one case, should he not have a right to stop them in the other? What injury is there to the sub-purchaser? The decisions in *In re* Westzinthus, 5 B. & Ad. 817, and Spalding *v.* Ruding, 6 Beav. 376, seem to me to be applicable both to *Ex parte* Golding, Davis, & Co., and to the present case. The appeal must succeed.[1]

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[1] The statement of facts has been abbreviated.

Appeal was taken to the House of Lords, and the following opinion delivered.

LORD BLACKBURN. My Lords, I perfectly agree in the result that this appeal must be dismissed with costs. Originally in this case there was a statement of facts made in the Court of Bankruptcy, upon which there was an appeal to the Appeal Court; and on that statement of facts the ingenuity of counsel seems to have led the court below to draw some inferences, which induced them, whilst giving judgment, as they have done, in favor of Mr. Falk, the present respondent, to intimate at the same time that they thought the case raised a question which had been raised in the case of *Ex parte* Golding, Davis, & Co., 13 Ch. D. 628, and that therefore they should give leave to appeal. When the case came here the first time, my noble and learned friend Lord Penzance thought that the statement of facts was not intelligible, and that it was desirable that it should be sent down to have the facts made clear; and now it appears that the original statement of facts was not only not intelligible but also not quite accurate; and we have now an amended and supplementary statement of facts, showing what the facts of the case really were. Taking that statement, it seems to me that the case is perfectly clear. We have no occasion to consider whether the case of *Ex parte* Golding, Davis, & Co., *supra*, was well or ill decided, because no point relating to it arises here.

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[1] JAMES and BAGGALLAY, L.JJ., delivered concurring opinions.

It appears that Mr. Falk of Liverpool had sold to Mr. Kiell a quantity of salt, which was shipped on board a vessel bound for Calcutta; that Mr. Kiell accepted a draft drawn against that cargo; that bills of lading were made out, which were signed not as is usual by the master but by the shipowner himself, and that Mr. Kiell got those bills of lading. Now, so far as that goes, standing there, nothing can be more thoroughly established than the law upon it. Mr. Falk having delivered the goods and taken a bill of exchange had no right whatever to meddle with those goods further, unless before the end of the *transitus* (I shall say a word presently as to what comes at the end of the *transitus*), Kiell the purchaser became insolvent and stopped payment, and then if Falk had stopped the goods *in transitu* he would have been revested in his rights as an unpaid vendor as against Kiell. It is pretty well settled now that it would not have rescinded the contract. But before the end of the *transitus* came, his right to stop the goods *in transitu* might be defeated by an indorsement upon the bill of lading to a person who gave value. In the present case there was such an indorsement and transfer of the bill of lading, but it was only an indorsement and transfer for a particular and limited purpose. It appears that Mr. Kiell in order to obtain an advance got Messrs. T. Wiseman & Co. of Glasgow, the correspondents and agents of Messrs. Wiseman, Mitchell, Reid, & Co. of Calcutta, to make an advance in his favor by drawing a bill of exchange upon him; and to secure the payment of that bill of exchange the bill of lading was indorsed, and the Bank of Scotland, who discounted or took that bill, became holders of the bill of lading for the purpose of protecting themselves. It was clearly a transfer for value to the Bank of Scotland, and as such, so far as that went, it defeated the right of the stoppage *in transitu* at law. But the unpaid vendor's right, except so far as the interest had passed by the pledging of the bill of lading to the pledgee, or the mortgagee, whichever it was, enabled the unpaid vendor in equity to stop *in transitu* everything which was not covered by that pledge. That was settled and has been considered law, or rather equity, ever since the case of *In re* Westzinthus, 5 B. & Ad. 817, and has been affirmed in Spalding *v.* Ruding, 6 Beav. 376; 12 L. J. (Ch.) 503; and I have no doubt it is very good law upon that point.

Here therefore the stoppage by Falk as unpaid vendor would revest in him his lien except so far as concerned the Bank of Scotland, unless something else had happened. Now what has happened? The argument of Mr. Bompas was this: First of all it appears that Messrs

Wiseman, Mitchell, Reid, & Co., who were the persons to whom the goods were consigned (I do not understand whether they were purchasers, or merely agents for Kiell & Co.), sent over to their correspondents T. Wiseman & Co. of Glasgow a sale note, and then they forwarded it to Kiell & Co. in this letter: "Dear Sirs, — We enclose sale note of your cargo of salt *ex* 'Carpathian' to arrive," and so on — the rest of the letter does not matter. So that at that time it appears that Messrs. Wiseman, Mitchell, & Co. had entered into a contract at Calcutta for a sale of the goods "to arrive." The date of that letter was the 17th of July, a fortnight or so before the ship actually did arrive at Calcutta. That, it was argued, put an end to the vendor's right to stop the goods *in transitu*, and *pro tanto* the equitable right to stop them *in transitu* which remained in Mr. Falk. I have endeavored to understand on what ground it is supposed to put an end to it. No sale, even if the sale had actually been made with payment, would put an end to the right of stoppage *in transitu* unless there were an indorsement of the bill of lading. Why any agreement to sell, unless it was made in such a way as to pass the right of property in the goods sold, should be supposed to put an end to the equitable right to stop them *in transitu* I cannot understand. I am quite clear that it does not.

The next thing which was attempted to be argued was this. The Bank of Scotland, the holders of the bill of lading at Glasgow, forwarded the bill of lading in due course to their agents at Calcutta; and it is surmised that their agents at Calcutta must have been some persons different from Messrs. Wiseman, Mitchell, & Co. I infer that Messrs. Wiseman, Mitchell, & Co. were the people who acted as their agents in this transaction, but I do not think it matters whether they were or not. The Bank of Scotland sent the bill of lading to their agents, whether they were Messrs. Wiseman, Mitchell, & Co. or any one else. Those agents received that bill of lading well knowing (or at all events they ought to have known) that the Bank of Scotland had by virtue of this bill of lading a hold over the goods. They were entitled to see that the goods were not sold or disposed of in any way prejudicial to their lien, and, if they were sold, that the money, or enough of it to repay the Bank of Scotland and secure them, should pass through their hands or the hands of their agents; and I see nothing that happened afterwards which shows that they acted otherwise than in strict conformity with the duty thus cast upon them. It was argued that inasmuch as Messrs. Wiseman, Mitchell, & Co. had acted for Kiell & Co. in selling the goods, taking a *del credere* commission to secure that the people to whom they sold should pay the price, therefore they were persons who were entitled to have the bill of lading indorsed to them as a security. I am utterly unable to understand that argument; it is clear to me that they were not so entitled.

The next thing which was said was this. There was a little confusion in the statement here, but it is now said upon the amended statement of facts, that Messrs. Wiseman, Mitchell, & Co., who I cannot but think were the persons employed by the Bank of Scotland as their agents, did at some time (I do not exactly know when) indorse the bill of lading and show it to the captain. I do not think that that comes to more than this, that they gave the captain complete notice, when he arrived at Calcutta, "We are the persons who have the legal right to the delivery of these goods, for we have the bill of lading, holding it under the Bank of Scotland, and consequently we are the persons entitled to the goods. You can deliver only to us without being responsible to us; if you deliver to us or with our sanction, you will not be responsible to us." I can put no other meaning upon it.

Then it was argued that this amounts to a delivery of the whole cargo by the shipowner to Messrs. Wiseman, Mitchell, & Co., who from that time forward would be holders of the goods; the shipowner in whose physical possession, in the hold of whose vessel, the goods lay, being changed from holding the goods as shipowner, not having delivered the goods, into a warehouseman who was very inconveniently holding those goods in his ship as a warehouse. I think that that is an arrangement which might be made although it is not a very convenient one. The freight was not paid; but I think it is possible to make an arrangement by which, though the freight is not paid, the shipowner changes himself completely into a warehouseman instead of being a carrier or a shipowner; he alters his responsibilities altogether; and yet by arrangement or agreement retains a lien over the goods until the freight is paid. I think such a contract might be made. But when one is asked to say that such a contract was made, the nonpayment of the freight is a very important element leading one to say that no such contract was made at all. In this case I cannot help thinking that no such contract was made, and there is no reason why we should hold that it was. The shipowner acted in the same way as if it had not been made and in no other way.

Then comes an argument which I really think is not tenable, and I should hardly mention it if it were not for the great importance of everything relating to the Factors Act and of every question touching it in the commercial world. It was argued that the recent Statute 40 & 41 Vict. c. 39 s. 5, which says that the transfer of a delivery order or any other document of title shall put an end to an unpaid vendor's right to countermand that delivery order and to keep the goods, operates just to the same extent and under the same circumstances as in the case of a bill of lading for goods at sea. In order to make out that proposition reliance was placed upon this fact, that Messrs. Wiseman, Mitchell, & Co., who were holders of the bill of lading, as I have already said, for the Bank of Scotland, wrote to the captain of the ship saying, "In order to save trouble we will not sign delivery orders for salt, but have written our sircar on board the above vessel to deliver salt to those men who produce cash receipts from our cashiers;" and by some strange process of reasoning it was said that the man who brought and showed to the sircar of Messrs. Wiseman, Mitchell, & Co. a receipt for a sum of money paid to their cashier for the salt, was the holder of a document of title for the salt in such a way that the indorsement of it could put an end to the right of stoppage *in transitu* by Mr. Falk. Now in the first place the statute in question was never meant to have that effect. In the next place it is an abuse of language to call such a receipt as this a document of title in any shape.

Then the last and desperate attempt was to say that the stoppage *in transitu* was not until the 5th of August. I see that Lord Bramwell takes a different view of the law from what I had always understood it to be. I had always myself understood that the law was that when you became aware that a man, to whom you had sold goods which had been shipped, had become insolvent, your best way, or at least a very good way, of stopping them *in transitu* was to give notice to the shipowner in order that he might send it on. He knew where his master was likely to be, and he might send it on; and I have always been under the belief that although such a notice, if sent, cast upon the shipowner who received it an obligation to send it on with reasonable diligence, yet if, though he used reasonable diligence, somehow or other the goods were delivered before it reached, he would not be responsible. I have always thought that a stoppage, if effected thus, was a sufficient stoppage *in transitu;* I have always thought that when the shipowner, having received such a notice, used reasonable diligence and sent the notice on, and it arrived before the goods were delivered, that was a perfect stoppage *in transitu.* Consequently I think that when notice was given to the shipowners (and although they had signed the bill of lading instead of the master signing it, I do not think that that makes any difference; I only mention it to say that it makes none) they were under an obligation to forward it with reasonable diligence, if they could, to the master.

What the shipowners did was this: on the 31st of July they sent a telegram (they waited two days, and they might have got into a scrape by that means), but they did send this telegram "Charterers Carpathian failed, unless bill of lading held for value, don't deliver." That was, as it strikes me, a sending forward of the notice to stop the goods *in transitu*: it was tantamount to saying, "We send to our captain the notice we have formally received ourselves;" and consequently I should say that the stoppage *in transitu* was complete on the 31st of July. But it is not necessary to decide that point, for it is clear enough that the goods were not then delivered, and nothing was done which could be called a delivery of the whole or any part of them until the 3d of August, when a person brings one of these receipts for, I think, 1,000 maunds of salt, or some small quantity of salt, and gets it delivered.

Then it is said that the delivery of a part is a delivery of the whole. It may be a delivery of the whole. In agreeing for the delivery of goods with a person you are not bound to take an actual corporeal delivery of the whole in order to constitute such a delivery, and it may very well be that the delivery of a part of the goods is sufficient to afford strong evidence that it is intended as a delivery of the whole. If both parties intend it as a delivery of the whole, then it is a delivery of the whole; but if either of the parties does not intend it as a delivery of the whole, if either of them dissents, then it is not a delivery of the whole. I had always understood the law upon that point to have been an agreed law, which nobody ever doubted since an elaborate judgment in Dixon *v.* Yates, 5 B. & Ad. 313, 339, by Lord Wensleydale, who was then Parke, J. The rule I had always understood, from that time down to the present, to be that the delivery of a part may be a delivery of the whole if it is so intended, but that it is not such a delivery unless it is so intended, and I rather think that the onus is upon those who say that it was so intended. Therefore the delivery of this particular parcel of salt was not a delivery of anything else.

What we are now dealing with is the delivery of the salt which was delivered after the 5th of August, and which was quite sufficient to dispose of the whole sum now in dispute. We do not need to inquire what were the rights in any particular parcel of salt delivered on the 3d of August. Supposing that those were mis-deliveries no harm would happen, as quite enough remained to pay the Bank of Scotland, and no dispute would arise about that; there is no complaint by anybody respecting it. The present question is with regard to the stoppage *in transitu* of the residue after an undoubted notice of stoppage *in transitu* was served upon the 5th of August. Is that subject to the rule that although the whole of the cargo could not be stopped because the bill of lading had been transferred to the Bank of Scotland, the interest which still remained in Kiell or in Kiell's assigns to whom he had sold it, or in anybody else except those who had become transferees of the bill of lading, might be stopped and might become vested in Falk the original vendor? I think there is no reason why it should not; and that being so, the judgment of the court below is right and ought to be affirmed.[1]

Cohen, Q. C., and *F. Thompson*, for the appellant.

Benjamin, Q. C., *Watkin Williams*, Q. C., and *G. W. Lawrance*, for the trustee.

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[1] Lords SELBORNE, WATSON, and FITZGERALD delivered concurring opinions.

Compare with *Ex parte* Golding and *Ex parte* Falk, Memphis, &c., R. Co. *v.* Freed, 38 Ark. 614; Branan *v.* Atlanta, &c., R. Co., 108 Ga. 70; Neimeyer Lumber Co. *v* Burlington, &c., R. Co., 54 Neb. 321; Gwyn *v.* Richmond, &c., R. Co., 85 N. C. 429; Eaton *v.* Cook, 32 Vt 58.

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BETHELL & CO. *v.* CLARK & CO.

IN THE QUEEN'S BENCH DIVISION, COURT OF APPEAL, MARCH 15, 1888.

[*Reported in* 20 *Queen's Bench Division*, 615.]

APPEAL from the judgment of the Queen's Bench Division on a special case.

The facts are fully stated in the report of the case in the court below (19 Q. B. D. 553). For the purposes of this report they may be briefly stated as follows: The special case was stated on interpleader proceedings to determine the title to the possession of certain goods. The goods had been sold by Clark & Co., iron-founders at Wolverhampton, to Tickle & Co., of London. The order for the goods did not specify any place to which they were to be sent, but on June 28, 1885, the purchasers wrote the vendors as follows: "Please consign the ten hogsheads of hollow ware to the 'Darling Downs,' to Melbourne, loading in the East India Docks here." The goods were delivered by the vendors to the London and North Western Railway Company, to be forwarded to the ship. They were accordingly sent by railway to Poplar, and taken thence to the ship in lighters by the Thames Steam Tug and Lighterage Company, as agents of the railway company, a mate's receipt being taken for them on shipment, which was forwarded to the purchasers. The vendors being informed that the purchasers were insolvent gave notice to the railway company to stop the delivery of the goods on board the ship; and the railway company gave a similar notice to the lighter company, but too late to prevent the shipment of the goods on the "Darling Downs." Bills of lading for the goods in accordance with the mate's receipt had been made out and signed ready for delivery, but, not having been applied for at the time, they remained in the possession of Bethell & Co., the owners or agents for the owners of the "Darling Downs," who were stakeholders in the interpleader. Shortly after the shipment the "Darling Downs" proceeded to Melbourne with the goods on board, but before she arrived at Melbourne the vendors wrote to the shipowners claiming the goods as their property. A petition in bankruptcy having been filed by the purchasers of the goods, a scheme of arrangement was sanctioned by the creditors, and a trustee appointed to administer their estate and effects. The goods being claimed by such trustee and also by the vendors, the shipowners interpleaded. The question for the court was whether the trustee or the vendors were entitled to the possession of or property in the goods.

The court below (Mathew and Cave, JJ.) gave judgment for the vendors on the ground that the right of the vendors to stop the goods *in transitu* continued till they arrived at Melbourne.

Willis, Q. C., and *G. E. Lyon*, for the trustee.

R. T. Reid, Q. C., and *C. C. Plumptre*, for the vendors, were not called upon.

LORD ESHER, M. R. In this case the vendors being unpaid and the purchasers having become insolvent, according to the law merchant the vendors had a right to stop the goods while *in transitu*, although the property in such goods might have passed to the purchasers. The doctrine of stoppage *in transitu* has always been construed favorably to the unpaid vendor. The rule as to its application has been often stated. When the goods have not been delivered to the purchaser or to any agent of his to hold for him otherwise than as a carrier, but are still in the hands of the carrier as such and for the purposes of the transit, then, although such carrier was the purchaser's agent to accept delivery so as to pass the property, nevertheless the goods are *in transitu* and may be stopped. There has been a difficulty in some cases where the question was whether the original transit was at an end, and a fresh transit had begun. The way in which that question has been dealt with is this: where the transit is a transit which has been caused either by the terms of the contract or by the directions of the purchaser to the vendor, the right of stoppage *in transitu* exists; but, if the goods are not in the hands of the carrier by reason either of the terms of the contract or of the directions of the purchaser to the vendor, but are *in transitu* afterwards in consequence of fresh directions given by the purchaser for a new transit, then such transit is no part of the original transit, and the right to stop is gone. So, also, if the purchaser gives orders that the goods shall be sent to a particular place, there to be kept till he gives fresh orders as to their destination to a new carrier, the original transit is at end when they have reached that place, and any further transit is a fresh and independent transit. The question is, under which of these heads the present case comes. In this case the contract does not determine where the goods are to go. It is argued for the vendors that directions were given by the purchasers to the vendors that the goods should be forwarded by carriers to Melbourne, so that while they were in the hands of any of the different sets of carriers who would necessarily be employed in so forwarding them, and until they arrived at Melbourne, they were still *in transitu.* The question, whether that is so, is a question of fact in the particular case. The goods were purchased at Wolverhampton, and, after the contract was made, the purchasers gave directions once and once only as to what was to be done with them. It was argued that those directions were to deliver them on board a particular ship in the East India Docks, and that there were no directions beyond the directions for such delivery, but that a fresh direction as to the ultimate destination of the goods would be required; and therefore the original *transitus* was at an end when the goods were put on board the ship. That question turns on the true construction of the letter of June 28, which says, "Please deliver the ten hogsheads of hollow ware to the 'Darling Downs,' to Melbourne, loading in the East India Docks here." The argument really amounted to saying that the meaning was that the goods were to be delivered on board the ship to be kept by those in charge of her as in a warehouse, and subject to orders from the purchasers either to deliver the goods back again out of the ship or to take them on where the ship was going. That cannot be the business meaning of the transaction. Here we have a ship loading in the docks for Melbourne, and the captain would have no authority to receive goods on board as a warehouseman, or for any purpose but to be carried to Melbourne. The meaning is that the goods were to be delivered on board to be carried to Melbourne. What would be the mode in which they would be so delivered? They would be put on board and the mate's receipt would be taken for them, the terms of which would show that the goods were received for carriage to Melbourne, and a bill of lading would afterwards be signed in the terms of such receipt. That is what was done here.

It follows, in my opinion, that those goods were in the hands of carriers as such, and in the course of the original *transitus* from the time they left Wolverhampton till they reached Melbourne. The case therefore falls within the doctrine of stoppage *in transitu*, and is not within the class of cases where, goods going through the hands of a number of carriers, at some stage in the process fresh directions are required from the purchaser as to further carriage. Here no such further directions were required. The letter of June 28 gives all the directions necessary for the transit to Melbourne. It is not necessary to refer to all the authorities cited. The argument of the counsel for the trustee is directly met by what was said by Bowen, L. J., in Kendal *v.* Marshall, Stevens, & Co., 11 Q. B. D. 356, at p. 369. He there says: "Where goods are bought to be afterwards despatched as the vendee shall direct, and it is not part of the bargain that the goods shall be sent to any particular place, in that case the transit only ends when the goods reach the place ultimately named by the vendee as their destination. In Coates *v.* Railton, 6 B. & C. 422, several cases were cited by Bayley, J., in the course of his judgment, and the principle to be deduced from them is, that where goods are sold to be sent to a particular destination, the *transitus* is not at an end until the goods have reached the place named by the vendee to the vendor as their destination." In *Ex parte* Miles, 15 Q. B. D. 39, I cited the test laid down by Lord Ellenborough in Dixon *v.* Baldwen, 5 East, 175, where he says, "the goods had so far gotten to the end of their journey that they waited for new orders from the purchaser to put them again in motion, to communicate to them another substantive destination, and that without such orders they would continue stationary;" and, applying that rule to the case then before me, I held that the goods had in that case got to the end of their journey when they arrived at Southampton. That would not be the case here; when the goods were put on board the ship, they would be in motion without any fresh orders being necessary until they reached Melbourne. Therefore, in my opinion, the right to stop *in* *transitu* still existed, and was rightly exercised by the vendors. I think the decision of the court below was correct, and that this appeal must be dismissed.[1] *Appeal dismissed.*[2]

DAVID ROWLEY ET AL. *v.* BENJAMIN BIGELOW ET AL.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, 1832.

[*Reported in* 12 *Pickering*, 307.]

TROVER for 627 bushels of yellow corn, valued at 55 cents a bushel.

At the trial before Wilde, J., it was proved by the plaintiffs, that on the 24th of May, 1830, the corn belonged to them and was in their possession in the city of New York, on board the sloop "Milan," of which S. Dunning, one of the plaintiffs, was master, and that it was measured and delivered on board the schooner "Lion." They alleged that one William N. Martin, a merchant there, fraudulently obtained possession of it by pretending to purchase it for cash; and it was proved that on the 25th of May he shipped it on board the "Lion," consigned to the defendants at Boston, and that the vessel sailed in the afternoon of that day for Boston. On the 26th, Dunning, having ineffectually demanded payment for the corn, at Martin's counting-house, proceeded to Boston, to reclaim it. He reached Boston before the arrival of the "Lion," and on the 29th gave notice to the defendants, to whom by Martin's orders the corn was to be delivered, that Martin had fraudulently obtained it from the plaintiffs and that they intended to repossess themselves of it. On the 30th, when the "Lion" had arrived in Boston harbor, Dunning boarded her and demanded of the master possession of the corn, giving him notice that Martin had obtained it fraudulently from the plaintiffs. The master notwithstanding delivered it to the defendants; after which Dunning demanded it of them and tendered them any freight or charges which they had paid. They refused to deliver the corn, and thereupon the suit was commenced.

In order to establish the fraud on the part of Martin, the plaintiffs relied on the depositions of C. A. Jackson and others, merchants in New York, who testified that Martin had made similar purchases of them about the same time, and under circumstances tending to show that he was insolvent, and that he knew it and had no reasonable expectation of paying for the merchandise according to his contract. The defendants objected to the admission of these depositions, but the judge permitted them to be read to the jury.

The defendants, to establish their right to hold the corn against the plaintiffs, offered in evidence a bill of lading, dated May 17, 1830, signed by the master of the "Lion," purporting to be for 2,000 bushels of yellow corn shipped by Martin and consigned to the defendants; also an invoice corresponding to the bill of lading and purporting to be for 2,000 bushels of corn consigned to the defendants for sale on the shipper's account, and signed by Martin; also a letter from Martin to the defendants, dated May 17 (to which the bill of lading and invoice were annexed) advising that he valued on them in favor of Henry Bennett for $1,000, at ten days' sight, and directing them, if he had valued too much on this shipment, to charge it to some previous one, there being an existing account between Martin and the defendants. And it was proved that a bill drawn accordingly by Martin, was accepted by the defendants on the 20th of May and paid by them at maturity.

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[1] FRY and LOPES, L. JJ., delivered concurring opinions.

[2] Lyons *v.* Hoffnung, 15 App. Cas. 391, *accord. Conf. Re* Gurney, 67 L. T. Rep. 598.

There was no evidence that the defendants had any knowledge of the fraudulent conduct of Martin, but it appeared that they received the bill of lading and invoice and accepted the draft in the usual course of business.

Upon this evidence the judge ruled, that the defendants had a good title to the property notwithstanding the fraudulent conduct of Martin, and notwithstanding the bill of lading had been signed before the corn was shipped; to which the plaintiffs excepted.

A verdict was taken for the defendants by consent; and if the whole court should be of opinion that they had a valid title to the corn, under the invoice and bill of lading, judgment was to be rendered upon the verdict; but if the court should be of opinion that the ruling was wrong, the verdict was to be set aside and the defendants defaulted, unless the court should also be of opinion that the depositions above mentioned were improperly admitted; in which case a new trial was to be granted.

Fletcher and *W. J. Hubbard,* for the plaintiffs.

Curtis, for the defendants.

SHAW, C. J. 2. It is next contended on the part of the plaintiffs, that no property passed by the fraudulent purchase of Martin, from the plaintiffs to him, so as to enable him to make a title to the defendants.

The evidence clearly shows that there was a contract of sale, and an actual delivery of the goods, by their being placed on board a vessel, pursuant to his order; and this delivery was unconditional, unless there was an implied condition arising from the usage of the trade that the delivery was to be considered revocable, unless the corn should be paid for, pursuant to the contract and to such usage. This contract and delivery were sufficient in law to vest the property in Martin, and make a good title, if not tainted by fraud. But being tainted by fraud, as between the immediate parties, the sale was voidable, and the vendors might avoid it and reclaim their property. But it depended upon them to avoid it or not, at their election. They might treat the sale as a nullity and reclaim their goods; or affirm it and claim the price. And cases may be imagined, where the vendor, notwithstanding such fraud practised on him, might, in consequence of obtaining security, by attachment or otherwise, prefer to affirm the sale. The consequence therefore is, that such sale is voidable, but not absolutely void. The consent of the vendor is given to the transfer, but that consent being induced by false and fraudulent representations, it is contrary to justice and right, that the vendor should suffer by it, or that the fraudulent purchaser should avail himself of it; and upon this ground, and for the benefit of the vendor alone, the law allows him to avoid it.

The difference between the case of property thus obtained, and property obtained by felony, is obvious. In the latter case, no right either of property or possession is acquired and the felon can convey none.

We take the rule to be well settled, that where there is a contract of sale, and an actual delivery pursuant to it, a title to the property passes, but voidable and defeasible as between the vendor and vendee, if obtained by false and fraudulent representations. The vendor therefore can reclaim his property as against the vendee, or any other person claiming under him and standing upon his title, but not against a *bona fide* purchaser without notice of the fraud. The ground of exception in favor of the latter is, that he purchased of one having a possession under a contract of sale, and with a title to the property though defeasible and voidable on the ground of fraud; but as the second purchaser takes without fraud and without notice of the fraud of the first purchaser, he takes a title freed from the taint of fraud. Parker *v.* Patrick, 5 T. R. 175. The same rule holds in regard to real estate. Somes *v.* Brewer, 2 Pick. 184.

3. Another ground is, that the plaintiffs had a right to stop *in transitu,* and exercised that right, in sufficient season, by demanding the goods of the master on his arrival at Boston, and before the goods reached the hands of the defendants.

The right of *stoppage in transitu* is nothing more than an extension of the right of lien, which by the common law the vendor has, upon the goods, for the price, originally allowed in equity and subsequently adopted as a rule of law. By a bargain and sale without delivery the property vests in the vendee; but where by the terms of sale, the price is to be paid on delivery, the vendor has a right to retain the goods till payment is made, and this right is strictly *a lien*, a right to detain and hold the goods of another as security for the payment of some debt, or performance of some duty. But when the vendor and vendee are at some distance from each other, and the goods are on their way from the vendor to the vendee, or to the place by him appointed for their delivery, if the vendee become insolvent and the vendor can repossess himself of the goods, before they have reached the hands of the vendee or the place of destination, he has a right so to do, and thereby regain his lien. This however does not rescind the contract, but only restores the vendor's lien, and it can only take place when the property has vested in the vendee.

Without considering what would have been the effect of the bill of lading in defeating the vendor's right to stop *in transitu*, had the place of destination been Boston, we are of opinion that upon another ground, the right did not exist in the present case.

What does or does not constitute a journey's end, and the termination of the transit, may, in many cases, be a question of difficulty and has often been a subject of discussion. But here we think it very clear, that a delivery of the corn on board of a vessel appointed by the vendee to receive it, not for the purpose of transportation to him, or to a place appointed by him to be delivered there for his use, but to be shipped by such vessel, in his name, from his own place of residence and business to a third person, was a termination of the transit, and the right of the vendor to stop *in transitu* was at an end. Noble *v.* Adams, 7 Taunt. 59.

4. It is contended that the defendants were not purchasers for a valuable consideration and *bona fide*, so as to be entitled to the benefit of the exception in their favor. But we are of opinion that they do stand in that relation, and are entitled to the benefit of it. It appears that they advanced, either in cash or by the acceptance of Martin's drafts in favor of third persons, to an amount equal to the value of the goods, and *that* after having been furnished with bill of lading and invoice and in the ordinary course of business. The ground upon which the plaintiffs rely is, that at the time the bill of lading was signed, the corn was not on board, and in fact, as appears by a comparison of dates, had not been purchased of the plaintiffs. This was undoubtedly irregular; and if done by collusion between Martin and the master to enable the former to get money or credit on the bill of lading, was a gross fraud upon any person deceived by it. But it is not perceived how the plaintiffs can avail themselves of this, supposing it to be a fraud. A bill of lading is a contract of carriage for hire, by which the master engages to deliver the goods to the shipper or his order, and so is *quasi*-negotiable. It operates by way of estoppel against the master and also against the shipper and indorser.

The bill of lading acknowledges the goods to be on board, and regularly the goods ought to be on board before the bill of lading is signed. But if through inadvertence or otherwise, the bill of lading is signed before the goods are on board, upon the faith and assurance that they are at hand, as if they are received on the wharf ready to be shipped, or in the shipowner's warehouse, or in the shipper's own warehouse, at hand and ready, and afterwards they are placed on board, as and for the goods embraced in the bill of lading, we think, as against the shipper and master, the bill of lading will operate on these goods by way of relation and by estoppel.

It is asked, how long after the signature of the bill of lading property may be delivered on board, so as to be bound by it and become the subject on which it shall operate. We think, at any time whilst the vessel is taking in her cargo for that voyage, as described in the bill of lading, and before she sails upon it. Here there was a time when the bill of lading might have been properly signed by the master, namely, after the corn was delivered and before the vessel sailed; and it is admitted that this was received as and for the corn mentioned in the bill of lading. And it can make no difference to the plaintiffs, whether the bill of lading was signed after this shipment, or a few days before, in anticipation of such shipment. Supposing, then, that when the goods were shipped, as against the shipper and master the bill of lading operated upon this property, and would have bound the master to deliver it to the consignee, as we think it would, then, by the uniform course and practice of merchants, the bill of lading represents the property, and any *bona fide* title for valuable consideration obtained by a transmission or negotiation of the bill of lading gives as valid and effectual a title to the goods as could be obtained by an actual delivery of the goods themselves. The defendants have shown such a title, and therefore the order of the court must be

Judgment on the verdict.[1]

CHARLES F. JOHNSON, ASSIGNEE, *v.* JOHN H. EVELETH.

SUPREME JUDICIAL COURT OF MAINE, DECEMBER 7, 1899.

[*Reported in* 93 *Maine*, 306.]

TROVER for the value of logs sold by the defendant to one Ware on credit. The logs were delivered by the defendant to the Kennebec Log Driving Company to be driven to Ware's mill. Ware, who had for a long time been insolvent, made an assignment to the plaintiff under the insolvent law. As soon as he learned of this the defendant resumed possession of most of the logs. Some scattering logs had already reached Ware's mill and had been sawed.

Chas. F. Johnson, for plaintiff.

W. T. Haines and *H. D. Eaton*, for defendant.

SAVAGE, J. The next question in this connection is, may the right of stoppage in transitu attach to logs being driven as these were. We have no doubt that it may. It may be conceded that the log-driving company is not a common carrier, although in some respects its duties are analogous to those of common carriers. See Mann *v.* White River Log, etc., Co., 46 Mich. 38, where the distinction is pointed out. But that is not decisive. When a vendor sends goods sold to the place of destination by private conveyance, the right of stoppage in transitu exists the same as if they are sent by common carrier. The vital question is, are they in transit between the vendor and the vendee. The right of stoppage in transitu is merely an extension of the lien for the price which the vendor has, after contract of sale and before delivery of goods sold on credit. The term itself implies that the goods are in transit, and that they have not come into the possession of the vendee. It permits the vendor to resume possession before the goods sold have come into the vendee's possession, if the latter has become insolvent. Whether they are in the possession of a carrier, strictly so called, while in transit, or whether they are in possession of a "middle-man," is immaterial. 2 Kent's Com. 702. In this case the logs were certainly in transit between the dam at East Outlet and Ware's mill. They were moving down the river. They were kept moving by the agency of the log-driving company. The company broke the jams, cleared the eddies and the banks of logs, took them wherever they became stranded, and drove in the rear. The company having assumed the duty of driving the logs, no one else had the right to interfere with the driving. So far as a mass of logs in a river is susceptible of possession, to that extent the log-driving company was in possession of these logs for the purpose of transporting them. And we think that was sufficient. It certainly accords with the equitable principles out of which the right of stoppage in transitu has grown. Newhall *v.* Vargas, 13 Maine, 93. The character of the possession of the log-driving company is only important as it shows that the logs had not come into the possession of the vendee, and were still in transit.

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[1] A portion of the opinion relating to the admissibility of evidence is omitted.

Finally, the plaintiff contends, inasmuch as some small portion of the logs had floated down to Ware's mill and had been received by him before his assignment, that this put him in constructive possession of the whole mass, and terminated the transitus. We are unable to come to that conclusion. The surveyor's bill shows that there were 7663 sticks in the lot of logs purchased. The defendant, when he took possession, found 6815 sticks in the drive. It appears that some had gone below Ware's mill to Hallowell, and undoubtedly some sticks had been left behind, upon the banks or in the eddies of the river. But assuming that the whole of the remaining 848 sticks had, during the season, floated down to or by Ware's mill, still we do not think that that fact constituted a constructive possession in Ware, or the plaintiff, of the logs which had not come down. It is not like the case where a vendee has taken some portion out of the whole mass, which was then susceptible of possession, and in which case he has thus obtained constructive possession of the whole. Such facts are important sometimes when it is necessary to decide whether a legal delivery has been made. But here, as we have said, it is not a question of technical delivery, but one of actual possession. Here Ware took only such scattering, floating logs as came to him. The remainder were not in his possession. They were still in the possession of the log-driving company. They were still being driven. They were still in actual transit. And we think the vendor had the right to stop them before that transit was ended. Such a conclusion gives effect to the spirit and purpose of the law. Buckley *v.* Furniss, 17 Wend. 504; Mohr *v.* Boston & Albany R. R., *supra.*

Plaintiff nonsuit.[1]

THE WHEELING & LAKE ERIE RAILROAD COMPANY *v.* KOONTZ ET AL.

OHIO SUPREME COURT, JANUARY 30, 1900.

[*Reported in* 61 *Ohio State*, 551.]

DAVIS, J. The only right of the vendors, under the facts appearing in this case, if any, was to recover the possession of the car-load of lumber by stoppage *in transitu.* This they might do at any time while the lumber remained in the possession of the carrier, as carrier. It had been carried to its destination, but it is not claimed that any manual delivery had been made to the consignee. There was no delivery to the consignee unless it was by construction. The facts which are claimed to constitute a constructive delivery, as they appear in an agreed statement of facts, are that the car arrived at its destination, Toledo, Ohio, on February 2, 1895; that the carrier notified the consignee of the arrival of the lumber and that thereafter, up to and including February 7, 1895, the car, with the lumber remaining thereon, remained upon the yard track of the defendant in Toledo, *for delivery* to the consignee; and that on or about the 7th day of February, 1895, the consignee sold the said car of lumber to the defendant for the sole consideration of a pre-existing indebtedness, which consisted of the freight charges on the car-load of lumber in question and other indebtedness. These facts show no delivery, either manual or constructive, unless the sale by the consignee to the defendant implies it. It does not appear that the consignee paid the freight or in any manner put himself in position to demand and enforce the possession of the lumber; nor does it appear that there was any agreement between the consignee and the defendant by which the former assumed the possession of the lumber and constituted the latter his agent to hold and care for the same. But in the absence of these necessary indications of a constructive delivery to the consignee, the defendant retained the custody and control of the property under a sale which is based partly on the consideration of the freight thereon, which must have been paid before a delivery could be presumed to have taken place, and partly on the consideration of other pre-existing debts, which were admitted by counsel on the oral argument to consist also of unpaid freight bills. Such a sale we do not think would constitute the defendant a *bona fide* purchaser; and we are of the opinion that the lumber was still in transit at the time when the plaintiffs gave notice of stoppage *in transitu* and tendered to defendant the freight due to it for the transportation of the lumber. The case having been twice reported heretofore (5 N. P., 15; 15 C. C., 288) it is unnecessary to review the authorities cited by counsel, nor to cite others.

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[1] The statement of facts is abbreviated and only so much of the opinion printed as relates to two questions.

The judgment of the circuit court is affirmed.[1]

BLACKMAN ET AL. *v.* PIERCE.

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CALIFORNIA SUPREME COURT, OCTOBER TERM, 1863.

[*Reported in* 23 *California*, 508.]

CROCKER, J., delivered the opinion of the Court. — NORTON, J., concurring.

This is an action brought against Pierce, Church & Co., warehousemen at Red Bluff, and Johns, the Sheriff of Tehama County, to recover the value of a lot of goods sold by the plaintiffs, merchants in San Francisco, to one McDaniel, of Trinity Center, Trinity County; and which they claim by the right of stoppage *in transitu*, the purchaser having become insolvent after the sale of the goods. It appears that the goods were duly marked to McDaniel, care of Pierce, Church & Co., Red Bluff; that the plaintiffs shipped them on a steamer at San Francisco, and they duly arrived at Red Bluff, the point of transshipment from the river steamer to wagons, to be transported to their final destination; that Pierce, Church & Co. put them in their warehouse, advised McDaniel of their arrival, and he wrote them that he would send a team after them; that while they were thus in the warehouse at Red Bluff an attachment was levied upon them by the sheriff, issued in an action brought by one Fuller against McDaniel; that after the purchase of the goods McDaniel became insolvent, and the price remained unpaid; that after the levy the plaintiffs, by their agent, gave notice to the warehousemen and the sheriff that McDaniel had become insolvent; that the goods had been sold to him by them; that the price was unpaid, and that they claimed the right of stoppage *in transitu,* and demanded the goods of them, and they refused to deliver them.

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[1] Farrell *v.* Richmond, &c., R. Co., 102 N. C. 390, *acc.*

See also Ry. Co. *v.* Meador, 65 Ga. 705; Branan *v.* Atlanta, &c., R. Co., 108 Ga. 70.

It is well settled that the fact that the carrier has ceased to hold the goods as carrier, and is holding them as warehouseman does not indicate that the transit is ended. Brewer Lumber Co. *v.* Boston & Albany R. Co., 179 Mass. 228; Reynolds *v.* Boston & Maine R. Co., 43 N. H. 580; Farrell *v.* Richmond, &c., R. Co., 102 N. C. 390; Hoover *v.* Tibbits, 13 Wis. 79; Jeffris *v.* Fitchburg R. Co., 93 Wis. 250; Howell *v.* Alport, 12 U. Can. C. P. 375. Nor is the payment of freight conclusive. Coventry *v.* Gladstone, L. R. 6 Eq. 44; Reynolds *v.* Boston & Maine R. Co., 43 N. H. 580; Howell *v.* Alport, 12 U. Can. C. P. 375.

The right of a vendor who has sold goods on credit, when the vendee is insolvent, to stop and take them into his possession, at any time before their arrival at the place of destination, and going into the actual or constructive possession of the purchaser, is well established. Depositing them at an intermediate point, with an agent of the purchaser, for the purpose of being forwarded, does not terminate the *transitus.* Markwald *v.* His Creditors, 7 Cal. 213. It is clear, therefore, that the mere fact that the goods had come into the possession of Pierce, Church & Co., to be forwarded to the purchaser, did not terminate the *transitus* or divest the plaintiffs of their right of stoppage *in transitu.*

This right of stoppage *in transitu* is paramount to any lien on the goods claimed by third persons against the purchaser. Thus it may be exercised to defeat an attachment or execution levied upon the goods by a creditor of the vendee;[1] for the lien acquired by the levy operates only upon the interest of the debtor, but cannot defeat the paramount right of a stranger. (Hilliard on Sales, 217.) The Court found that the warehousemen stated to plaintiffs' agent, at the time of the demand, that they had no charges upon the goods. This was stated in reply to a question of the agent, who told them he was ready to pay their charges if any they had. By this, the warehousemen waived their lien for charges, if they had any. (Everett *v.* Saltus, 15 Wend. 474; Everett *v.* Coffin, 6 Id. 608; Saltus *v.* Everett, 20 Id. 268.)

The judgment is affirmed.

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[1] Mason *v.* Wilson, 43 Ark. 172; White *v.* Mitchell, 38 Mich. 390; Calahan *v.* Babcock, 21 Ohio St. 281; Allyn *v.* Willis, 65 Tex. 65; Harris *v.* Tenney, 85 Tex. 254. The right of the seller prevails also over a lien of the carrier by custom or contract for a general balance due from the consignee. Oppenheim *v.* Russell, 3 Bos. & P. 42; Farrell *v.* Richmond, &c., R. Co., 102 N. C. 390.

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NEWHALL *v.* CENTRAL PACIFIC R. R. CO.

SUPREME COURT OF CALIFORNIA, JULY, 1876.

[*Reported in* 51 *California*, 345.]

ACTION to recover the value of merchandise, alleged to have been converted by the defendant to its own use.

Campbell, Fox & Campbell, for the appellant.

W. H. Rhodes and *S. M. Wilson*, for respondent.

CROCKETT, J. This case comes up on the findings, and there is, therefore, no controversy as to the facts; the only question being, whether the plaintiffs are entitled to judgment on the facts found. The facts necessary to a correct understanding of the only question of law in the case are, that a mercantile firm in New York sold certain merchandise on credit to a similar firm in San Francisco, and shipped the same in the usual course of business, by railway, to the vendees as consignees, under bills of lading in the usual form. The bills of lading were received at San Francisco by the consignees before the goods arrived; and while the merchandise was in transit, in the custody of the defendant as a common carrier, the consignees failed, and became insolvent, and thereupon the vendors notified the defendant in writing that they stopped the goods *in transitu;* that the vendees had become insolvent, and the goods were not paid for, and that they must not be delivered to the consignees, but to the vendors. The plaintiffs then were, and for many years had been, auctioneers and commission merchants, doing business in San Francisco, and had been in the habit of receiving from the consignees bills of lading and goods under them, for sale on commission. About two hours after the notice of stoppage *in transitu* was served upon the defendant, the consignees indorsed and delivered the bills of lading to the plaintiffs, who, on the faith thereof and of the goods named therein, "advanced a sum of money to the consignees in the usual course of business;" and the sum so advanced was to be reimbursed out of the proceeds of the goods, which were to be sold at auction by the plaintiffs. At the time of the indorsement and transfer of the bills of lading to the plaintiffs, they had no notice that the consignees were in failing circumstances, or had failed, or that any notice of stoppage *in transitu* had been served upon the defendant. While the goods were still in the possession of the defendant as a common carrier, the plaintiffs, as holders, exhibited to the defendant the bills of lading, tendered the charges, and demanded a delivery of the goods, which was refused, and the action is to recover their value.

The question involved being one of great practical importance, it has been discussed by counsel, both orally and in printed arguments, with learning and ability. But after the most careful research, they have failed to call to our attention a single adjudicated case in which the precise question under review has been decided or discussed. There are numerous decisions, both in England and America, to the effect that where goods are consigned by the vendor to the vendee, under bills of lading in the usual form, as in this case, an attempt by the vendor to stop the goods *in transitu* will be unavailing as against an assignee of the bill of lading, who took it in good faith, for a valuable consideration, in the usual course of business, before the attempted stoppage. The leading case on this point is Lickbarrow v. Mason, 2 Term R. 63, the authority of which has been almost universally acquiesced in by the the courts and text-writers, in this country and in England. There being little or no conflict in the authorities on the point adjudicated in that case, it would be useless to recapitulate them here. But it is important to ascertain the principles which underlie these decisions, that we may determine to what extent, if at all, they are applicable to the case at bar. The first, and, as I think, the controlling point determined in these cases, is, that by the bill of lading the legal title to the goods passes to the vendee, subject only to the lien of the vendor for the unpaid price; which lien continues only so long as the goods are in transit, and can be enforced only on condition that the vendee is or becomes insolvent while the goods are in transit.

On the failure of each of these conditions, the right of stoppage is gone and the lien ceases, even as against the vendee. But it is further settled by these adjudications, that if the bill of lading is assigned, and the legal title passes to a *bona fide* purchaser for a valuable consideration before the right of stoppage is exercised, the lien of the vendor ceases as against the assignee, on the well-known principle that a secret trust will not be enforced as against a *bona fide* holder for value of the legal title. In such a case, if the equities of the vendor and assignee be considered equal (and this is certainly the light most favorable to the vendor in which the transaction can be regarded), the rule applies that where the equities are equal the legal title will prevail. But in such a case it would be difficult to maintain that the equities are equal. The vendor has voluntarily placed in the hands of the vendee a muniment of title, clothing him with the apparent ownership of the goods; and a person dealing with him in the usual course of business, who takes an assignment for a valuable consideration, "without notice of such circumstances as render the bill of lading not fairly and honestly assignable," has a superior equity to that of the vendor asserting a recent lien, known perhaps, only to himself and the vendee. Brewster v. Sime, 42 Cal. 130.

These being the conditions which determine and control the relative rights of the vendor and assignee, where the assignment is made before the notice of stoppage is given, precisely the same principles, in my opinion, are applicable when the assignment is made after the carrier is notified by the vendor. Notwithstanding the notice to the carrier, the vendor's lien continues to be only a secret trust as to a person, who, in the language of Mr. Benjamin, in his work on Sales, section 866, takes an assignment of a bill of lading "without notice of such circumstance as renders the bill of lading not fairly and honestly assignable." The law provides no method by which third persons are to be affected with constructive notice of acts transpiring between the vendor and the carrier; and in dealing with the vendee, whom the vendor has invested with the legal title and apparent ownership of the goods, a stranger, advancing his money on the faith of this apparently good title, is not bound, at his peril, to ascertain whether, possibly, the vendor may not have notified a carrier — it may be on some remote portion of the route — that the goods are stopped *in transitu.* If a person, taking an assignment of a bill of lading, is to encounter these risks, and can take the assignment with safety only after he has inquired of the vendor, and of every carrier through whose hands the goods are to come, whether a notice of stoppage in transition has been given, it is quite certain that prudent persons will cease to advance money on such securities, and a very important class of commercial transactions will be practically abrogated. In my opinion the judgment should be affirmed, and it is so ordered. *Judgment affirmed.*

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DIEM *v.* KOBLITZ.

SUPREME COURT OF OHIO, JANUARY 19, 1892.

[*Reported in* 49 *Ohio St.* 41.]

ERROR to the Superior Court of Cincinnati.

The action was brought by Koblitz Brothers against Frederick J. Diem, and the declaration set forth that on August 15, 1894, the defendant sold the plaintiff a quantity of paper bags for $3,084.80, to be paid in equal portions in thirty, sixty, and ninety days. The defendant set apart the goods and delivered a large portion to a carrier for shipment to the plaintiff in Cleveland, but on August 23, 1884, he cancelled the sale and disposed of the goods. The plaintiff had agreed to resell the goods at an advance of twenty-five per cent, and being unable to carry out that sale was greatly injured. The defendant's answer denied the allegations of the declaration and alleged that the plaintiffs were insolvent when he stopped the goods in the carrier's hands. The plaintiffs' replication denied the allegation of insolvency, and stated that they were ready and willing to pay for the goods, and had accepted drafts for the price.[1]

The cause was tried to a jury, and a verdict obtained by the plaintiffs, upon which judgment was subsequently rendered. On the trial, the court excluded evidence offered by the defendant, to prove that at the time of the purchase of the goods described in the petition, the plaintiffs were insolvent, and their commercial paper had gone to protest; and ruled, that there was no "question of insolvency in the case;" that the action was "simply an action for the non-performance of a contract;" that the answer admitted "the non-performance," and that there was "nothing left but the measure of damages."

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[1] The statement of the pleadings has been abbreviated.

The court accordingly instructed the jury as follows: —

"In this case the making of the contract to sell, and the fact that the goods were not delivered, but were sold to another party before the time when any of the drafts became due, is admitted, and that in my judgment constitutes a breach of the contract, so that the only questions that remain for the consideration of the jury are those which relate to the damages, if there were any, to Koblitz Brothers, by reason of the failure to deliver the goods."

And the following instruction requested by the defendant was refused: —

"If the jury find that plaintiffs at the date of said contract were insolvent, or had committed an overt act of insolvency by stopping the payment of their commercial paper, and defendant having been informed of said insolvency, and by reason thereof stopped the transit of said goods, and took possession of the same, then they will find for defendant unless they find that plaintiffs tendered performance of said contract after said stoppage in transit existed."

Exceptions were taken by the defendant to the foregoing rulings of the court, the instructions to the jury, and the refusal to instruct as requested, which were embodied in a bill of exceptions duly allowed and made part of the record.

A motion of the defendant for a new trial was overruled, and he prosecuted error to the general term, where the judgment of the special term was affirmed, and to obtain the reversal of the judgments below he prosecutes error to this court.

Thomas McDougall, for plaintiff in error.

Henry C. Oettinger, and *Frank Seinsheimer,* for defendant in error.

WILLIAMS, C. J. The contract of the parties, as shown by the pleadings, was one for the sale of goods on credit; the plaintiffs agreeing to give their commercial paper for the purchase price, payable at the times stipulated. As no time was specified in the contract for the delivery of the goods, the defendant's obligation was to deliver them when the plaintiffs gave their commercial paper, as they agreed to do, or within a reasonable time. The petition avers that the plaintiffs were at all times ready to perform their part of the contract, and, that they requested performance by the defendant, which was by him refused. The answer denies these averments, and alleges, that the plaintiffs became, and were insolvent, and their commercial paper dishonored; and, upon this information coming to the defendant, after part of the goods had been delivered to the carrier for shipment, he stopped them in transit, resumed possession, and afterwards resold them with the other goods included in the contract, for the same price plaintiffs were to pay for them. The reply denies the insolvency of the plaintiffs, and avers that they accepted drafts drawn by defendant on them for the whole purchase price of the goods, payable in accordance with the contract.

The view which the court below took of the case, was, that the resale of the goods, as alleged in the answer, was a breach of the contract by the defendant, which gave the plaintiffs, notwithstanding their insolvency, an immediate right of action against him for damages. Hence, proof of the insolvency of the plaintiffs was excluded, as immaterial, and the case was submitted to the jury as involving no inquiry except the amount of the plaintiffs' damages.

We do not understand it to be claimed, that the defendant, upon learning of the plaintiffs' insolvency, might not lawfully retake the goods while they were yet in the custody of the carrier; nor, that he was bound to deliver any part of the goods so long as the insolvency of the plaintiffs continued. The claim is, that the right of the vendor in such case, is simply to retain possession of the property until the purchase price is paid; and therefore, a resale by him before the expiration of the credit, puts it out of his power to deliver to the first vendee, and so constitutes a breach of the contract with him, for which he may, though insolvent, maintain a special action for damages. Whether this claim is correct or not, is the principal question in the case.

The right of stoppage *in transitu*, is the right of the vendor to resume possession of the goods sold, while they are in transit to the vendee, who is insolvent, or in embarrassed circumstances. Actual insolvency of the vendee is not essential. It is sufficient if before the stoppage *in transitu*, he was either in fact insolvent, or had, by his conduct in business, afforded the ordinary apparent evidences of insolvency.[1] Nor is the vendor's right abridged, or in any way affected by

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[1] "It is not an unlimited power that is vested in the consignor, to vary the consignment at his pleasure in all cases whatever. It is a privilege allowed to the seller, for the particular purpose of protecting him from the insolvency of the consignee. Certainly it is not necessary that the person should be actually insolvent at the time. If the insolvency happen before the arrival, it would be sufficient to justify what has been done, and to entitle the shipper to the benefit of his own provisional caution. But if the person is not insolvent, the ground is not laid on which alone such a privilege is founded." The Constantia, 6 C. Rob. 321, 326.

"This statement of the doctrine of stoppage *in transitu*, which is supported by such high authorities, does not sustain the proposition, that a vendee, insolvent at the time of the sale of the goods, and still remaining insolvent, can object to their stoppage *in transitu*. He could only complain when his insolvency was known to the vendor at the time of sale, and the contract was made in view of such, his condition. The object in allowing the privilege to the vendor being his protection against the insolvency of the vendee, such privilege, unless waived by the vendor, ought properly to extend to cases of insolvency, whether existing at the time of sale, or occurring at any time before the actual delivery of the goods. A vendee who disputes the right of stoppage *in transitu*, must be prepared to aver, as in the case of Wilmshurst *v.* Bowker, 2 M. & G. 792, which was an action by a vendee against a vendor for improperly stopping the delivery of goods, that he was neither bankrupt nor insolvent. Independently the fact that he has received the vendee's bills of exchange, or other negotiable securities for the whole price, even though they have been negotiated and are still outstanding. It seems to be well settled, that when the right of stoppage *in transitu* is properly exercised, the effect is to restore the vendor to precisely the same position as if the goods had never left his possession. He has the same rights with respect to the property, and they may be enforced in the same way. His right to intercept the goods before they reach the hands of the vendee, and his right to withhold those still in his possession, rest upon the same just principle that the insolvent vendee cannot require the vendor to deliver the goods or perform the contract when he himself is unable to pay for them, or perform the contract on his part. To require the goods to be delivered to such vendee would simply result in the application of the property of one man to the payment of another man's debts. The right of the unpaid vendor, with respect to the goods, is sometimes called a lien; and it is a lien, in the sense that the vendee, upon payment or tender of the price, but not otherwise, may recover them. But it is something more than a mere common law lien, which is only a naked right of possession. With the goods in his possession, the vendor has a special property in them, which is parcel of his original ownership. Whether the effect of the stoppage *in transitu*, or the retention of the goods by the vendor, on the discovery of the vendee's insolvency, is to rescind the contract, or not, has been the subject of much discussion, and some authors say the question is not yet definitely settled. But the prevailing opinion now is, we believe, that the contract is not, necessarily, rescinded, unless the parties by their conduct so treat it; that conclusion, being most favorable to the vendor, for whose protection the doctrine of stoppage *in transitu* was first established; for, if the exercise of the right operated to rescind the contract, the vendor would be deprived of the remedy, which it is now generally conceded he

of any circumstances to the contrary, the vendee might have the benefit of a presumption of ability to comply with his contract, and the burden of showing insolvency might be cast on the vendor. It may be that this would be sufficiently shown by the proof of an overt act of insolvency, such as a stoppage of payment, though, in fact, an actual insolvency, in the sense of not having means adequate to the payment of debts, might not exist. If the vendee, before the stoppage *in transitu*, had, by his conduct in business, afforded the ordinary apparent evidences of insolvency, he ought not to complain of the precautionary measure taken by the vendor, though it should turn out that he was ultimately able to pay. But, though no such evidences of insolvency should precede the stoppage *in transitu*, still, if the fact of insolvency existed, the vendee ought not to complain. This, at least, is clearly to be inferred from the language of the authority which has been cited, and appears entirely reasonable and proper. Fair dealing will be better insured by leaving to the vendor his privilege of stoppage *in transitu*, in all cases of insolvency, whether evidenced by the ordinary accompanying acts, or shown actually to exist. The rights of a fair vendee will be sufficiently protected by giving him an indemnity when the right of stoppage *in transitu* is exercised upon rumor or suspicion without any foundation in fact, and by depriving the vendor, in all cases, of any chance of speculating upon the goods, by requiring them to be delivered or accounted for to the vendee, or his assignee, on the payment or tender of the agreed price." Benedict *v.* Schaettle, 12 Ohio St. 515, 519.

has in a proper case, upon a resale of the goods, to hold the vendee, or the assignee of his estate, for the loss sustained through his non-performance of the contract, or in consequence of a fall in the market price. And, as the stoppage does not rescind the contract of sale, it follows, that the vendee, or his assignee, may obtain the goods on payment of the price; or, if the vendee was able and ready to perform the contract on his part, he may recover damages for the failure of the seller to deliver the property according to its terms. But can the vendee maintain such action if he is not able to perform? And does his insolvency at the time fixed for the delivery of the property, amount to such inability? Or, where the sale is upon credit, does a resale of the property by the vendor, before the expiration of the time of the credit, give the insolvent vendee, notwithstanding his inability to pay for the goods, a right of action against the vendor for the difference between the contract price and their market value, at the time of the resale? As an authority sustaining the right of the vendee to maintain such an action against his vendor, Bloxam *v.* Sanders, 4 B. & C. 941, is cited, where Bailey, J., says: "If goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him: but his right of possession is not absolute; it is liable to be defeated if he becomes insolvent before he obtains possession. Whether default in payment when the credit expires will destroy his right of possession, if he has not before that time obtained actual possession, and put him in the same situation as if there had been no bargain for credit, it is not now necessary to inquire, because this is a case of insolvency, and in case of insolvency the point seems to be perfectly clear. If the seller has despatched the goods to the buyer, and insolvency occurs, he has a right in virtue of his original ownership to stop them *in transitu.* Why? Because the property is vested in the buyer, so as to subject him to the risk of any accident; but he has not an indefeasible right to the possession, and his insolvency, without payment of the price, defeats that right. And if this be the case after he has despatched the goods, and whilst they are *in transitu, a fortiori*, is it when he has never parted with the goods, and when no *transitus* has begun. The buyer, or those who stand in his place, may still obtain the right of possession, if they will pay or tender the price, or they may still act upon their right of property if anything unwarrantable is done to that right. If, for instance, the original vendor sells when he ought not, they may bring a special action against him for the injury they sustain by such wrongful sale, and recover damages to the extent of that injury; but they can maintain no action in which right of property and right of possession are both requisite, unless they have both those rights." Still the question remains, when is the resale wrongful? And what is necessary on the part of the vendee, to enable him to maintain the action for the resale, was not decided, nor does it appear to have been a question in that case. The action was trover, to the maintenance of which, the right of possession was essential.

In Smith's Leading Cases, vol. i., pt. ii., p. 1199, in the note to Lickbarrow *v.* Mason, 2 T. R. 63, it is said: "Supposing the contract of sale not to be rescinded, it seems to follow, that the goods, while detained, remain at the risk of the vendee, and that the vendor can have no right to resell them, at all events until the period of credit is expired; after that period, indeed, the refusal of the vendee, or his representatives to receive the goods *and* pay the price, would probably be held to entitle the vendor to elect to rescind the contract." The only authority cited in support of the note above quoted, is the case of Langford *v.* Tiler, Salk. 113, from an examination of which, it will be seen, that it does not meet the question. The full report of the case, which is very brief, is as follows: —

"The defendant, who was administratrix to her late husband, used to deal in tea in his lifetime, and bought four tubs of the plaintiff at so much per tub, one of which she paid for and took away, leaving fifty pounds, in earnest for the other three; and Holt, Chief Justice, ruled, 1st, That the husband was liable upon the wife's contract, because they cohabited. 2d, That notwithstanding the earnest, the money must be paid upon the fetching away the goods, because no other time for payment is appointed. 3d, That earnest only binds the bargain, and gives the party a right to demand; but then a demand without the payment of the money is void. 4th, That after earnest given, the vendor cannot sell the goods to another, without a default in the vendee; and therefore, if the vendee does not come and pay and take the goods, the vendor ought to go and request him; and then if he does not come and pay, and take away the goods in convenient time, the agreement is dissolved, and he is at liberty to sell them to any other person." The sale, it appears, was not on credit, nor was the purchaser insolvent; nor does the case hold that the vendor would be liable in damages for a resale of the goods without a request made of the vendee to receive and pay for them, if, at the time, he was not ready and able to pay the purchase price. On the contrary, the action was by the vendor against the vendee, who was the administratrix of her husband's estate, to charge the estate with her contract of purchase; and Lord Holt was speaking of what was necessary to be done by the vendor to enable him to sue for the vendee's breach in not making full payment. The holding, that to entitle the seller to sue, he must offer to perform and request performance by the purchaser, is in accordance with the now generally recognized rule on the subject.

The general rule is, that in contracts of bargain and sale, where there is no agreement for credit, the promise of the vendor to sell and deliver the property, and that of the purchaser to pay the contract price, are mutually dependent, and neither party is bound to perform, without contemporaneous performance by the other. Payment, or tender of the price, is the condition upon which the purchaser can require delivery of the property; and delivery or tender by the seller, is just as essential on his part if he would sue for the price, or for damages for its non-payment. If both parties are unable to perform, neither can maintain an action against the other; and therefore, while it is necessary for the vendor, if he would sue, to offer performance on his part, he is in a position to defend, without doing so, if the vendee is not able to perform. In Reader *v.* Knatchel, 5 T. R. 218, an application was made of the rule, which is much in point. The plaintiff declared upon an agreement by the defendant, to deliver to him a quantity of Manchester cottons. The defence was, that after the making of the contract, the plaintiff had compounded with his creditors. Mr. Justice Butler directed the jury, "that if they believed the plaintiff was really in such a situation as to be unable to pay for the goods, that was a good defence in point of law to the action; and the jury accordingly found a verdict for the defendant."

When the sale is upon credit, it is one of the implied conditions of the contract that the vendee shall keep his credit good; his promise to pay at a future day, involving an engagement on his part that he will remain, and then be, able to pay; which engagement is broken when he becomes insolvent, and unable to pay, and hence the right of the vendor to then stop performance of the contract on his part. Nor is the rule varied by the fact that the vendee has given his notes or bills, or other securities for the price, payable at the end of the time for which the credit is allowed. The vendor, in such case, incurs no liability by not delivering the property, unless the vendee pay, or tender the contract price. But in order to sue the vendee, he should offer to deliver according to the contract. Such is the scope of the rule laid down in Mining Co. *v.* Brown, 124 U. S. 385, where it is held: "The insolvency of the vendee in a contract for the sale and future delivery of personal property in instalments, payment to be made in notes of the vendee as each instalment is delivered, is sufficient to justify the vendor for refusing to continue the delivery, unless payment be made in cash; but it does not absolve him from offering to deliver the property in performance of the contract if he intends to hold the purchasing party to it; he cannot insist upon damages for non-performance by the insolvent without showing performance on his own part, or an offer to perform, with ability to make the offer good."

The rule must work both ways. The rights and obligations of the vendor and vendee are correlative. If the insolvency of the vendee is sufficient to justify the vendor in refusing to deliver the property, unless payment be made in cash, it follows that the vendor incurs no liability by his refusal, and therefore no right of action accrues to the vendee, unless payment be made by him. And if the vendor cannot insist upon damages for the vendee's non-performance, without showing an offer on his part with the ability to perform, so, neither can the vendee, if he is without the ability to perform, recover from the vendor. The observations of Gholson, J., in Benedict *v.* Schaettle, 12 Ohio St. 520–521, are in point, and are in harmony with this view of the subject. He says: "If the true principle of the right of stoppage *in transitu* be found in that certainly just rule of mutual contract, by which either party may withhold performance, on the other becoming unable to perform, on his part; if the foundation of the rule be a just lien on the goods for the price, until delivered, an equitable lien adopted for the purposes of substantial justice, then it is the ability to perform the contract — to pay the price — which is the material consideration. If there be a want of ability, it can make no difference, in justice or good sense, whether it was produced by causes, or shown by acts, at a period before or after the contract of sale. Substantially, to the vendor who is about to complete delivery, and abandon or lose his proprietary lien, the question is, can the vendee perform the contract on his part; has he, from insolvency, become unable to pay the price?" And in another part of the opinion he further says: "The rights of a fair vendee will be sufficiently protected by giving him an indemnity when the right of stoppage *in transitu* is exercised upon rumor or suspicion without any foundation in fact, and by depriving the vendor, in all cases, of any chance of speculating upon the goods, by requiring them to be delivered or accounted for to the vendee, or his assignee, on the payment or tender of the agreed price."

But, it is contended, that while the vendor may refuse to deliver the property to the insolvent vendee, he is obliged to keep it for the vendee until the time of the credit expires; and, if he resell before that time, the vendee may have his action for damages.

When, by the contract, the property is to be delivered at a future day, and the vendor sells it to another before that time arrives, the vendee, being able to perform, may have an immediate action; for the vendor, by thus disabling himself from performing by delivery at the proper time, commits a breach of the contract, and the vendee need not wait until the time for the delivery arrives. But that rule has no application here. The obligation of the vendor, under a contract like that between the parties in this case, is to deliver the goods at the time stipulated in the agreement, which is at once, upon the receipt or tender of the purchaser's commercial paper, or within a reasonable time; not at the time to which the credit is extended. The right of the vendee is to receive the goods at the time the vendor contracts to deliver them, and he is not bound to receive them at any other time. The breach, therefore, on the part of the vendor, if there be one, consists in his failure to deliver the goods according to the contract, and occurs at that time, and not upon a resale subsequently made; and the vendee's cause of action arises, if at all, upon the failure to deliver, and not on the resale. In the case now before us, the averments of the defendant's answer, which on the trial he was not permitted to prove, though he offered to do so, show that at the time the goods were to have been delivered, according to the contract of sale, the plaintiffs were insolvent, and their paper dishonored, so that the condition upon which their right to the goods depended, had not been performed by them, and they were without the necessary ability to perform the same. Upon what just principle can the seller in such a case be required to hold the goods until the expiration of the credit? It is true that, at that time, the vendee may again be solvent, and able to pay. There is no presumption, or assurance, that he will. If any presumption arises, it is rather, that the insolvency will continue, which is more in accordance with the experience of the commercial world. But, as we have seen, it is part of the vendee's engagement, that he will maintain his credit, which is broken by his insolvency. And it would be unjust to require the vendor to sustain the loss resulting from the destruction or deterioration of the goods in the mean time, which, in many instances, must ensue if the seller is compelled to keep the goods shut up, and take the risk of the future solvency of the buyer. The injustice of such a requirement is conceded where the goods are of a perishable nature; and the vendor, it is now settled, is not obliged to keep goods of that character until the termination of the credit. In the notes to Lickbarrow *v.* Mason, in Smith's Leading Cases, vol. i., pt. ii., p. 1199, it is said, "But what, it will be said, if the goods be of so perishable a nature that the vendor cannot keep them until the time of credit has expired? In such a case it is submitted that courts of law having originally adopted this doctrine of stoppage *in transitu* from equity, would act on equitable principles by holding the vendor invested with an implied authority to make the necessary sale." It is insisted, however, that the right of sale in such cases constitutes an exception to the rule. In our opinion, the reasons upon which the exception rests, if it be such, should make the exception the general rule. The value of many kinds of merchandise, not perishable, depends largely upon their being in the market at the appropriate seasons, and to supply temporary demands; and if not available for those purposes, at the proper time, they become comparatively worthless, or so reduced in value as to entail great loss, which may be less only in degree, though greater in amount, than where the goods are perishable; and it is no more just or equitable, to subject the vendor to the loss in the one case, than in the other. The right of resale ought not, we think, be made to depend upon the degree or extent of the loss that must ensue, if it should be denied. It rests upon a different principle, and grows out of the failure of the vendee to keep his engagement. Not that the contract is thereby rescinded, for that would defeat the vendor's remedy for damages upon resale after due notice; but, that he may elect to treat the agreement for the credit as at an end, on account of the vendee's default. We see no good reason for holding that the rights of the seller are any the less where the sale is upon credit, and the property is retained by him on account of the buyer's insolvency, than they would be if the sale were for cash, and the vendee was unable to pay the price agreed upon. In either case the incapacity of the vendee to perform his part of the agreement — and insolvency is incapacity — warrants the vendor in withholding performance on his part.

We are therefore of opinion the trial court erred in excluding the evidence of the plaintiffs' insolvency, and in charging the jury as shown in the statement of the case; and in also refusing the instruction requested by the defendant therein contained. Counsel have argued a question relating to the charge of the court on the measure of damages; but as no exception was taken to the charge on that subject it will not be further noticed. For the errors mentioned above, —

The judgments below are reversed, and the cause remanded for further proceedings.[1]

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[1] Compare as to the duty of a solvent contractor to tender performance to a co-contractor who is insolvent, or his assignee, Gibson *v.* Carruthers, 8 M. & W. 321; *Ex parte* Tondeur, L. R. 5 Eq. 160; *Ex parte* Agra Bank, L. R. 9 Eq. 725; N. E. Iron Co. *v.* Gilbert R. R. Co., 91 N. Y. 153; Pardy *v.* Kanady, 100 N. Y. 121; Vandegrift *v.* Cowles Engineering Co., 161 N. Y. 435.

"When the price of goods sold on credit is due and unpaid, and the vendee becomes insolvent before obtaining possession of them, the vendor's right to the property is often called a lien, but it is greater than a lien. In the absence of an express power the lienor usually cannot transfer the title to the property on which the lien exists by a sale of it to one having notice of the extent of his right, but he must proceed by foreclosure. When a vendor rightfully stops goods *in transitu,* or retains them before *transitus* has begun, he can, by a sale made on notice to the vendee, vest a purchaser with a good title. Dustan *v.* McAndrew, 44 N. Y. 72. His right is very nearly that of a pledgee, with power to sell at private sale in case of default. Bloxam *v.* Sanders, 4 B. & C. 941; Bloxam *v.* Morley, *id.* 951; Milgate *v.* Kebble, 3 M. & G. 100; Audenreid *v.* Randall, 3 Cliff. 99, 106; Black. Sal. [2d ed.] 445, 454, 459; Benj. Sal. [Corbin's ed.] § 1280; Jones' Liens, § 802. The vendee having become insolvent and refused payment of the notes given for the purchase-price of the property which remained in the vendor's possession, his right to retain it as security for the price was revived as against the vendee and his attaching creditor. Arnold *v.* Delano, 4 Cush. 33; Haskell *v.* Rice, 11 Gray, 240; Milliken *v.* Warren, 57 Maine, 46; Clark *v.* Draper, 19 N. H. 419; Bloxam *v.* Sanders, 4 B. & C. 941; Bloxam *v.* Morley, *id.* 951; Hamburger *v.* Rodman, 9 Daly, 93; Benj. Sal. [Bennett's ed.] § 825; 2 *id.* [Corbin's ed.] § 1227; Story Sal. § 285; Black. Sal. 454." Tuthill *v.* Skidmore, 124 N. Y. 148, 153

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McGILL *v.* CHILHOWEE LUMBER COMPANY ET AL.

TENNESSEE SUPREME COURT, AUGUST 30, 1904.

[*Reported in* 82 *Southwestern Reporter*, 210.]

McALISTER, J. This record presents a general creditors' bill to wind up the affairs of the Chilhowee Lumber Company as an insolvent corporation. The bill was sustained as a general creditors' bill, and a receiver appointed to take charge of the assets of the insolvent corporation.

The questions now presented to this court arise on the appeal of the Youmans Lumber Company, which is asserting a preferred claim for the value of about 29,000 feet of oak lumber, which it claims was converted by the Chilhowee Lumber Company and the Southern Brass & Iron Company. The facts in regard to this controversy, as found and established by the Court of Chancery Appeals, are as follows:

"The Youmans Lumber Company sold the lumber in question (two car loads) to the Chilhowee Lumber Company, one car being shipped on July 6th and one on July 8th, from La Follette, Tennessee, consigned to the Chilhowee Lumber Company at Lenoir City, Tennessee. Before the lumber reached its destination, the Chilhowee Lumber Company had become financially embarrassed, and the Youmans Lumber Company stopped the lumber in transit, took possession of it at Lenoir City, and, by permission of one J. W Baugher, unloaded it upon his premises, which were located within sixty or one hundred feet of the millyards of the defendant company. At this time the defendant company was in the hands of a receiver appointed under another bill filed prior to the bill in this case. . . . There is no question at all but that the lumber was sold by the Youmans Lumber Company to the Chilhowee Lumber Company; that it was shipped to Lenoir City; that it was stopped in transitu; that the cars were unloaded by the Youmans Lumber Company, who took possession of the lumber, and, by permission of Mr. Baugher, the lumber was piled on his lot, and did not then pass into the possession of the Chilhowee Lumber Company. . . . As a matter of fact, this lumber remained on the yard where Mr. Youmans had placed it, without any authority, so far as this record shows, from Mr. Youmans, or the Youmans Lumber Company, or any one else, to take charge of it or remove it. . . . It appears, however, that the agents of the Chilhowee Lumber Company went to Mr. Baugher, upon whose yard the lumber was left, and told him that matters had been arranged, and that the lumber belonged to the Chilhowee Lumber Company, and thereupon some of the lumber (one-fourth) was taken and used by the Chilhowee Lumber Company.

"Subsequently, on the 19th of September, Mr. Peter Blow, representing the Southern Brass & Iron Company, having a claim or account for the sum of sixty-one dollars and forty cents for goods sold to the Chilhowee Lumber Company, which was overdue and unpaid, went down to Lenoir City to collect his claim. . . . Mr. Blow demanded payment of his account, and, after trying to put him off, Mr. Morrow, the secretary and treasurer of the Chilhowee Company, finally proposed to sell Mr. Blow some lumber in payment of the account, and showed him this lumber, which was then piled upon the yard of Mr. Baugher. Mr. Blow agreed to take the lumber for his debt, but at the request of Mr. Morrow agreed to leave the lumber where it was until the 1st of October, and agreed that Mr. Morrow or the Chilhowee Lumber Company might, by paying some sixty-one dollars and forty cents by the 1st of October, repurchase or redeem the lumber. A contract was entered into between the parties embodying the features just stated, but was not acknowledged or registered. . . . The lumber was still on the lot of Mr. Baugher, and was pointed out, and by agreement of the parties was placed in possession of J. W. Baugher, trustee for the Southern Brass & Iron Company, and Mr. Baugher assumed control of the lumber."

It will be observed that all this was done without the knowledge or consent or participation of the Youmans Lumber Company. It appears further that subsequently the original bill in this case was filed, and the receiver appointed. Soon thereafter, the receiver having told Mr. Blow that he could not redeem the lumber, the latter ordered the lumber shipped to Knoxville, where about 10,000 feet of it was received and sold by Mr. Blow for the sum of $103.98, out of which he paid $26 freight and other expenses of shipment, including loading and unloading, amounting to $24, leaving net proceeds realized of $53.94. The balance of this lumber, estimated to be about 6,000 feet, was left upon the yard of Mr. Baugher at Lenoir City, the injunction having issued prohibiting its removal; and it was subsequently washed away by floods and lost.

The injunction referred to issued upon a petition filed by the receiver, alleging that the property belonged to the defendant corporation. The Southern Brass & Iron Company answered the petition, and insisted that the lumber had been sold to it by J. W. Morrow, secretary and treasurer of defendant company, on September 19, 1901. The Youmans Lumber Company intervened by petition, asserting a lien upon this lumber upon the ground that it had exercised its right of stoppage in transitu, and that it had been dispossessed of the lumber wrongfully.

The Court of Chancery Appeals held as follows:

"Upon these facts we are of opinion and find that the lumber in question had been stopped in transitu, piled up upon the yard of Mr. Baugher by the Youmans Lumber Company, and had not been paid for by the Chilhowee Lumber Company; that subsequently the officers and agents of the Chilhowee Lumber Company wrongfully and without authority went upon the yard of Mr. Baugher, and by false representations assumed and took possession of said lumber, and did use up one-fourth of it in its mill; that subsequently Mr. Morrow, secretary and treasurer, acting for the Chilhowee Lumber Company, did sell or pledge and deliver to Mr. Baugher, acting as trustee for the Southern Brass & Iron Company, the remaining three-fourths of this lumber. At the time of this transaction the Chilhowee Lumber Company was not the owner of this lumber, as it had never been legally delivered to it, and it therefore, in our opinion, had no right to execute the pledge for the sale and delivery of this lumber to the defendant Peter Blow for the Southern Brass & Iron Company."

Says that court: "We think the Southern Brass & Iron Company and Peter Blow are liable to the Youmans Lumber Company for the value of the lumber so taken. It appears that the amount of the lumber actually taken by the Southern Brass & Iron Company and Mr. Blow was worth the net amount realized, fifty-three dollars and ninety-four cents, and for this amount we think the Youmans Lumber Company is entitled to a decree against the Southern Brass & Iron Company and Peter Blow."

The Youmans Lumber Company complain of this part of the decree to the extent that the Court of Chancery Appeals allowed a credit or reduction for expenses incurred by the Southern Brass & Iron Company in shipping this lumber from Lenoir City to Knoxville. The insistence made in this court on behalf of the Youmans Lumber Company is that, having found that complainants' lumber was wrongfully appropriated, the Court of Chancery Appeals should not have allowed credit for any expenses incurred by the Southern Brass & Iron Company in taking possession of this property and shipping it away. The theory of the Youmans Lumber Company is that the Southern Brass & Iron Company should have been held liable for the market value of the lumber appropriated and converted at Lenoir City.

We are constrained to hold that this assignment of error is well made. It was held by this court at the present term, in Knoxville Electric Company *v.* East Tennessee Light & Power Company (no written opinion), that a litigant whose property is wrongfully attached cannot be adjudged liable either for costs of the receivership under which it was preserved or for a receiver's certificate issued for its exclusive benefit. Upon the same principle we are unable to see why a party whose property has been wrongfully appropriated and sold should be onerated with the costs and expenses of that sale. He is clearly entitled to recover the market value of the property at the time and place of the conversion. The Court of Chancery Appeals did not find there was no market for this lumber at Lenoir City, and that on that account its value should be determined by the Knoxville market. It was therefore in error in not adjudging liability against the Southern Brass & Iron Company for the value of this lumber at Lenoir City.

The next assignment is that the Court of Chancery Appeals erred in holding that the loss of 6,000 feet of lumber washed away by floods at Lenoir City must fall on the Youmans Lumber Company.

As already seen, one-fourth of the lumber belonging to the Youmans Lumber Company had been appropriated by the Chilhowee Lumber Company wrongfully, and it sold the remaining three-fourths of that lumber to the Southern Brass & Iron Company. The latter company, under its purchase, removed one-half of the lumber, leaving deposited in the yard of J. W. Baugher about 6,000 feet. As found by the Court of Chancery Appeals, this 6,000 feet of lumber was washed away by floods and high water, without any fault being especially attributable to any one.

The theory now advanced on behalf of the Youmans Company is that the legal title to this lumber had passed from the Youmans Company to the Chilhowee Company and from the Chilhowee Company to the Southern Brass & Iron Company, and that the loss should fall upon the latter company. It is insisted on behalf of the Youmans Company that when it exercised its right of stopping the lumber in transitu on account of the insolvency of the purchaser the effect of such stoppage was not to rescind the sale or interfere with the title, but simply to restore the seller to his original lien to secure the payment of the purchase price. In Mechem on Sales, vol. 2, § 1612, it is said: "The effect of the exercise of the right of stoppage, as it seems now to be generally agreed on, is not to rescind the sale, but to restore the seller to his right of possession and lien. . . . The assumption of the lien, as has already been seen, does not of itself effect a rescission of the sale. The goods still remain the goods of the buyer, until the seller has in some way foreclosed his right, and until that time the buyer may redeem them." Sheppard *v.* Newhall, 7 U. S. App. 544, 4 C. C. A. 352, 54 Fed. 306; Cross *v.* O'Donnell, 44 N. Y. 661, 4 Am. Rep. 721; Rowley *v.* Bigelow, 12 Pick. (Mass.) 307, 23 Am. Dec. 607; 23 Am. & Eng. Encyc. of Law (2d Ed.), col. 23, p. 932.

It is true that the sale of this lumber by the Youmans Company to the Chilhowee Company was not rescinded by the seller's act in stopping the lumber in transit, but the title to the lumber was still in the Chilhowee Company, and the right of possession remained in the Youmans Company, until the purchase price was paid, and its lien thereby extinguished. It is insisted, however, by counsel for the Southern Brass & Iron Company, that this lien was absolutely dependent for its existence and enforcement upon the fact of the seller's retaining possession of the property, and, having lost its possession, the Youmans Company were not entitled to enforce the lien. "At most," it is said, "it could only enforce that lien upon the specific property involved, or its immediate proceeds, provided they could be followed and identified."

While it is true, as insisted by counsel, that the seller's lien is dependent upon possession, it is also true that it is not extinguished by a wrongful dispossession of the property. The Court of Chancery Appeals has found as a fact that "the Chilhowee Lumber Company wrongfully and without authority went upon the yard of Mr. Baugher, and by false representations assumed to take possession of said lumber." Such a wrongful and fraudulent dispossession did not operate to extinguish the seller's lien. "The change of possession must be voluntary to constitute a waiver of the lien. Therefore, where such a change is effected by force or fraud, or without the consent of the lienholder, the lien is not thereby determined." Am. & Eng. Encyc.

of Law (2d Ed.), vol. 19, p. 27; Caldwell *v.* Tutt, 10 Lea, 259, 43 Am. Rep. 307; Mechem on Sales, vol. 1, § 153.

It is also true that the Youmans Lumber Company was entitled to regain this possession from the wrongdoer. "So, if by artifice or evasion the buyer obtained possession of the goods, as upon a promise or understanding of immediate payment, which afterwards is evaded or denied, the seller, who has done nothing to estop himself or waive his right, may regain possession by virtue of his lien as against any one but a bona fide purchaser for value." Mechem on Sales, vol. 2, § 1490; Am. & Eng. Encyc. of Law (2d Ed.), vol. 19, p. 35.

The Court of Chancery Appeals has found as a fact that the Southern Brass & Iron Company was not an innocent purchaser, and this exception to the rule is therefore eliminated from this case. In respect of the remedy of the lienholder to recover the possession of this property, the law is thus stated, viz.:

"If the property is wrongfully taken from the custody of the lienholder by a third person, the lienholder's remedy is by an action to recover the possession or for a wrongful conversion. In the latter action the measure of damages is the amount of the lien, not exceeding the value of the property." Am. & Eng. Encyc. of Law (2d Ed.), vol. 19, p. 35.

The Court of Chancery Appeals, as already stated, adjudged liability against the Southern Brass & Iron Company for the net amount realized by the latter company from its sale of the lumber in Knoxville, upon the ground that at the time of its purchase from the Chilhowee Lumber Company the lumber had not been delivered to it by the Youmans Company.

Now it is insisted on behalf of the Youmans Company that the Southern Brass & Iron Company should also be held liable for the 6,000 feet of lumber washed away by the floods, for the reason that at the time of said loss the legal title to the 6,000 feet was vested in the Southern Brass & Iron Company under its purchase from the Chilhowee Company. This contention is based upon the theory that, although the Youmans Company exercised its right of stoppage in transitu, the sale was not thereby rescinded, but the title to the lumber remained in the Chilhowee Lumber Company under the original purchase, and therefore the legal title to the 6,000 feet of lumber passed from the Chilhowee Company to the Southern Brass & Iron Company under its contract of purchase.

We are unable to concur with counsel in this contention. It is very plain to us that the Chilhowee Company could not communicate a title to the Southern Brass & Iron Company to the lumber in question, for the reason that said lumber had never been legally delivered by the Youmans Company to the Chilhowee Company; and it is very clear that until the Chilhowee Company had the right of possession it could not communicate a title to any purchaser. The full scope and meaning of the doctrine announced by Mr. Mechem in his text, and other authorities cited, where the same principle is affirmed, is that the seller is not to be prejudiced by the exercise of his right of stoppage in transitu, but may enforce his contract of sale against the purchaser. Until the seller has relinquished his right of possession to the purchaser, the latter cannot, of course, communicate any title to the property so as to defeat the seller's lien.

We are therefore of opinion that the Southern Brass & Iron Company cannot be held liable for the loss of the 6,000 feet of lumber washed away by high water, upon the theory that it owned the legal title to the lumber. We are further of opinion that, since the Southern Brass & Iron Company exercised no acts of ownership over this 6,000 feet, and did not remove it, but left it standing where it was originally deposited by the Youmans Company, it cannot be held liable as for a conversion. Moreover, it appears from the finding of the Court of Chancery Appeals that the Southern Brass & Iron Company was enjoined, at the instance of the receiver of the Chilhowee Company, against removing that lumber, or exercising any acts of ownership over it, at the very time the lumber was swept away.

The decree of the Court of Chancery Appeals will be modified as herein indicated and affirmed.

CHAPTER V.

SPECIAL RIGHTS AND REMEDIES OF THE BUYER.

SECTION I.

INSPECTION.

LORYMER *v.* SMITH.

IN THE KING'S BENCH, NOVEMBER 8, 1822.

[*Reported in* 1 *Barnewall and Creswell,* 1.]

ASSUMPSIT for not accepting two parcels of wheat, one containing 700, the other 1400 bushels. Plea, general issue. At the trial before Bayley, J., at the last summer assizes for Gloucester, it was proved that on the 11th of September, 1821, a contract for the wheat was made between the parties at Bristol, and bought and sold notes were exchanged. They were in the following terms: "Bought of James Lorymer, 700 bushels of wheat, 1400 ditto, ditto, at 9*s.* 6*d.* per bushel, according to samples, banker's bill if required." By the usage of the place the buyer had a right to inspect the wheat in bulk. On the 19th of September the defendant went to the plaintiff's warehouse and desired to see the wheat; the parcel containing 700 bushels was shewn to him, but the remaining 1400 bushels were not in the plaintiff's warehouse. Plaintiff offered to send a load to the defendant for his inspection, or to send for a bushel at that time, but declined shewing the whole, saying that he did not choose to let defendant into his connexions. The latter replied, that under those circumstances he would not have the wheat; a banker's bill was not at that time tendered or demanded. A few days afterwards defendant having sent to the plaintiff respecting some oats, the latter informed the messenger that the 1400 bushels of wheat were then in his lofts, and might be inspected; and that the whole was ready, and would be delivered upon banker's bills being given for the price. The learned Judge thought that the plaintiff had put an end to the contract, by refusing to shew the wheat in bulk when requested to do so on the 19th of September, and by his direction a verdict was found for the defendant. And now,

W. E. Taunton moved for a new trial.

ABBOTT, C. J. It appears that, by the usage of the place, the buyer had a right to inspect the wheat in bulk; which is so reasonable, that, without any such usage, the law would give him that right. Here, on the 19th of September, the buyer desired to see the whole of the wheat in bulk, but the seller refused to shew it; upon that refusal, the request having been made at a proper and convenient time, the buyer was entitled to rescind the contract. If this were not so, a man might bargain to deliver corn not then in his possession, and rely upon making a future purchase in time to fulfil his undertaking; but that is a mode of dealing not to be encouraged.

BAYLEY, J. I am of the same opinion.

HOLROYD, J. The buyer had a right to inspect the wheat in bulk, in order to ascertain whether it corresponded with the sample, and might have insisted upon having it delivered immediately upon tendering a banker's bill for the price. The seller not being ready to complete his part of the contract on the 19th of September, when he was requested to shew the wheat, cannot afterwards insist upon performance by the buyer.

BEST, J., concurred.

Rule refused.[1]

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[1] In Charles *v.* Carter, 96 Tenn. 607, the court held that the following instructions to the jury should have been given:

"6. If you find that the conduct of the plaintiff and his agents at Kansas City was such, that they declined and refused to permit an inspection of the potatoes by the defendant within a reasonable time after their arrival in Kansas City, and an inspection thereof was, in consequence, not made, then it was no longer the duty of the defendant to take such potatoes, and you must find for the defendant.

"7. The Court further charges you that it becomes a question of fact for you to determine what would be a reasonable time for the defendant to inspect these potatoes, and, in determining what was a reasonable time, you will consider the perishable nature of the property itself, the length of time it had been barreled up and confined in a railroad car, as well as the season of the year and condition of the weather at the time."

PETTITT *v.* MITCHELL.

IN THE COMMON PLEAS, NOVEMBER 14, 16, 1842.

[*Reported in* 4 *Manning & 9 Granger*, 817.]

TINDAL, C. J. This is a rule obtained by the defendant, calling on the plaintiff to shew cause why a verdict should not be entered for him, the defendant, or why there should not be a new trial. It is the case of a sale of goods by auction; and the first part of the rule is grounded upon two conditions, which are set forth in the third and fourth pleas, and which, it is insisted on the part of the defendant, are implied by law, in addition to the printed conditions under which the sale took place. It is said that in the case of a sale under such circumstances as the present, the law will imply a right on the part of the purchaser, before payment of the purchase money, to inspect and to measure the articles bought, in order to enable him to see whether they conform with the description of them given in the printed catalogue of sale.

The first question is, whether in a sale by auction circumstanced as this case is, the law will imply such conditions or either of them; and I think it will not. The stress of the case is, whether the purchaser has the right to inspect and measure the goods before payment of the money; for it is not denied that he may do so before he takes them away and, if the measurement should turn out to be short, that he would be entitled to a deduction from the purchase money. An argument has been raised on the part of the defendant, upon the cases of Howe *v.* Palmer and Lorymer *v.* Smith, that by law a purchaser may rescind the contract if he is not permitted to inspect the commodity he has purchased; but in both of those cases the purchase was by sample, and the commodity was in bulk, and therefore it was held, that the purchaser had a right to see that the bulk corresponded with the sample. But the present is not the case of the purchase of an uncertain quantity or of a certain quantity out of an uncertain bulk, but it is the purchase of a certain thing, which the purchaser has a right and power to inspect before the sale. There is also the circumstance of the measurement being made in the first instance, not by the seller himself, but by a third party, the auctioneer, who stands as a middle man between the parties; which constitutes a material difference between such a case as the present and that of a sale in a shop. If the law is called upon to impose a condition in such a case, it will look to the convenience of a rule sought to be introduced; and it will not impose a condition where the preponderance of inconvenience would be against it. It appears that in this sale there were 488 lots sold; and it certainly would seem that the inconvenience would be greater if there were to be established a right on the part of each purchaser to measure any lot before payment of the purchase money. The purchasers may be unknown persons, and the stake is much greater on the part of the auctioneer who is a known person of responsibility; and it is not likely that any thing more than a small quantity will be in dispute between the parties. Upon principle, therefore, I am of opinion, that in a sale of this sort, no such conditions are to be imported as those set up by the defendant.

In this case, too, there are printed conditions of sale, and it appears to me that the conditions sought to be imported would materially vary those that are printed. By these it is stipulated that a deposit is to be made in the first instance, and that the remainder of the purchase money is to be paid "before the delivery" of the goods; that is, according to the evidence, before the delivery order is given and the goods are handed over to the purchaser. That the term "delivery" in the fourth condition does not mean the same as "taking away," clearly appears by the following paragraph of the same condition which stipulates that "warehouse room will be charged on all lots left uncleared after the time specified, until such lots are *taken away*, or resold." There are therefore three things to be done; the payment of the remainder of the price, the delivery of the article, and the clearing or taking it away — which are each distinct and separate; and I can readily understand that the auctioneer may have intended by this contract to avoid frivolous objections and the inconvenience that would ensue from a different course.

As to the motion for a new trial, it appears that there was evidence on both sides. The witnesses called for the defendant state that on the occasion of different purchases at sales by auction, they have inspected the goods, they have bought, before payment of the price; but they do not produce the conditions of sale under which such purchases were made; and it may have been a mere favour to them that they were permitted to make the inspection. Upon the whole, therefore, I am of opinion that this rule must be discharged.[1]

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[1] COLTMAN, ERSKINE, and MAULE, JJ., delivered concurring opinions.

ISHERWOOD *v.* WHITMORE, AND OTHERS, ASSIGNEES OF JARRATT.

In the Exchequer, April 28, 1843.

[*Reported in* 11 *Meeson & Welsby*, 347.]

Assumpsit. The first count of the declaration stated, that before and at the time of the making of the agreement next thereinafter mentioned, the plaintiff was possessed and had possession of divers goods, to wit, 2000 hats, of the value, to wit, of £1000, which goods then were the property of the defendants, subject to a lien which the plaintiff then had thereupon, the said lien then being of great value, to wit, of the value of £250; and thereupon, before the commencement of the suit, to wit, on the 23rd day of July, 1842, it was agreed between the plaintiff and the defendants, that the plaintiff should deliver up to the defendants the said goods and abandon his said lien thereon, and that the defendants should therefore pay the plaintiff the sum of £250 upon the delivery of the said goods to the defendants. The declaration then alleged mutual promises, and averred that after the making of the said agreement and promises, and before the commencement of this suit, to wit, on the day and year last aforesaid, the plaintiff was ready and willing and then tendered and offered to deliver up the said goods to the defendants, and to abandon his said lien thereon, and then requested the said defendants to accept the said goods and the said abandonment of the said lien of the plaintiff, and to pay the plaintiff the said sum of £250; and although the plaintiff had always performed the said agreement in all things on his part to be performed, yet the defendants, not regarding, &c., did not nor would, when they were so requested, or at any time before or since, accept the said goods or any of them, or the abandonment of the said lien of the plaintiff, or pay the plaintiff the said sum of £250 or any part thereof, but then and always neglected and refused so to do.

There was a second count upon an account stated. The defendants pleaded, first, non assumpserunt; secondly, a traverse of the tender of the hats, as alleged in the declaration.

At the trial before Lord Abinger, C. B., at the London sittings after last term, it appears that the hats originally belonged to one Arthur Jarratt, who had become bankrupt, and the defendants were his assignees. Jarratt had, previously to his bankruptcy, deposited these hats with the plaintiff, who had a lien upon them for £250, the amount claimed. A long correspondence took place between the plaintiff and defendants after the bankruptcy, and which was given in evidence, by which it was agreed that the defendants should discharge the lien and take the hats. The defendants accordingly went for the hats to a wharf where, as they had been previously informed, the hats would be delivered to them on payment of the money; and were there shewn two closed casks, which they were told contained the hats, but the persons who had the charge of them refused to allow the defendants to open the casks or to inspect their contents. On this state of facts, it was objected for the defendants that in order to make out the allegation in the declaration that a tender had been made, it ought to have been shewn that the hats were offered in such a way that the defendants had an opportunity of inspecting them. The Lord Chief Baron, reserving leave to the defendants to move to enter a nonsuit, left it to the jury to say whether they were satisfied that the defendants had by the contract, as collected from the correspondence, agreed to take the hats without requiring an inspection of them or not, and they found that the defendants were not to have an inspection of them, and gave their verdict for the plaintiff, with £250 damages.

M. D. Hill having obtained a rule to enter a nonsuit on the point reserved, or for a new trial, on the ground that the learned Judge had misdirected the jury in leaving to them the question whether there was an agreement to take the hats without inspection, there being no evidence of such a contract;

Platt and *Byles*, Serjts., now shewed cause. — A party tendering goods in pursuance of a contract is not bound to allow an inspection of them in the first instance, and if the party to whom they are offered refuses to receive them, he does so at his peril. It is otherwise where there is a contract for the purchase of goods by sample, in which case the buyer is always entitled to inspect the bulk before he can be compelled to pay for it. But when a chattel is identified by description, as was the case here, no such right exists, for the property passes by the contract. [PARKE, B. — There is here no question about the passing of the property; for inasmuch as the plaintiff claims only a lien upon the hats, they are admitted to have belonged to the defendants from the beginning. The casks might have contained nothing, or anything else than the hats. Ought you not to have given the parties a reasonable opportunity of seeing whether or not the hats were there? There is nothing to shew any contract that he was to purchase the hats without looking at them. ALDERSON, B. — It is clear they agreed to buy the hats without reference to the quality; but does it follow that they were to do so without seeing them?] But although there may be a right of inspection, it does not merely follow that it is a condition precedent; and an inspection in this case would have been attended with much inconvenience, as it could not have been had without taking out all the hats, which would amount to several thousands. In Pettit *v.* Mitchell,[1] it was held that the purchaser of goods at an auction is not entitled to measure them before he paid the money. [PARKE, B. — In that case the purchaser had an opportunity of inspecting the lots before they were put up for sale, as two days were given to inspect the articles before the day of sale.] In the present case the jury have found that by the terms of the contract the defendants were not to have an opportunity of inspection. [PARKE, B. — Yes, but the meaning of that was, that they were not to have the option that ordinary persons have; that is, without inspection so as to ascertain the value.] The defendants in making the agreement relied upon the honour of the plaintiff to deliver the article correctly and according to contract, and the jury must be taken as finding affirmatively the existence of such a contract.

M. D. Hill, Ball, and *Gale,* in support of the rule, were stopped by the Court.

PARKE, B. — It is perfectly clear in this case that there was no tender of these goods. A tender of goods does not mean a delivery or offer of packages containing them, but an offer of those packages, under such circumstances that the person who is to pay for the goods shall have an opportunity afforded him, before he is called on to part with his money, of seeing that those presented for his acceptance are in reality those for which he has bargained. We so decided when this case was before us on the argument of the demurrer, and by which decision we mean to abide.[2] This case is quite distinguishable from that of Pettit *v.* Mitchell, which has been relied on by the plaintiff; for looking at the contract of sale in that case, it was evidently part of the agreement between the parties, that after the sale the lots were to be taken away by the purchaser without any further inspection. The next question here however is, whether the Lord Chief Baron was right in leaving it to the jury to say whether there had been a special contract to take these goods without any inspection, to see if they were really those bargained for. I am satisfied that he did not mean to put the question to them in that sense; there was nothing in the case to warrant his doing so; but that they were to say whether the assignees were to have the ordinary opportunity to which persons purchasing articles are entitled, namely, of inspecting the articles they have delivered to them, in order to see whether they were of the right quality, or whether, on the contrary, they were not to take the articles such as they were delivered to the plaintiff by the bankrupt Jarratt, and on which the plaintiff had a lien. If, however, it is said that the Lord Chief Baron left to the jury to say whether the assignees had agreed to take whatever the cask might have contained, I do not think there was any warrant for his leaving such a point; but, as I have said before, I am satisfied he did not mean that, but merely that they were not to have an opportunity of seeing if the articles were merchantable. That appears to me to be the true question, and the verdict of the jury affirming that proposition was perfectly right and amounts to a finding that the defendants were to take these hats, whatever their quality. An authority for this position is furnished in Co. Litt. 208 a, where it is said, "the feoffee may tender the money in purses or bags, without shewing or telling the same, for he doth that which he ought, viz. to bring the money in purses or bags, which is the usual manner to carry money in, and then it is the part of the party that is to receive it to put it out and tell it." For that position Wade's case[1] is cited as an authority, and shews that the party to whom the tender is made ought to have an opportunity of seeing the money or goods which are the subject of it. The verdict for the plaintiff on the first plea must therefore remain, but on the plea of tender it must be entered for the defendant.

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[1] Law J., vol. 12, N. S., C. P. 9.

[2] 10 M. & W. 757.

ALDERSON, B. — I am of the same opinion. The jury have found by their verdict, and I think reasonably and properly found, that the bargain between these parties was, that the assignees were to take the hats in the actual condition in which they then were, provided that those sent were the very identical hats received by Isherwood from the bankrupt. Provided that condition was complied with, the assignees were bound to take the hats in whatever condition they might then be, and would have no right to inspect them for the purpose of seeing that they were then in a marketable state. Such is in substance the finding of the jury; and I think that on these pleadings it was necessary to satisfy them, that the defendants, before they were required to pay down the money, had an opportunity of inspecting the articles, in order to see that they were the same hats. It appears from the evidence that they were sent in two covered cases, and the question comes to this, were the assignees bound to take the word of Isherwood that those hats really were contained in those cases, or had they not a right to see that Isherwood spoke the truth in this respect, before they were called on to pay for the article, although they could not object to the quality of it?

ROLFE, B., concurred.

Rule absolute.

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[1] 5 Rep. 115.

OK

BENJAMIN LINCOLN v. DANIEL GALLAGHER.

SUPREME JUDICIAL COURT OF MAINE, FEBRUARY 28, 1887.

[*Reported in* 79 *Maine*, 189.]

THIS was an action of assumpsit for damages on a breach of contract for the purchase and sale of thirty-five sixty-fourths of the schooner Annie Gus of Dennysville, Maine.

The defence was that the schooner was not delivered by plaintiff to defendant in a reasonable time, and that the defendant had no opportunity to examine the vessel in order to see that she was in good order as stipulated in the contract.

Thomas L. Talbot, for the plaintiff.

John F. Lynch, for the defendant.

PETERS, C. J. It was said in Howard v. Miner, 20 Maine, 330, that on a contract for the delivery of specific articles which are ponderous or cumbrous, when it is not designated in the contract, and there is nothing in the condition and situation of the parties to determine the place of delivery, 1. it is the privilege of the creditor to name a reasonable and suitable one; that the debtor should request the creditor to select the place, and if the creditor fails to do so, the debtor may appoint the place.

-determine & inspection buyer must place need y for it.

In the case at bar a vessel was purchased on the eastern coast somewhere, to be delivered to the buyer in Portland. Had the defendant provided a suitable place at some dock or wharf, which could have been reached by the use of reasonable exertion, the delivery should have been made there. The purchaser, after notice, failing to provide a place, we think the seller would be justified in tendering a delivery at safe anchorage in the harbor. He should not be required to go to special expenses to himself to obtain a place at the wharf or upon the shore.

By the bill of exceptions, examined with the judge's charge, we find that a controversy arose between the parties over the requirement of the purchaser that the seller should go to the expense himself of placing the vessel in a dry dock in order that the seller could there examine her. There was some reason to suspect that the vessel had been ashore on her voyage to Portland, and the purchaser desired an inspection to see whether she had escaped injury or not.

There can be no doubt that, in offering delivery, the seller was under obligation to afford an opportunity to the purchaser to make the examination. But any expenses to be incurred thereby, beyond what would be necessary in putting the vessel in a proper place for delivery, would fall upon the buyer and not upon him. The seller was under no obligation to incur any unusual expense. He could not be called upon to place the vessel in a dry dock. He tenders the property as sound, according to the agreement under which he acted. The buyer must accept or reject it at his risk. Benj. Sales, § 695. Croninger *v.* Crocker, 62 N. Y. 151.

Exceptions overruled.

WALTON, DANFORTH, EMERY, FOSTER and HASKELL, JJ., concurred.

JOHN W. DOANE ET AL. *v.* JOHN H. DUNHAM.

ILLINOIS SUPREME COURT, SEPTEMBER TERM, 1875.

[*Reported in* 79 *Illinois*, 131.]

MR. JUSTICE WALKER delivered the opinion of the court:

This case was previously before this court, and is reported in 65 Ill. 512. The facts presented by this record do not vary materially from those stated in the opinion, as reported, except there seems to be a conflict of evidence on the last trial as to the length of time the sugar was retained by appellants before it was examined, found to be different from that intended to be purchased, and the notice to take it back.

When the case was formerly before us, it was held that this was an executory contract, and after the sugar was received appellants were entitled to a reasonable time within which to make an examination, and to give notice to remove the sugar; and that whether the notice was given in apt time was a question to be determined by the jury, in the light of all the attending circumstances, and, of course, with proper instructions from the court.

Appellee having again recovered a judgment for the supposed value of the sugar, appellants again bring the record to this court, and seek a reversal, upon the grounds that the court below gave improper instructions on behalf of appellee, and refused to give proper ones asked by appellants.

An examination of those given, of which complaint is made, fails to disclose error. They inform the jury that there should have been an examination of the sugar, and a notice to take it back, within a reasonable time, considering all the circumstances. This is, no doubt, true, as a legal proposition. Even under clear and satisfactory evidence that it was the general and uniform usage for the kind of goods in question never to be examined until the wholesale merchant sold to his customer, the proposition is correct. If such was the usage, and both parties dealt with reference to it, then it would, according to such usage, be within a reasonable time to examine it when offered for sale by appellants. But the rule, no doubt, has the limit that it must be so offered in due course of trade. A person who should buy as speculation, or with the intention of holding it for sale at a distant period of time, could not claim its benefits. It could only be applied in cases falling within the general course of trade.

The court below refused to instruct for appellants, that:

"If the jury believe, from the evidence, that it is not the custom among wholesale dealers in Chicago, engaged in business as defendants were, to examine sugar of the kind and quality sold by plaintiff to the defendants, upon receiving the same in store, or upon sale of the same to customers, and that it was not customary for such sugar to be examined until opened by dealers to sell from to customers, and that the sugar was damaged when it was delivered, and not of the quality sold them, the jury are to take into consideration all of these facts and things in determining whether defendants gave plaintiff notice, within a reasonable time, to take back said sugar; and if they find therefrom that they did, then they must find for the defendants."

If such was the uniform custom, understood and acted upon by the trade in Chicago, then it is but a fair presumption that the parties acted upon it, and should be governed by it. There was sufficient evidence upon which to base the instruction, and it should have been given.

Appellants asked, but the court refused to give, this instruction:

"If the jury believe, from the evidence, that, according to the well-established usage and custom of trade among wholesale dealers in standard powdered sugar in Chicago, the same is sold and handled in original packages, and no examination is made as to quality or condition thereof upon purchase or sale thereof, and that the plaintiff was familiar with said usage and custom, and had long been in the habit of handling and dealing in said sugar in Chicago, and that the sugars in question were not examined by either parties when taken from plaintiff's store; and if the jury also believe, from the evidence, that said sugar was caked when so taken from plaintiff's store, and not in the condition contemplated by either plaintiff or defendants, and that the defendants dealt with said sugars pursuant to said usage and custom, and that as soon as they found out that said sugar was damaged they offered to return the same, and notified said plaintiff to take same away, and that the plaintiff neglected so to do, and that the same was destroyed by fire while being so held by defendants, subject to the order of said plaintiff, then they must find for the defendants."

In this, we think, the court erred.

It has been frequently held by this court, and the rule seems to be general, that custom and usages of trade are supposed to enter into and form a part of all contracts, where the usage or custom prevails, in reference to the matter to which the contract relates. And if such be the presumption, then it was manifest error to refuse this instruction.

For the wrongful refusal to give these instructions, the judgment of the court below is reversed and the cause remanded.

Judgment reversed.

HOLMES ET AL. *v.* GREGG ET AL.

NEW HAMPSHIRE SUPREME COURT, DECEMBER, 1889.

[*Reported in* 66 *New Hampshire*, 621.]

ASSUMPSIT, for lumber sold and delivered. Pleas, the general issue and a tender. Trial by the court, and a general finding that the sum tendered was sufficient. The plaintiffs are lumber dealers in Chicago, and the defendants are manufacturers of doors, sash, blinds, etc., in Nashua. One of the plaintiffs, being in Nashua soliciting orders, received from the defendants an order for five lots of lumber of different dimensions and prices, all amounting to about $1,000. The lumber sent by the plaintiffs came to the defendants' yard in box-cars, in which it could not be examined. When unloaded and examined, three of the five lots were accepted and used by the defendants, and the others, not conforming to the order in dimensions, quality, quantity, and price, were rejected, and piled in their yard, where they remained subject to the plaintiffs' order. The defendants seasonably informed the plaintiffs of their action, and tendered the price of the accepted lots.

C. W. Hoitt and *Sulloway & Topliff*, for the plaintiffs.

G. B. French, for the defendants.

DOE, C. J. The defendants rightfully inspected and measured the lumber before determining to accept or reject it. Benj. Sales, *ss.* 918, 1042, 1049–1051, 1342, 1343, 1348–1350. Without an express stipulation that the contract was or was not entire, the parties might have understood that it was severable in such a sense that the defendants could accept the lots that conformed to the contract, and reject the rest. In the general finding for the defendants there is no error of law. *Judgment for the defendants.*

ALLEN, J., did not sit: the others concurred.[1]

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[1] See also Chapman *v.* Morton, 11 M. & W. 533; Demens *v.* Le Moyne, 26 Fla. 323; Knoblauch *v.* Kronschnabel, 18 Minn. 300; Pierson *v.* Crooks, 115 N. Y. 539; Hardt *v.* Western Electric Co., 84 N. Y. App. Div. 249; Rheinstrom *v.* Steiner, 69 Ohio St. 452; Sun Publishing Co. *v.* Minnesota Type Co., 22 Ore. 49; Holt *v.* Pie, 120 Pa. 425; Charles *v.* Carter, 96 Tenn. 607; Bell *v.* Anderson, 74 Wis. 638.

PHILADELPHIA WHITING COMPANY *v.* DETROIT LEAD WORKS.

MICHIGAN SUPREME COURT, JUNE TERM, 1885.

[*Reported in* 58 *Michigan*, 29.]

SHERWOOD, J.[1] The plaintiff agreed to sell and the defendant to buy 300 barrels of the best commercial whiting. 300 barrels were shipped by the plaintiff from Philadelphia and received by the defendant in Detroit on September 9. The defendant commenced using the whiting as soon as it arrived, working up two barrels the first day, and from three to four barrels per day until it had used up forty-two barrels and sold them to its customers, who made complaints to the defendant very soon after they received the putty manufactured from the whiting. The defendant made complaint to the plaintiff by letter dated September 21; and on September 30 again wrote: "If we do not hear from you by October 10 we will store the remaining whiting at your expense and risk." On November 24 the defendant wrote that it had stored 258 barrels of the whiting in a storage warehouse where storage and insurance were running against it.

We fail to discover any error in the rulings or charge of the court on the subject of damages. It was the defendant's duty to receive and take charge of the goods when they arrived in Detroit, and he had a right to expect that they would be of the quality ordered; and if the plaintiff failed to furnish the article purchased by the defendant, and promised by plaintiff to be the best commercial whiting, but did furnish an inferior quality, and ship and deliver the same to the defendant at Detroit, as and for the goods promised, without notifying the defendant of the inferior quality of the goods, the plaintiff would be liable, unless the defendant chose to keep the goods, for all necessary charges and expenses in testing the article until defendant found out the difference in quality, and in addition thereto all other necessary, legitimate and approximate damages it sustained, arising directly from the failure of the plaintiff to redeem its promise as to the character of the article delivered. This would include all those expenses incurred in the means taken and things done which would be expected of any careful, prudent business man engaged in the trade under like circumstances. Insurance, freight, cartage and storage paid upon the goods were proper items of damage, and it was not improper to introduce evidence containing the footings of these items as claimed by the defendant. The fifteenth, sixteenth, seventeenth, twentieth and twenty-first assignments of error, all relating to these subjects, cannot, therefore, be sustained.

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[1] The statement of facts in this opinion has been abbreviated and portions of the opinion have been omitted.

I think the following from the charge of Judge Chipman states the law correctly: "If you find for the defendants, I think they are entitled to what, under the undisputed testimony in the case, the cartage, freight and storage amount to, together with the difference in price — in the market price — between what they purchased this whiting for, and what other whiting cost them at that time."

It is claimed the court should have allowed the plaintiff to recover for the value of the forty-two barrels used or sold by defendant in testing the article before he found out its inferiority. Had this been done, simple justice would have required the allowance to the defendant of the damages it sustained in the use it made of the plaintiff's goods in testing the quality, and this, according to the undisputed testimony, was at least $1000, so that it clearly appears the plaintiff has not been injured by the action of the court upon this point complained of. Certainly the defendant derived no benefit from the amount used.

The article appears to have been, however, one which must be used before its quality can be ascertained. It was not apparent upon examination, and in such case it is the right of the defendant to make use of so much thereof as, under all the circumstances, may become actually necessary for that purpose, without liability for the value of the same if it fails in the test to fulfil the plaintiff's contract. The charge of the court submitted this part of the case fairly to the jury in the following paragraph thereof:

"The question arises whether the goods were of such a character that, upon being received by the defendants, they could determine whether the goods were in accordance with the contract or not. If they were such goods that any one could determine by mere inspection of them, the mere sight of them would determine their character, then there would be no difficulty in this case whatever — there would be nothing to leave to you; and if you find they were such goods, then your verdict must be for the plaintiff. But the contention of the defendant is that they are not such goods; that they are of such a character that it is impossible, without actually trying them in the process of manufacture, to determine what kind of goods they are; that the question whether they are the kind of goods ordered at all, or whether they are the quality of goods that were ordered, can only be determined by the process of actual use. Now, you have heard the testimony upon that point, and you are to determine where the truth lies; whether that is so, or whether it is not so. If that is so, then the mere acceptance of the goods would not constitute an acceptance, and the defendants would have the right under the law to go a step further and to try to make experiment as to the quality of the goods, and as to whether they were such as fulfilled the contract which had been made between the parties. Now, in regard to this matter of trial, it must be reasonable; it must be such a trial as under all the circumstances of the case the subject-matter — that is, the goods — rendered necessary. The party cannot go on under the guise of making an experiment for an unreasonable length of time, or use an unreasonable quantity of the goods. The party must act with promptitude, and that promptitude must be reasonable in view of all the circumstances of the case. What would be reasonable promptitude in one case would not be promptitude at all in another case; so that in this case, as in other like cases, your duty will be to determine as to the degree of diligence the defendants used in ascertaining whether this article was the article they had contracted for, and as to whether the quantity which they used was such as did not go beyond a reasonable amount for the purposes of experiment. There were three hundred barrels in all. A certain number of barrels were used; was there too much used? Was the experiment continued so long as to amount to an acceptance of the goods? — as to amount to an actual entering into a use of the goods? All these are questions for you to determine, and you must determine them by the testimony in the case. Now, in regard to the degree of promptitude. If you find that the goods were not up to the mark; if you find that the experiments and the use were such as you would assume to be reasonable — then the next question is, what did the defendants do in regard to the goods? It is claimed by them in testimony, and I think virtually admitted, that they stored the goods and notified the plaintiff that the goods were stored and subject to their order, and that was done shortly after or about the time, as I understand it, that these experiments, as they claim they were, ceased. Now, as I say, they must act promptly. They could not retain the goods for any great length of time after they knew that the goods were bad, and yet, by writing a letter of that kind, absolve themselves from paying for the goods. Neither could they continue their experiments too long, or use too great a quantity in their experiment." Benjamin on Sales, § 655 et seq.

On a review of the whole case — and it is all before us — we find no error in the rulings or charge of the court, and

The judgment should be affirmed.[1]

COOLEY, C. J., and CAMPBELL, J., concurred.

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[1] Compare Lucy *v.* Mouflet, 5 H. & N. 229; Cream City Glass Co. *v.* Friedlander, 84 Wis. 53; Zipp Mfg. Co. *v.* Pastorino, 120 Wis. 176.

OK

SAMUEL M. LAWDER & SONS COMPANY *v.* ALBERT MACKIE GROCERY COMPANY.

MARYLAND COURT OF APPEALS, APRIL 1, 1903.

[*Reported in* 97 *Maryland*, 1.]

BOYD, J.[1] The appellee sued the appellant for breach of a contract by which the appellee agreed to buy and the appellant to sell 700 cases of tomatoes at a fixed price, "Terms cash, less one and one half per cent. Buyer to give shipping instructions when requested by the seller. To be delivered as packed during the season of 1901. F. o. b. Baltimore." The appellant seasonably notified the appellee that the tomatoes were ready to go forward and requested the payment of the price, to which the appellee replied, "Will not pay for the tomatoes until the goods reach us." The appellant refused to deliver on these terms and this action was brought.

It is contended that conceding that the appellant had the right to require the payment in cash, it could only be demanded after the tomatoes reached New Orleans. We are, however, again confronted with the terms of the contract, in passing on that question. It provides "Buyer to give shipping instructions when requested by seller. To be delivered as packed during the season of 1901. F. o. b. Baltimore." There is nothing in that language which would justify us in saying that the cash was not to be paid until the tomatoes reached New Orleans. Indeed there is no express provision in the contract for shipping them to that city. It may be said that it states the residence of the buyer to be at New Orleans, and hence the presumption is that they were to be shipped there. In the absence of some instruction to the contrary from the buyer it may be that the contract should be construed to mean that they were to be shipped to that city, but as the seller was only required to deliver them "f. o. b. Baltimore" and the contract provided for the "Buyer to give shipping instructions when requested by seller" there would be no reason why the seller should not ship them to some other point, if so instructed by the buyer, unless such shipment would impose a greater burden on the seller than shipping them to New Orleans would have done. If, for example, the buyer had sold those tomatoes in bulk to some one in Richmond, there could be no valid reason for the seller sending them to New Orleans and thus require the buyer to pay the freight to that place, and then reship them to Richmond. It would seem therefore to be possible that the tomatoes might never have gone to New Orleans, under the terms of the contract, and hence it is difficult to see how it can be said that the cash was not to be paid until they reached that city.

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[1] The statement of the case is abbreviated, and a portion of the opinion in which the contract is construed, is omitted.

But if it be conceded that the contract contemplated that the shipment should be to New Orleans and not elsewhere, it cannot be denied that if the appellant had placed the tomatoes purchased, in proper condition, on board the cars at Baltimore, with correct shipping instructions, its responsibility would have been at an end. The carrier would then have been the agent of the buyer and the seller would have had no redress against the carrier in case of loss. If the goods had been destroyed or injured, the buyer and not the seller could have held the carrier responsible, so far as there was any responsibility, and if there was none the buyer would have been compelled to sustain the loss. The seller would not even have had a lien on the goods for the purchase-money, and no right but that of stoppage *in transitu*, if circumstances arose that justified the exercise of that right. When then the contract provides for payment of cash and only requires the seller to deliver the goods free on board at Baltimore, why should the seller be required to wait until they arrive at New Orleans before it is entitled to its money? While the terms "f. o. b. Baltimore" required the seller to place, at its own expense, the goods on board in Baltimore, the buyer was required to pay the freight to the carrier and the goods were then at his risk. This contract not only uses the term "f. o. b. Baltimore" but it says "To be delivered as packed during the season of 1901. F. o. b. Baltimore." In the record there is a period after "1901," but the expression "To be delivered," etc., unquestionably refers to and is connected with "f. o. b. Baltimore," and hence shows that the delivery was intended to be there. Although the sale was for cash, a delivery made unconditionally and without fraud or mistake would have vested the title to the goods in the appellee, Foley *v.* Mason, *supra*, and hence such a delivery in Baltimore would have had that effect, and a delivery elsewhere would not have been in accordance with the contract. It seems clear to us then that by the terms of the contract the payment was to be made in Baltimore upon delivery of the tomatoes on board the car and the appellee having refused, as alleged in the pleas, to make such payment, it cannot sustain this action, without in some way meeting the allegations of the pleas. Any other construction would be placing the appellant in a position not contemplated by the contract.

It was conceded by the appellee that a cash sale means a sale for cash to be paid on delivery of the goods, and that as a general rule the place of delivery is the place where the goods are being manufactured; but it is said that this rule is not invariable and may be affected by the situation of the parties, the nature and subject-matter of the contract, and other collateral circumstances which show a different intention, to which courts give effect, and that there is a distinction noted in the authorities between the rules governing deliveries in sales of specific and ascertained chattels and those of goods not in existence, but to be manufactured by the seller to correspond with the description in the contract of sale. It is true that such a distinction is made in the absence of stipulations in the contract which govern the parties, but when the contract itself prescribes the terms and these terms are free from doubt, they must be the guide for Courts in passing on the rights of the parties.

Great stress was placed on the right of the appellee to inspect the goods before acceptance. If it be conceded that it had such right, as it may be, the further question arises as to where, under this contract, it could be exercised. The mere fact that the buyer has the right to inspect goods before acceptance does not necessarily mean that the inspection is to be made at the residence or place of business of the buyer. He might inspect at the seller's place of business, but if the contract provides for delivery at a particular place, he must accept or reject at that place, unless otherwise provided for in the contract. In short a contract to deliver at one place cannot be said to mean delivery at another place, because the buyer lives there and has the right to inspect the goods, and there is no such uncertainty as to the place of delivery in this contract as would justify the Court in holding that it was at New Orleans, because the appellee had its place of business there. An inspection of canned goods at any place away from the canning establishment must be attended with some difficulties. Every can that is opened is doubtless injured for the ordinary purposes of trade, for unless it is speedily sold the fruit or vegetables must soon become worthless. There is nothing in the record to show what the custom is as to inspection and the parties made no special provision in the contract for it, but it is manifest that there could not be an inspection of every can in seven hundred cases at the place to which they were to be shipped. But whatever inspection was to be made could have been done as well at the place from which the goods were shipped as at the point of destination, and it is mainly a question of convenience to the respective parties as to where it shall be made. If they determine that by their contract, it must control, and if it is silent as to inspection but is as clear as this is as to delivery, any inspection that is desired before payment must be made before or at the time of delivery, when the terms are cash.

It was said on behalf of the appellee that the usual method of collecting the purchase-money for such goods is for the vendor to draw on the vendee and not deliver the bill of lading until the draft is paid, but a sufficient answer to that is that it was not the method adopted in this contract. The standing of these parties is not known to us, and we do not mean to reflect upon either of them, but if a vendor wants to relieve himself of all risk of loss, or unfair dealing by a vendee residing at a distance, he has the undoubted right to require payment at the place where the goods are to be shipped from, and not subject himself to the risk of loss or inconvenience by the vendee declining to accept the goods at the place of destination, and when the contract provides for that, as we think this does, the contracting parties are bound by it.

Judgment reversed and a new trial awarded, the costs to be paid by the appellee.[1]

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POLENGHI BROTHERS *v.* DRIED MILK COMPANY, LIMITED.

IN THE KING'S BENCH DIVISION, DECEMBER 7, 1904.

[*Reported in* 49 *Solicitors' Journal,* 120.]

ACTION tried in Commercial Court. The plaintiffs agreed to sell by sample certain milk powders to the defendants. The agreement was dated the 20th of January, 1904, and contained, *inter alia,* the following clause: "Prices to be paid . . . 4½*d.* per lb. c. i. f.[2] London . . . and 6*d.* per lb. c. i. f. London. . . . Payment to be made in London against the shipping or railway documents, or with the vendors' consent by ninety days' bills to be guaranteed by two of the directors of the Dried Milk Co. (Limited), and approved by the vendors . . ." The goods arrived at the railway company's warehouse. The defendants refused payment until the bulk had been inspected.

KENNEDY, J. The goods were arrived goods at the railway company's warehouse. They were goods in respect of which the sellers were in a position to tender to the buyer the shipping documents, and the defendants were not entitled to inspect under section 15 of the Sale of Goods Act, 1893, before payment.

Judgment for plaintiffs.[3]

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[1] Compare Pope *v.* Allis, 115 U. S. 363; Weil *v.* Stone, 69 N. E. Rep. 698 (Ind. App.).

[2] As to the effect of these letters see L. R. 5 H. L. 395, 406.

[3] "Besides the incidents attaching to a contract of sale by sample, and which have been enumerated by my Lord, I think there is also the following, that such a contract always contains an implied term that the goods may under certain circumstances be returned; and that such term necessarily contains certain varying or alternative applications, and, amongst others, the following, that, if the time of inspection, as agreed upon, be different from the place of delivery, the purchaser may, upon inspection at such time and place, if the goods be not equal to sample, return them *then and there* on the hands of the seller. Otherwise the right of inspection given to the purchaser would fail in its primary object;" per Brett, J., in Heilbutt *v.* Hickson, L. R. 7 C. P. 438, 456. See also Herrick *v.* Gallagher, 60 Barb. 566.

WILTSE *v.* BARNES.

IOWA SUPREME COURT, JUNE 12, 1877.

[*Reported in* 46 *Iowa*, 210.]

THIS is an action of replevin which was commenced before a justice of the peace. The justice rendered judgment for plaintiff in the sum of forty-five dollars and costs. Defendant appealed to the Circuit Court, where the cause was submitted upon the following agreed statement of facts:

"That about the first day of September, 1875, defendant, J. C. Barnes, as local agent of the American Express Company, received at the office of said company at Strawberry Point, Iowa, a certain box marked 'dry goods,' billed and marked 'C. O. D. thirteen dollars,' and consigned to plaintiff; that defendant immediately informed plaintiff of the receipt of the box; that plaintiff tendered the amount of express charges, one dollar and fifty cents, and demanded an inspection of the goods, and then claimed that the box contained a human skeleton, the bones of which, before matriculation, were the property of plaintiff; that the same had been left with one W. Mahone, the consignor, in Chicago, Ill., under an agreement between them that said Mahone was to matriculate the same in a good, workmanlike manner, for the sum of fifteen dollars; that plaintiff had paid him five dollars on said agreement, and with the further understanding that the skeleton, when complete, should be shipped to plaintiff by express; that previous to shipment some correspondence had taken place between Mahone and plaintiff in relation to the loss of some of the bones, and an offer on the part of Mahone to supply them for the sum of three dollars; that plaintiff directed said Mahone to supply the lost bones, and when the job was completed to ship the same to him at Strawberry Point, Iowa, by express, C. O. D. Plaintiff then claimed the right to inspect the skeleton contained in the box to ascertain if the bones had been supplied and the matriculation well executed. Defendant then informed plaintiff that it was against the rules and regulations of the express company to allow an inspection of express goods without the consent of the consignor; that defendant immediately telegraphed to consignor for permission to allow plaintiff to inspect the goods; that consignor refused to allow an inspection to be made, and directed that unless plaintiff received the same and paid the amount claimed at once that defendant should ship the same back to consignor; that within a few days thereafter defendant reported to plaintiff the orders and directions of said consignor, and requested him to receive the goods and pay the amount demanded; that plaintiff then offered to place the amount of the claim, viz.: C. O. D. thirteen dollars in money in the hands of defendant, on condition that he could then inspect the goods, and if found to be perfect in its parts and the workmanship good, then the plaintiff to keep the goods and defendant to retain the money, otherwise plaintiff to return the goods and take back the money, and offered to leave the question to defendant to decide whether the parts were all there and the job reasonably well done, at the same time tendering the express charges, one dollar and fifty cents, and leaving the same on defendant's table; that defendant refused to receive the money or allow plaintiff to inspect the goods, and notified plaintiff that he should re-ship the goods to Chicago, according to instructions; plaintiff then notified defendant that he should proceed to replevin the same; that while plaintiff was endeavoring to obtain his writ of replevin defendant placed the box upon an eastern-bound freight train with orders that it be left at some station east and taken up by the next express train; that the officer with the writ of replevin reached the express office before the arrival of the first eastern-bound express train, and that the box was in defendant's hands at the time the writ issued; that the value of the goods was forty-five dollars; that plaintiff's damages, if any, were ten dollars." The court rendered judgment for defendant. Plaintiff appeals.

A. S. Blair, for appellant.

J. H. Peters, for appellee.

DAY, Ch. J. In addition to the foregoing stipulation, it is agreed that the following rule of the express company was admitted in evidence: "No agent, clerk, messenger, or driver is authorized to open for inspection or examination any parcel, box, or bale, accompanied by a C. O. D. collection, until said collection and express charges are paid." The following extract of a circular calling attention of agents to the above rule, dated July 1, 1862, was also admitted: "Our orders from shippers are to transport, collect, deliver, and return the proceeds of their invoices, and, if there are errors, they must be reconciled with and by the shipper. We neither make nor sell the goods, and cannot be held accountable for any discrepancies. This rule may give offence to some unreasonable persons, but a plain explanation should satisfy them that this company should not be censured. If consignees refuse the goods because they are not allowed to make the examination before payment, then they must write the shipper for a change of his order; and under no circumstances are you authorized to allow the examination without the written permission of the shipper or the agent from where the goods came, and if the goods are positively refused, advise that agent at once of the facts, and wait for further orders."

If this rule had been brought home to the knowledge of the shipper, then it would be presumed that he shipped pursuant to its provisions, and with the expectation that it would be observed. There is, however, no proof that the shipper knew of the existence of this rule; still, we think it was competent for him to stipulate as to the terms of shipment, and the conditions under which delivery should be made to the consignee.

It does not appear that any special contract was made at the time of shipment. It is, however, shown that before this action was commenced the consignor refused to allow an inspection of the property to be made, and directed that unless plaintiff received the same and paid the amount at once defendant should ship it back to consignor. After receiving this direction the defendant had no right to deliver the property in violation of the orders of the consignor, nor had the consignee, as against the defendant, a right to the possession of it. The defendant, by obeying the orders of the consignor, did not render himself liable for the value of the property.

The only case cited by appellant which has much direct bearing upon this question is that of Lyons *v.* Hill, 46 N. H. 49. In that case a package of goods was forwarded by a carrier to be paid for on delivery. It was held that the carrier did not render himself liable for the price by furnishing the consignee reasonable opportunity for examination and taking the property back when it was found to be unsatisfactory. In that case there was no proof of a special direction by the consignor not to permit an inspection. We think, under the facts of this case, the defendant is not liable.

Affirmed.[1]

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[1] Compare Louisville Lithographic Co. *v.* Schedler, 23 Ky. L. Rep. 465; Hardy *v.* American Express Co., 182 Mass., 328; Lyons *v.* Hill, 46 N. H. 49; Herrick *v.* Gallagher, 60 Barb. 566.

SECTION II.

WARRANTY.

A.

EXPRESS WARRANTY.

O.K

CHANDELOR *v.* LOPUS.

IN THE EXCHEQUER CHAMBER, EASTER TERM, 1625.

[*Reported in Croke, James,* 4.]

ACTION upon the case. Whereas the defendant being a goldsmith, and having skill in jewels and precious stones, had a stone which he affirmed to Lopus to be a bezoar-stone, and sold it to him for one hundred pounds; *ubi revera* it was not a bezoar-stone: the defendant pleaded not guilty, and verdict was given and judgment entered for the plaintiff in the King's Bench.

But error was thereof brought in the Exchequer Chamber; because the declaration contains not matter sufficient to charge the defendant, viz., that he warranted it to be a bezoar-stone, or that he knew that it was not a bezoar-stone; for it may be, he himself was ignorant whether it were a bezoar-stone or not.

And all the justices and barons (except ANDERSON) held, that for this cause it was error: for the bare affirmation that it was a bezoar-stone, without warranting it to be so, is no cause of action; and although he knew it to be no bezoar-stone, it is not material, for every one in selling his wares will affirm that his wares are good, or the horse which he sells is sound; yet if he does not warrant them to be so, it is no cause of action, and the warranty ought to be made at the same time of the sale; as F. N. B. 94 c. and 98 b., 5 Hen. 7, pl. 41; 9 Hen. 6, pl. 53; 12 Hen. 4, pl. 1; 42 Aff. 8; 7 Hen. 4, pl. 15. Wherefore, forasmuch as no warranty is alleged, they held the declaration to be ill.

ANDERSON to the contrary; for the deceit in selling it for a bezoar, whereas it was not so, is cause of action. — But, notwithstanding, it was adjudged to be no cause, and the judgment was reversed.[1]

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[1] Seixas *v.* Woods, 2 Caines, 48; Swett *v.* Colgate, 20 Johns. 196, *acc.* See 2 Harv. L. Rev. 9; 1 Col. L. Rev. 71.

BUTTERFIELD *v.* BURROUGHS.

IN THE QUEEN'S BENCH, TRINITY TERM, 1706.

[*Reported in* 1 *Salkeld,* 211.]

THE plaintiff declared that the defendant sold him a horse such a day and at such a place, *& adtunc & ibidem warrantizavit equum prædict.*, to be sound, wind and limb, whereupon he paid his money, and avers the horse had but one eye, etc. The defendant pleaded *non warrantizavit;* upon which there was a verdict for the plaintiff; and now in arrest of judgment it was objected, 1st, That the want of an eye is a visible thing, whereas the warranty extends only to secret infirmities.[1] But to this it was answered and resolved by the court, that this might be so, and must be intended to be so, since the jury have found the defendant did warrant. 2d Obj., As the warranty is here set forth, it might be at a time after the sale; whereas it ought to be part of the very contract, and therefore it is always alleged *warrantizando vendidit. Sed non allocatur;* for the payment was afterwards, and it was that completed the bargain, which was imperfect without it.

JENDWINE *v.* SLADE.

AT NISI PRIUS, TRINITY TERM, 1797.

[*Reported in* 2 *Espinasse,* 572.]

THIS was an action brought to recover damages on the sale of two pictures, one of which was said to be a Sea-piece by Claude Lorraine, the other a Fair by Teniers, which the defendant had sold to the plaintiff as originals, when in fact they were copies.

The defence relied on was, that they were sold under a catalogue, not amounting to an absolute warranty, but upon which the buyer was to exercise his own judgment; and further, that a bill had been filed by the defendant two years ago, to compel the plaintiff to complete the sale; to which he had put in no answer, but paid the money, and that he therefore could not now seek to rescind the contract after such acquiescence.

The plaintiff's counsel answered this objection by insisting, that the name of the artist put opposite any picture in a catalogue was a warranty; and if the article sold did not correspond with it, it avoided the sale; and as to the transaction in respect to paying the money, that the plaintiff was deceived, but had brought his action as soon as he discovered the fraud.

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[1] "BRIAN. If a man sells me a horse, and warrants that he has two eyes, if he has not I shall not have an action of deceit for I could know this at the beginning." Y. B. 11 Edw. IV. 6 10.

"And the distinction is taken where I sell a horse that has no eye, there no action lies. Otherwise where he has a counterfeit false and bright eye." Southerne *v.* Howe, 2 Rolle, 5. See also Y. B. 13 Hy. IV. 1. 4.

Several of the most eminent artists and picture dealers were called, who differed in their opinions respecting the originality of the pictures.

When the evidence was closed,

Lord KENYON said: It was impossible to make this the case of a warranty; the pictures were the work of artists some centuries back, and there being no way of tracing the picture itself, it could only be matter of opinion whether the picture in question was the work of the artist whose name it bore, or not. What then does the catalogue import? That, in the opinion of the seller, the picture is the work of the artist whose name he has affixed to it. The action in its present shape must go on the ground of some fraud in the sale. But if the seller only represents what he himself believes, he can be guilty of no fraud. The catalogue of the pictures in question leaves the determination to the judgment of the buyer, who is to exercise that judgment in the purchase.

With respect to the bringing of the action his Lordship added, that if any fraud has been committed in a sale, if the party comes recently after discovery of the deception, he is not barred by circumstances having taken place, such as were stated.

The cause was referred to arbitration.

Erskine and *Lawes*, for the plaintiff.

Law and *Fielding*, for the defendant.

POWER *v.* BARHAM.

IN THE KING'S BENCH, JANUARY 14, 1836.

[*Reported in* 4 *Adolphus & Ellis*, 473.]

ASSUMPSIT. The declaration stated that, in consideration that the plaintiff, at the defendant's request, would buy of him four pictures at a certain price, to wit, &c., the defendant "promised the plaintiff that the said pictures were painted by a certain artist or master in painting, called or named Canaletti, otherwise Canaletto." Breach, that the said pictures "were not, nor was either of them, painted by the said artist or master called or named Canaletti, otherwise Canaletto," whereby the said pictures were and are of little or no use, &c., and the plaintiff lost the benefits, &c. Plea, non assumpsit. On the trial before Coleridge, J., at the sittings in Middlesex after last term, it appeared that the defendant sold the pictures to the plaintiff for £160, and, at the time of the sale, gave the following bill of parcels and receipt: —

Mr. N. Power.
Bought of J. Barham.
May 14th, 1832.

Four pictures, Views in Venice, Canaletto,	£160 00
Settled by two pictures	£ 50 00
And a bill at five months	110 00
	£160 00

J. Barham.

Was this a warranty

A carver and gilder, who had been employed by the plaintiff to procure original pictures for him, gave evidence of previous representations by the defendant to him and to the plaintiff, that the pictures were genuine; some doubt, however, was raised as to the expressions actually used. The witness stated that the pictures were in the manner of Canaletti, and, at the time of the sale, appeared to him worth the money. A witness experienced in paintings stated that he considered the pictures not to be Canaletti's, and valued them at about £8 each; and some other evidence was given on this point. For the defendant it was contended that the bill of parcels was not a warranty, but only an expression of opinion; and Jendwine *v.* Slade, 2 Esp. N. P. C. 572, was cited. The learned judge, in summing up, told the jury that the pictures were admitted not to be Canaletti's, and that the only question on the pleadings was whether the promise was made; and he submitted to their consideration, upon the whole of the evidence, whether the defendant had made a representation, as part of his contract, that the pictures were genuine, not using the name of Canaletti as matter of description merely, or as an expression of opinion upon something as to which both parties were to exercise a judgment, but taking upon himself to represent that the pictures were Canaletti's. His Lordship noticed the argument on behalf of the defendant, as to the bill of parcels; and said that the words of Lord Kenyon, in the case referred to, must be considered, not as a general rule of law, but as a direction to the jury on the circumstances of that case. The jury found a verdict for the plaintiff, saying, "We think the bill of parcels is a warranty."

Lord Denman, C. J. I think that the case was correctly left to the jury. We must take the learned judge to have stated to them that the language of Lord Kenyon in Jendwine *v.* Slade, *supra*, was merely the intimation of his opinion upon such a contract as was then before him. It may be true that, in the case of very old pictures, a person can only express an opinion as to their genuineness; and that is laid down by Lord Kenyon in the case referred to. But the case here is that pictures are sold with a bill of parcels containing the words "Four Pictures, Views in Venice, Canaletto." Now words like these must derive their explanation from the ordinary way in which such matters are transacted. It was, therefore, for the jury to say, under all the circumstances, what was the effect of the words, and whether they implied a warranty of genuineness, or conveyed only a description, or an expression of opinion. I think that their finding was right: Canaletti is not a very old painter.[1] But, at all events, it was proper that the bill of parcels should go to the jury with the rest of the evidence. *Rule refused.*[2]

MARGETSON *v.* WRIGHT.

In the Common Pleas, May 12, 1832.

[*Reported in* 8 *Bingham*, 454.]

The defendant sold the plaintiff a race-horse called "Sampson," which he warranted sound, wind and limb, *at the time of sale.* Some time after the sale, the horse became lame; whereupon the plaintiff sued the defendant upon his warranty, and obtained a verdict.

It appearing, however, that the subsequent lameness was occasioned by a splint, the existence of which was known to the plaintiff at the time of sale, the defendant obtained a rule absolute for a new trial. See 7 Bingh. 603.

Upon the second trial, the plaintiff gave evidence as to the nature and consequences of various kinds of splints; that a splint may or may not be the efficient cause of lameness, according to the position which it occupies, and its size or extent; and that "Sampson's" splint was in a very bad situation, as it pressed upon one of the sinews, and would naturally produce, when the horse was worked, inflammation of the sinew, and consequent lameness.

The jury again found a verdict for the plaintiff, when the learned judge who presided (Vaughan, B.), requesting them to tell him distinctly, whether, in their judgment, the horse was sound; or, if unsound, whether the unsoundness arose from the splint of which evidence had been given; the jury said, "that although the horse exhibited no symptoms of lameness when the contract was made, he had upon him at the time of the contract, the seeds of unsoundness arising from the splint." Whereupon

Wilde, Serjt., obtained a rule *nisi* for a new trial, upon the ground, that the learned Baron ought to have directed a verdict for the defendant.

Spankie, Serjt., showed cause. *Cur. adv. vult.*

Tindal, C. J. This was an action upon a warranty, in which the defendant warranted the horse to be sound, wind and limb, "at this time," — that is, at the time of the warranty made. The jury at the trial found a verdict for the plaintiff. The learned judge requested the jury to tell him distinctly whether, in their judgment, the horse was sound; or, if they believed him to be unsound, whether that unsoundness arose from the splint of which evidence had been given. In answer to which inquiry, the jury said, "That although the horse exhibited no symptoms of *lameness* at the time when the contract was made, he had then upon him the seeds of unsoundness arising from the splint." The question upon this application for a new trial is, Whether this finding of the jury sanctions the verdict for the plaintiff or not; that is, whether the court can see with sufficient clearness that the jury thought that the horse was unsound at the time of the contract, and consequently that the warranty was broken. It appears that the evidence before the jury was, in substance, that a splint might or might not be the efficient cause of lameness, according to the position which it occupied, and its size and extent; that this splint was in a very bad situation, as it pressed upon one of the sinews, and would naturally produce, when the horse was worked, inflammation of the sinew, and consequent lameness. The jury, therefore, drawing their attention to the particular splint to which the evidence related, appear to us to have intended that this individual splint, though it did not at the moment produce lameness, was, at the time of the contract, of that sort and in that situation as to contain, in their language, the seeds of unsoundness, — that is, the efficient cause of the subsequent lameness. If the lameness complained of had proceeded from a new or different splint, or from the old splint taking a new direction in its growth, so as to affect a sinew, not having pressed on one before, such a lameness would not have been within the warranty, for it would not have constituted a present unsoundness at the time of the warranty made. But the jury find that the very splint in question is the efficient cause of lameness. On the former motion, our attention was not called to any evidence, if any such was given, as to the different nature and consequences of splints which the learned judge reports to have been given upon the present occasion; but it now appears that some splints cause lameness, and others do not, and that the consequences of a splint cannot be apparent at the time, like the loss of an eye or any visible blemish or defect, to a common observer. We therefore think that, by the terms of this written warranty, the parties meant this was not a splint at that time which would be the cause of future lameness, and that the jury have found that it was. We therefore think that the warranty was broken, and that the *postea* must be delivered to the plaintiff.

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[1] Canaletti died in 1768, Claude Lorraine and Teniers (the younger), the painters mentioned in Jendwine *v.* Slade, died, the first in 1682, the latter in 1694.

[2] Littledale and Williams, JJ., delivered brief concurring opinions. Coleridge, J., also concurred.

Guaer

dictu
cont

Rg.

Rule discharged.

CYRUS H. McCORMICK AND ANOTHER *v.* J. J. KELLY.

MINNESOTA SUPREME COURT, JULY 15, 1881.

[*Reported in* 28 *Minnesota*, 135.]

APPEAL from order of District Court, county of Brown.

John Lind, for appellant.

B. F. Webber, for respondents.

DICKINSON, J. This action was brought to recover the amount of a promissory note made by the defendant to the plaintiffs for part of the purchase-price of a harvester purchased by the former from the latter. The making of the note is not in issue; the only defence asserted being in the nature of a counter-claim for damages from an alleged breach of warranty, on the part of plaintiffs, in respect to the harvester.

By his answer the defendant avers that he first took the machine on trial, and upon the trial it proved to be unsatisfactory and would not do good work, and that he notified the plaintiffs to take the machine away; whereupon the plaintiffs promised and agreed with the defendant to put the machine in good order; to furnish certain parts of the machine new, and warranted the machine to be well made, of good material, durable, and not liable to break or get out of order; that it would cut and elevate grain as well as any other machine, and was in all respects a first-class machine, and capable of doing first-class and satisfactory work as a harvesting machine; relying upon which promises, agreements, and warranties, defendant purchased the machine, giving the note in question.

The answer further alleges that the plaintiffs refused to put the machine in good order, or to furnish new parts for the machine, and sets forth a breach of the terms of the warranty.

By a reply the plaintiffs put in issue the making of a warranty, as well as the agreement to furnish new parts for the machine. The evidence on the part of the defendant tended to prove that he got the machine for trial before the commencement of the harvest of 1878; that it did not work well, although he used it to cut about 70 acres of grain; that he often made complaint to the agents of the plaintiffs, who urged him to keep the machine, and do the best he could with it; and that after harvest the agent of plaintiffs represented that it was as good a machine as there was in the market, and he would make it so; that it was all right, and would do as good work as any machine in market, and it should be fixed up in first-class order, with the new parts referred to in the answer; that the defendant purchased the machine then, and gave the note, relying, as he testifies, upon the representations made. The evidence tends to show that at this time the defendant knew the defects in the machine of which he now complains.

At the request of the defendant the court instructed the jury as follows: "'If the jury find, from the evidence, that the plaintiffs expressly warranted the machine for which the note in suit was given, and that the defendant was induced by such warranty to execute and deliver said note, the plaintiffs are liable for all damages which the defendant has sustained by reason of the breach of such warranty; and this liability is not affected by the fact that the defendant tried said machine before the making of said warranty." To this the plaintiffs excepted.

At the request of the plaintiffs the court instructed the jury as follows: "I charge you that where a general warranty is given on the sale of a machine, defects that were apparent at the time of making of the bargain, and were fully known to the purchaser, cannot be relied upon as a defence to a note given for such machine, when the purchaser has such knowledge at the time of giving the same. (2) If you find that the machine was taken on trial, under a contract of purchase, and that, after having fully tried it, the defendant gave his note therefor, he cannot offset against any such note damages arising from any alleged breach of warranty against defects known to the defendant at the time of settlement and giving of the note."

The court further instructed the jury in the following language: "A vendor may warrant against a defect that is patent and obvious. . . . You sell me a horse, and you warrant that horse to have four legs, and he has only three. I will take your word for it. [The court then read in the hearing of the jury the following from Addison on Contracts: 'When a general warranty is given on a sale, defects which were apparent at the time of the making of the bargain, and were known to the purchaser, cannot be relied on as a ground of action. If one sells purple to another, and saith to him, "This is scarlet," the warranty is to no purpose, for that the other may perceive this; and this gives no cause of action to him. To warrant a thing that may be perceived at sight is not good.'] Gentlemen, that is not the law of this State."

The court erred in these instructions to the jury. It has always been held that a general warranty should not be considered as applying to or giving a cause of action for defects known to the parties at the time of making the warranty; and both the weight of authority and reason authorize this proposition, viz.: that for representations in the terms or form of a warranty of personal property no action will lie on account of defects actually known and understood by the purchaser at the time of the bargain. Marjetson *v.* Wright, 7 Bing. 603; Dyer *v.* Hargrave, 10 Ves. Jr. 506; Schayler *v.* Russ, 2 Caines' R. 202; Kenner *v.* Harding, 85 Ill. 264; Williams *v.* Ingam, 21 Texas, 300; Marshall *v.* Drawhorn, 27 Ga. 275; Shewalter *v.* Ford, 34 Miss. 417; Brown *v.* Bigelow, 10 Allen, 242; Story on Cont. § 830; Benj. on Sales (2d ed.), 502; Chitty on Cont. (11th Am. ed.), 644.

A warranty, for the breach of the conditions of which an action *ex contractu* for damages can be maintained, must be a legal *contract*, and not a mere naked agreement. It must be a representation of something as a fact, upon which the purchaser relies and by which he is induced, to some extent, to make the purchase, or is influenced in respect to the price or consideration. Oneida Manuf'g Society *v.* Lawrence, 4 Cow. 440; Lindsey *v.* Lindsey, 34 Miss. 432; Blythe *v.* Speake, 23 Texas, 429; Adams *v.* Johnson, 15 Ill. 34; Ender *v.* Scott, 11 Ill. 35; Hawkins *v.* Berry, 5 Gil. 36; 2 Add. on Cont. 626 (Morgan's ed.).

In the nature of things one cannot rely upon the truth of that which he *knows* to be untrue; and to a purchaser fully *knowing* the facts in respect to the property, misrepresentation cannot have been an inducement or consideration to the making of the purchase, and hence could have been no part of the contract.

It has often been said that a general warranty may cover patent defects, and it has led to some misapprehension of the law. The proposition is strictly true; but, as was said by the court in Marshall *v.* Drawhorn, *supra*, it is "confined to those cases of doubt and difficulty where the purchaser relies on his warranty and not on his own judgment." It has no application to the case of a purchaser who *knows* the defects in the property and the untruthfulness of the vendor's representations. We do not, however, mean to say there may not be a warranty against the future consequences or results from even known defects. The fact that a portion of the charge given at the request of the plaintiffs stated correctly the legal principle under consideration, cannot affect the result. In fact, that the instructions to the jury were thus inconsistent, and calculated to mislead or confuse rather than inform and guide the jury, is in itself a sufficient reason why the verdict should not stand. Vanslyck *v.* Mills, 34 Iowa, 375; C., B., & Q. R. Co. *v.* Payne, 49 Ill. 499.

For the reasons already indicated, a new trial must be awarded, and it is unnecessary to consider whether the verdict is supported by the evidence presented in this case; nor is it necessary to consider some other alleged errors involving no doubtful questions of law, and which are not likely to recur upon another trial. Anticipating, however, that upon the retrial, as in the former one, the question may arise as to the authority which an agent empowered to sell machinery of the kind in question may be presumed to possess in respect to the warranting of the property, in the absence of any proof of express authority we will pass upon the question as it is presented by the facts in this case. For the purposes of this case it is sufficient to say that an agent engaged for his principal in the business of selling personal property, is presumed to be authorized to sell with warranty. It may be, however, that if the property be of a kind not usually sold with warranty, no such presumption will be exercised. Nelson *v.* Cowing, 6 Hill, 336; Smith *v.* Tracy, 36 N. Y. 79; Schuchardi *v.*

Allens, 1 Wall. 359; Upton *v.* Suffolk Co. Mills, 11 Cush. 586; Boothby *v.* Scales, 27 Wis. 626; Ahern *v.* Goodspeed, 72 N. Y. 108; Murray *v.* Brooks, 41 Iowa, 45. In the case of such an agent engaged in selling harvesters without proof of express authority to warrant, the court will presume such authority.

The order refusing a new trial is reversed, and a new trial is awarded.[1]

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WOLCOTT, JOHNSON, & CO. *v.* LEWIS D. MOUNT.

NEW JERSEY SUPREME COURT, JUNE TERM, 1873.

[*Reported in* 7 *Vroom,* 262.]

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ON *certiorari* to the Monmouth Pleas, on the trial of an appeal from the judgment of a justice of the peace.

The cause was argued in this court on the following statement of the case:

On the trial of the appeal, Mount, the appellee and plaintiff before the justice, proved that Wolcott, Johnson, & Co. were merchants, keeping a store of general merchandise, in the county of Monmouth, and that, among other articles, they advertised and kept agricultural seeds for sale, and sold seeds. Mount went to their store and asked one of the partners, Bloomfield Wolcott, for early strap-leaf red-top turnip seed, and Wolcott showed him, and sold to him, seed which Wolcott told him was early strap-leaf red-top turnip seed, and sold it to Mount (two pounds) as such, and Mount paid him   cents for the same. Mount sowed the same on   acres of his ground, which he had prepared with care and great expense for the purpose. Mount had been in the habit, year after year, to sow early strap-leaf red-top turnip seed, to produce turnips for the early New York market, such kind and description of turnips yielding a large profit, and he, at time of purchase, stated that he wished this description and kind of seed for that purpose.

The seed sold to Mount by Wolcott was sown upon the ground prepared for same by Mount, and the turnips produced therefrom were not early strap-leaf red-top turnips, but turnips of a different kind and description, to wit, Russia, late, and not salable in market, and only fit for cattle, and he lost his entire crop. The plaintiff proved that the seed sold him by Wolcott was not early strap-leaf red-top turnip seed, but seed of a different kind and description, to wit, Russia turnip seed, and that it produced no profit to him, and that early strap-leaf red-top turnip seed on same ground in other years had produced large profits to Mount, and on adjoining ground, prepared in same way, the same year, had produced great profits to the owner, and that Mount was damaged thereby.

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[1] "Although the general rule is that a warranty will not extend to guard against defects that are plain and obvious to the senses of the purchaser, and which require no skill to detect, this has no application to cases where the vendor uses art to conceal, and does conceal, such defects. Chadsey *v.* Greene, 24 Conn. 562; Robertson *v.* Clarkson, 9 B. Mon. 507; Grant *v.* Shelton, 3 B. Mon. 423; Irving *v.* Thomas, 18 Me. 414. See also Kohl *v.* Lindley, 39 Ill. 201." Kenner *v.* Harding, 85 Ill. 264, 268. See further, Tabor *v.* Peters, 74 Ala. 90; Moncrief *v.* Wilkinson, 93 Ala. 373; Fletcher *v.* Young, 69 Ga. 591; Ragsdale *v.* Shipp, 108 Ga. 817; Hansen *v.* Gaar, 63 Minn. 94; Branson *v.* Turner, 77 Mo. 489; Bennett *v.* Buchan, 76 N. Y. 386; Pinney *v.* Andrus, 41 Vt. 631; French Code Civ. Art. 1642; German Burg. Gesetzbuch, §§ 459, 460.

It is agreed that Wolcott did not know that the seed he sold Mount was not early strap-leaf red-top turnip seed, and that he did not sell the seed to him fraudulently, the said Wolcott having purchased the seed for early strap-leaf red-top turnip seed. It is also agreed that this kind of turnip seed cannot be known and distinguished, by the examination through sight or touch, from Russia or other kinds, but only by the kind of turnips it produces after sowing, can it be known.

The Court of Common Pleas gave judgment for the plaintiff below for $99.12 damages.

Argued at February Term, 1873, before Justices BEDLE, DALRIMPLE, and DEPUE.

For the plaintiff in *certiorari*, *H. G. Clayton.*

For the defendant, *B. Gummere.*

DEPUE, J. The action in this case was brought on a contract of warranty and resulted in a judgment against the defendants in the action for damages.

Two exceptions to the proceedings are presented by the brief submitted. The first touches the right of the plaintiff to recover at all. The second the measure of damages.

Rl 1. In the absence of fraud or a warranty of the quality of an article, the maxim, *caveat emptor*, applies. As a general rule, no warranty of the goodness of an article will be implied on a contract of sale.

Rl. 2.. It has been held by the courts of New York, that no warranty whatever would arise from a description of the article sold. Seixas *v.* Woods, 2 Caines, 48; Snell *v.* Moses, 1 Johns. 96; Sweet *v.* Colgate, 20 Johns. 196. In these cases the defect was not in the quality, but the article delivered was not of the species described in the contract of sale.

acc. In the well known case of Chandelor *v.* Lopus, Cro. Jac. 4, it was decided that a bare affirmation that a stone sold was a bezoar stone, when it was not, was no cause of action. p. 6

The cases cited fairly present the negative of the proposition on which the plaintiff's right of action depends. Chandelor *v.* Lopus was decided on the distinction between actions on the case *in tort* for a misrepresentation, in which a *scienter* must be averred and proved and actions upon the contract of warranty. 1 Smith's Lead. Cas. 283. Chancellor Kent, who delivered the opinion in Seixas *v.* Woods, in his Commentaries expresses a doubt whether the maxim, *caveat emptor*, was correctly applied in that case, inasmuch as there was a description in writing of the article sold, from which a warranty might have been inferred. 2 Kent, 479. And in a recent case before the Commission of Appeals of New York, Earl, C., declared that Seixas *v.* Woods had been much questioned and could no longer be regarded as authority on the precise point. Hawkins *v.* Pemberton, 51 N. Y. 204 In the later English cases some criticism has been made upon the application of the term warranty to representations in contracts of sale, descriptive of articles which are known in the market by such description, per Lord Abinger in Chanter *v.* Hopkins, 4 M. & W. 404; per Erle, C. J., in Bannerman *v.* White, 10 C. B. N. S. 844. But in a number of instances it has been held that statements descriptive of the subject-matter, if intended as a substantive part of the contract, will be regarded in the first instance as conditions, on the failure of which the other party may repudiate *in toto*, by a refusal to accept or a return of the article, if that be practicable, or if part of the consideration has been received, and rescission therefor has become impossible, such representations change their character as conditions and become warranties, for the breach of which an action will lie to recover damages. The rule of law is thus stated by Williams, J., in Behn *v.* Burness, as established on principle and sustained by authority, 3 B. & S. 755.

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In Bridge *v.* Wain, 1 Starkie, 504, no special warranty was proved, but the goods were described as scarlet cuttings, an article known in the market as peculiar to the China trade. In an action for breach of warranty, Lord Ellenborough held that if the goods were sold by the name of scarlet cuttings, and were so described in the invoice, an undertaking that they were such must be inferred. In Allan *v.* Lake, 18 Q. B. 560, the defendant sold to the plaintiff a crop of turnips, described in the sold note as Skirving's Sweedes. The seed having been sown, it turned out that the greater part was not of that kind, but of an inferior kind. It was held that the statement that the seeds were Skirving's Sweedes, was a description of a known article of trade and a warranty. In Josling *v.* Kingsford, 13 C. B. N. S. 447, the purchaser recovered damages upon a contract for the sale of oxalic acid, where the jury found that the article delivered did not, in a commercial sense, come properly within the description of oxalic acid, though the vendor was not the manufacturer, and the vendee had an opportunity of inspection (the defect not being discoverable by inspection), and no fraud was suggested. In Wieler *v.* Schillizzi, 17 C. B. 619, the sale was of "Calcutta linseed." The goods had been delivered, and the action was in form on the warranty implied from the description. The jury having found that the article delivered had lost its distinctive character as Calcutta linseed, by reason of the admixture of a foreign substance, the plaintiff recovered his damages upon the warranty.

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The doctrine that on the sale of a chattel as being of a particular kind or description, a contract is implied that the article sold is of that kind or description, is also sustained by the following English cases: Powell *v.* Horton, 2 Bing. N. S. 668; Barr *v.* Gibson, 3 M. & W. 390; Chanter *v.* Hopkins, 4 M. & W. 399; Nichol *v.* Godts, 10 Exch. 191; Gompertz *v.* Bartlett, 2 E. & B. 849; Azemar *v.* Casella, Law Rep. 2 C. P.

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431, 677; and has been approved by some decisions in the courts of this country. Henshaw *v.* Robins, 9 Metc. 83; Borrekins *v.* Bevan, 3 Rawle, 23; Osgood *v.* Lewis, 2 Harr. & Gill, 495; Hawkins *v.* Pemberton, 51 N. Y. 198.

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The right to repudiate the purchase for the non-conformity of the article delivered, to the description under which it was sold, is universally conceded. That right is founded on the engagement of the vendor, by such description, that the article delivered shall correspond with the description. The obligation rests upon the contract. Substantially, the description is warranted. It will comport with sound legal principles to treat such engagements as conditions in order to afford the purchaser a more enlarged remedy, by rescission, than he would have on a simple warranty; but when his situation has been changed, and the remedy, by repudiation, has become impossible, no reason supported by principle can be adduced, why he should not have upon his contract such redress as is practicable under the circumstances. In that situation of affairs, the only available means of redress is by an action for damages. Whether the action shall be technically considered an action on a warranty, or an action for the non-performance of a contract, is entirely immaterial.

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The contract which arises from the description of an article on a sale by a dealer not being the manufacturer, is not in all respects co-extensive with that which is sometimes implied, where the vendor is the manufacturer, and the goods are ordered by a particular description, or for a specified purpose, without opportunity for inspection, in which case, a warranty, under some circumstances, is implied that the goods shall be merchantable, or reasonably fit for the purpose for which they were ordered. In general, the only contract which arises on the sale of an article by a description, by its known designation in the market, is that it is of the kind specified. If the article corresponds with that description, no warranty is implied that it shall answer the particular purpose in view of which the purchase was made. Chanter *v.* Hopkins, 4 M. & W. 414; Ollivant *v.* Bayley, 5 Q. B. 288; Windsor *v.* Lombard, 18 Peck. 55; Mixer *v.* Coburn, 11 Metc. 559; Gossler *v.* Eagle, &c., Co, 103 Mass. 331. The cases on this subject, so productive of judicial discussion, are classified by Justice Mellor, in Jones *v.* Just, Law Rep., 3 Q. B. 197. Nor can any distinction be maintained between statements of this character in written and in oral contracts. The arguments founded on an apprehension that where the contract is oral, loose expressions of judgment or opinion pending the negotiations, might be regarded as embodied in the contract, contrary to the intentions of parties, is without reasonable foundation. It is always a question of construction or of fact, whether such statements were the expression of a mere matter of opinion, or were intended to be a substantive part of the contract, when concluded. If the contract is in writing, the question is one of construction for the court. Behn *v.* Burness, 3 B. & S. 751. If it be concluded by parol, it will be for the determination of the jury, from the nature of the sale, and the circumstances of each particular case, whether the language used was an expression of opinion, merely leaving the buyer to exercise his own judgment, or whether it was intended and understood to be an undertaking which was a contract on the part of the seller. Lomi *v.* Tucker, 4 C. & P. 15; De Sewhanberg *v.* Buchanan, 5 C. & P. 343; Power *v.* Barham, 4 A. & E. 473. In the case last cited, the vendor sold by a bill of parcels, "four pictures, views in Venice — Canaletto;" it was held that it was for the jury to say, under all the circumstances, what was the effect of the words, and whether they implied a warranty of genuineness, or conveyed only a description or an expression of opinion, and that the bill of parcels was properly laid before the jury with the rest of the evidence.

The purchaser may contract for a specific article, as well as for a particular quality, and if the seller makes such a contract, he is bound by it. The state of the case presented shows that the plaintiff inquired for seed of a designated kind, and informed the defendants that he wanted it to raise a crop for the New York market. The defendants showed him the seed, and told him it was the kind he inquired for, and sold it to him as such. The inspection and examination of the seed were of no service to the plaintiff. The facts and circumstances attending the transaction were before the court below, and from the evidence, it decided that the proof was sufficient to establish a contract of warranty. The evidence tended to support that conclusion, and this court cannot, on *certiorari*, review the finding of the court below, on a question of fact, where there is evidence from which the conclusion arrived at may be lawfully inferred.[1]

NOTE. — In Kenner *v.* Harding, 85 Ill. 264, 268, the court said: "In determining whether there was in fact a warranty, the decisive test is, whether the vendor assumes to assert a *fact* of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected, also, to have an opinion and to exercise his judgment. In the former case, there is a warranty; in the latter, not. Benjamin on Sales, 454. And this is substantially the rule recognized by this court in Adams *v.* Johnson, 15 Ill. 345."

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In Stroud *v.* Pierce, 6 Allen, 413, 416, the court said: "The second exception relates to the ruling of the judge, that 'a representation that a pianoforte is well made and will stand up to concert pitch is a representation of fact, which, if proved to be false, as between a seller making the representation and a buyer relying upon it, would authorize the buyer to recover,' &c. The word 'representation' was undoubtedly used here as synonymous with affirmation; and there can be no doubt that such an affirmation is a warranty. It relates to the quality of the article, and is like an affirmation that a horse is sound and will work well in a harness. The defendant contends that it should have been left to the jury to find whether this language was used with the intention of affirming the fact, or of expressing an opinion. But the intent of the party is immaterial. The legal proposition stated by the judge was correct."

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See further to the same effect. Ormsby *v.* Budd, 72 Ia. 80; McClintock *v.* Emick, 87 Ky. 160; Hawkins *v.* Pemberton, 51 N. Y. 198; Fairbanks Canning Co. *v.* Metzger, 118 N.Y. 260; Ingraham *v.* Union R. R. Co., 19 R. I. 356; Herron *v.* Dibbrell, 87 Va. 289.

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[1] A portion of the opinion is omitted which held that the plaintiff had been rightly allowed to recover as damages the profits he would have made, the defendants having had notice of the use to which the seed was to be put, and the amount of profit being susceptible of proof.

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HOLMES, APPELLANT, v. TYSON.

PENNSYLVANIA SUPREME COURT, JANUARY 25, 1892.

[*Reported in* 147 *Pennsylvania State*, 305.]

PER CURIAM. This was an action brought for a breach of warranty in the sale of a horse. The learned judge below directed a nonsuit, for the reason that the evidence was not sufficient to show a warranty. In this we think he was right. At the time the transaction was closed, and the money paid, there was no warranty. On the contrary, the plaintiff said to the defendant: "I have nothing to show that you warrant this horse as you represent him," to which the defendant replied: "The horse is just the same as when you drove him on Monday." This is very far from being a warranty. It was, at most, an assertion that the horse was in the same condition as on the previous Monday, and there was nothing in the case to show that it was not true. There was evidence of previous statements having been made to the plaintiff, that the horse was kind, sound, and gentle, but the defendant did not warrant him to be so. It was held in Jackson v. Wetherill, 7 S. & R. 480, that an assertion by the vendor to the vendee, at the time of selling a mare, that he is sure she is safe, and kind, and gentle in harness, amounts only to a representation, and does not constitute a warranty, or express promise that she is so. In McFarland v. Newman, 9 Watts, 55, the action was assumpsit on an alleged warranty in the sale of a horse, and the court below charged the jury that "a positive averment, made by the defendant at the time of the contract, is a warranty; that it is a part, or parcel, of the contract." This ruling was reversed in this court, Gibson, C. J., saying in his opinion: "As the cause goes back to another jury, it is proper to intimate the principle on which a correct decision of it must depend. Though, to constitute a warranty requires no particular form of words, the naked averment of a fact is neither a warranty of itself nor evidence of it. In connection with other circumstances, it certainly may be taken into consideration; but the jury must be satisfied, from the whole, that the vendor actually, and not constructively, consented to be bound for the truth of his representation. Should he have used expressions fairly importing a willingness to be thus bound, it would furnish a reason to infer that he had intentionally induced the vendee to treat on that basis; but a naked affirmation is not to be dealt with as a warranty, merely because the vendee had gratuitously relied on it; for not to have exacted a direct engagement, had he desired to buy on the vendor's judgment, must be accounted an instance of folly. Testing the vendor's responsibility by these principles, justice will be done without driving him into the toils of an imaginary contract."

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We have quoted this extract from the opinion in McFarland v. Newman, because it bears upon another point. It was contended, in the case in hand, that the question whether there was a warranty should have been submitted to the jury. As the warranty, if any, is to be found in the oral testimony, it would undoubtedly be the province of the jury to determine it, if there was a conflict of evidence. Had the language used been equivocal; had the one party asserted a warranty, and the other denied it, the matter should have been submitted to the jury. But the plaintiff's own testimony showed there was no warranty. There was the mere assertion of a fact, which the cases cited show was not a warranty, nor the evidence of one. Under such circumstances, it would have been the duty of the court to instruct the jury that, upon the undisputed facts, there was not sufficient evidence of a warranty. As the action was upon a warranty, and no warranty was shown, the learned judge did not err in directing a nonsuit.

Judgment affirmed.[1]

JOSEPH H. ROGERS *v.* FRANKLIN WOODRUFF ET AL.

OHIO SUPREME COURT, DECEMBER TERM, 1873.

[*Reported in* 23 *Ohio State,* 632.]

ERROR to the Superior Court of Cincinnati.

Franklin Woodruff and others, the plaintiffs in the Superior Court, sued to recover the price of eight hundred and eighty-three sacks of Liverpool salt they alleged they had sold and delivered to the defendant, at $2.10 per sack. The defendant met this demand by a counterclaim, by which he alleged that, on the 13th day of October, 1862, he made a contract in writing with George W. Phillips, who was the duly authorized agent of plaintiffs, in that behalf, by which contract, plaintiffs sold to the defendant one thousand sacks coarse Liverpool, and two thousand sacks fine Liverpool salt, at two ten one-hundredths dollars per sack, all of which was to be delivered by the 15th day of November, then next ensuing, to be paid for by the defendant upon the delivery thereof.

He further averred that the plaintiffs failed to deliver any of said salt by the 15th of November; that for some time after that date he was ready and willing to receive the same, and so notified plaintiffs; that between that date and December 8th, they did deliver the eight hundred and eighty-three sacks mentioned in the petition; that failing to deliver the remainder he, on December 8th, notified them he would not receive any more, but should hold them responsible in damages. He claimed damages at the rate of ninety cents per sack for the salt not delivered.

The plaintiffs replied, denying that they contracted to deliver the salt by November 15th, and averring, among other things, that the contract made by them with defendant was conditional — the salt being sold to arrive, and being expected to arrive; that none of it did arrive by the time named, and that the contract was therefore determined; but that salt having advanced, defendant continued to receive it as it arrived until December 8th, when, salt having declined, he refused to receive any more.

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[1] A doctrine somewhat similar to that held by the Pennsylvania court is held in House *v.* Fort, 4 Blackf. 294; Jones *v.* Quick, 28 Ind. 125; Kircher *v.* Conrad, 9 Mont. 191; Enger *v.* Dawley, 62 Vt. 164. (*Conf.* Hobart *v.* Young, 63 Vt. 363.) See also Horton *v.* Green, 66 N. C. 596.

Upon the trial plaintiffs admitted that salt, such as described in the contract, on November 15, 1862, was worth three dollars per sack. On December 8th, it had fallen below contract price.

The contract, put in evidence by defendant, was in these words:

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CINCINNATI, October 13, 1862.

Sold J. H. Rogers one thousand sacks coarse Liverpool, and two thousand sacks fine Liverpool salt at $2.10 per sack, to arrive by the 15th November. GEORGE W. PHILLIPS, JR.

It further appeared that the salt called for by the contract did not arrive by November 15th; that portions of it did arrive, and were delivered to the defendant, as the same arrived, between November 15th and December 8th.

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Defendant called witnesses, and offered to prove that by the general custom of merchants, the phrase "to arrive by the 15th November," meant "deliverable on or before the 15th of November." This testimony was objected to and excluded, and defendant excepted.

The case was tried by the court without a jury. The court held the defendant not entitled to recover on his counter-claim, and rendered judgment for plaintiffs, as demanded in the petition, for the value, at the contract price, of the salt delivered.

The defendant moved for a new trial, which being overruled, he took a bill of exceptions setting out all the testimony.

It is now insisted on his behalf:

1. That the contract was not conditional. but absolute; and that by its terms plaintiffs were bound to deliver the salt by November 15th.

2. That it was competent for the defendant to show that by the custom of merchants, the terms "to arrive by 15th November," meant "deliverable by 15th of November."

D. Thew Wright, for plaintiff in error.

Henry Snow, for defendants in error.

STONE, J. The counter-claim of the defendant below is based upon an executory contract made October 13, 1862, by which, as defendant alleges, the plaintiffs sold and contracted to deliver to him by the 15th of November, then next ensuing, 3,000 sacks of Liverpool salt. This allegation of the counter-claim is denied by the reply, and is not, in our judgment, supported by the contract given in evidence.

Held.

Effect is, of course, to be given to the words of the contract, "to arrive by the 15th of November," but the question is, what effect? They are, as we think, words of condition and description only, and cannot be construed as a warranty that the salt shall arrive.

They serve to distinguish the salt which was the subject of the contract from the mass of salt of the same variety found in the market. The salt plaintiffs contracted to sell and defendants to buy, was not salt which plaintiffs may then have had on hand, or salt which had previously arrived. It was salt which was to arrive between the date of the contract and the 15th of November following. Whether it would arrive or not depended upon contingencies, not absolutely within the control of either party. If it arrived within the time limited, plaintiffs were impliedly bound to deliver it upon the contract. If it failed to arrive within that time no such obligation arose. There was, in that case, no salt which, under the terms of the contract, the plaintiffs were bound to deliver or the defendant to accept.

Cases have frequently arisen involving the construction of contracts, in their essential features, not to be distinguished from the contract here in question. It has uniformly been held that contracts of this description — for the sale of goods to arrive — are conditional, the words "to arrive," or other equivalent words, not importing a warranty that the goods will arrive, and the obligation to perform the contract by an actual transfer of the property being, therefore, in the absence of other words showing a contrary intent, contingent upon its arrival. Alewyn *v.* Pryor, Ryan & Moody, 404; Lovatt *v.* Hamilton, 5 M. & W. 639; Johnston *v.* Macdonald, 9 M. & W. 600; Shields *v.* Pettee, 2 Sand. 262.[1] See also Russell *v.* Nicol, 3 Wend. 112; Benj. on Sales, 470; 1 Parsons on Cont., title "Of Sales to Arrive," and cases cited.

In the present case, it is not alleged that any of the salt referred to in the contract arrived, or came within the control of the plaintiffs prior to the 15th of November, nor is it claimed that its arrival was delayed by their agency. The defendant counts upon the contract as made, and bases his claim to recover solely upon the ground that the plaintiffs, by its terms, stipulated absolutely, and at all events, to deliver the salt within the time limited.

2. The testimony offered by defendant to show that by the custom of merchants, the words "to arrive by the 15th of November," meant "deliverable on or before the 15th of November," tended materially to change the meaning and legal effect of the contract, and was clearly incompetent. *Judgment affirmed.*

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[1] Neldon *v.* Smith, 36 N. J. L. 148, *acc.* Compare Abe Stein Co. *v.* Robertson, 167 N. Y. 101.

B.

IMPLIED WARRANTY.

(*a*) WARRANTY OF TITLE.

MORLEY *v.* ATTENBOROUGH.

IN THE EXCHEQUER, FEBRUARY 17, 1849.

[*Reported in* 3 *Exchequer*, 500.]

PARKE, B. This case was argued some time ago before my Lord Chief Baron, my Brothers Rolfe, Platt, and myself, and stood over for our consideration. The plaintiff brought an action of assumpsit, stating that in consideration that the plaintiff would buy a harp for a certain sum, the defendant promised that he, the defendant, had lawful right to sell it, and the breach assigned was that he had not.

It appeared on the trial, before my Brother Platt, that the defendant, who was a pawnbroker, had the harp pledged with him in the way of his business, and, the time having elapsed for its redemption, and the pledge being unredeemed, offered it for sale through certain auctioneers, who sold it to the plaintiff. It turned out that the harp had been pledged to the defendant by a person who had no title to it, and the real owner obliged the plaintiff to give it up, after it had been delivered to him by the defendant. But, of the want of title of the pawner to it, the defendant was ignorant, and there was no express warranty. My Brother Platt directed a verdict for the plaintiff, reserving leave to move to enter a nonsuit.

On showing cause, the case was fully argued, and every authority cited and commented upon on both sides, bearing on the question, whether there is an implied warranty of title in the contract of sale of an article, or under what circumstances there is a liability on the part of the vendor to make good a loss by defect of title.

It is very remarkable that there should be any doubt, as that, certainly, is a question so likely to be of common occurrence, especially in this commercial country. Such a point, one would have thought, would not have admitted of any doubt. The bargain and sale of a specific chattel, by our law (which differs in that respect from the civil law), undoubtedly transfers all the property the vendor has, where nothing further remains to be done according to the intent of the parties to pass it. But it is made a question, whether there is annexed by law to such a contract, which operates as a conveyance of the property, an implied agreement on the part of the vendor, that he has the ability to convey. With respect to *executory* contracts of purchase and sale, where the subject is unascertained, and is afterwards to be conveyed, it would probably be implied that both parties meant that a good title to that subject should be transferred, in the same manner as it would be implied, under similar circumstances, that a merchantable article was to be supplied. Unless goods, which the party could enjoy as his own, and make full use of, were delivered, the contract would not be performed. The purchaser could not be bound to accept if he discovered the defect of title before delivery, and if he did, and the goods were recovered from him, he would not be bound to pay, or, having paid, he would be entitled to recover back the price, as on a consideration which had failed. But when there is a bargain and sale of a specific ascertained chattel, which operates to transmit the property, and nothing is said about title, what is the legal effect of that contract? Does the contract necessarily import, unless the contrary be expressed, that the vendor has a good title? or has it merely the effect of transferring such title as the vendor has? According to the Roman law (vide Domat, Book 1, tit. 2, s. 2, art. 3), and in France (Code Civil, chap. 4, sect. 1, art. 1603), and Scotland, and partially in America (1 Johns. Rep. 274; Broom's Maxims, 628, where this subject is well discussed), there is always an implied contract that the vendor has the right to dispose of the subject which he sells (Bell on Sale, 94); but the result of the older authorities is, that there is by the law of England no warranty of title in the actual contract of sale, any more than there is of quality. The rule of *caveat emptor* applies to both; but if the vendor knew that he had no title, and concealed that fact, he was always held responsible to the purchaser as for a fraud, in the same way that he is if he knew of the defective quality. This rule will be found in Co. Litt. 102 a; 3 Rep. 22 a; Noy, Max. 42; Fitz. Nat. Brev. 94 c, in Springwell *v.* Allen, Aleyn, 91, cited by Littledale, J., in Early *v.* Garrett, 9 B. & C. 932, and in Williamson *v.* Allison, 2 East, 449, referred to in the argument. The same principle applies to transfer by deed. Lord Hale says, "Though the words 'assign, set over, and transfer,' do not amount to a covenant against an eign title, yet, as against the covenantor himself, it will amount to a covenant against all claiming under him" (Deering *v.* Farrington, 3 Keb. 304, which was an assignment of a chose in action).

It may be, that as in the earlier times the chief transactions of purchase and sale were in markets and fairs, where the *bona fide* purchaser without notice obtained a good title as against all except the Crown (and afterwards a prosecutor, to whom restitution is ordered by the 21 Hen. 8, c. 11), the common law did not annex a warranty to any contract of sale. Be that as it may, the older authorities are strong to show that there is no such warranty implied by law from the mere sale. In recent times a different notion appears to have been gaining ground (see note of the learned editor to 3 Rep. 22 a); and Mr. Justice Blackstone says, "In contracts for sale it is constantly understood that the seller undertakes that the commodity he sells is his own;" and Mr

Wooddeson, in his Lectures, vol. 2, p. 415, goes so far as to assert that the rule of *caveat emptor* is exploded altogether, which no authority warrants.

At all times, however, the vendor was liable if there was a warranty in fact; and at an early period, the affirming those goods to be his own by a vendor in possession, appears to have been deemed equivalent to a warranty. Lord Holt, in Medina *v.* Stoughton, 1 Salk. 210; Ld. Raym. 593, says, that "where one in possession of a personal chattel sells it, the bare affirming it to be his own amounts to a warranty;" and Mr. Justice Buller, in Pasley *v.* Freeman, 3 T. R. 57, disclaims any distinction between the effect of an affirmation, when the vendor is in possession or not, treating it as equivalent to a warranty in both cases.

Some of the text writers drop the expression of "warranty" or "affirmation," and lay down in general terms, that if a man sells goods as his own, and the title is deficient, he is liable to make good the loss, 2 Black. Com. 451; the commentator cites, for that position, Cro. Jac. 474, and 1 Roll. Abr. 70, in both which cases there was an allegation that the vendor affirmed that he had a title, and therefore it would seem, that the learned author treated the expression, "selling as his own," as equivalent to an affirmation or warranty. So Chancellor Kent, in 2 Com. 478, says, "that in every sale of a chattel, if the possession be in another, and there be no covenant or warranty of title, the rule of *caveat emptor* applies, and the party buys at his peril; but if the seller has possession of the article, and he sells it at his own, and for a fair price, he is understood to warrant the title." From the authorities in our law, to which may be added the opinion of the late Lord Chief Justice Tindal, in Ormrod *v.* Huth, 14 M. & W. 664, it would seem that there is no implied warranty of title on the sale of goods, and that if there be no fraud, a vendor is not liable for a bad title, unless there is an express warranty, or an equivalent to it, by declarations or conduct; and the question in each case, where there is no warranty in express terms, will be, whether there are such circumstances as to be equivalent to such a warranty. Usage of trade, if proved as a matter of fact, would, of course, be sufficient to raise an inference of such an engagement; and without proof of such usage, the very nature of the trade may be enough to lead to the conclusion, that the person carrying it on must be understood to engage that the purchaser shall enjoy that which he buys, as against all persons. It is, perhaps, with reference to such sales, or to executory contracts, that Blackstone makes the statement above referred to.

Similar questions occur in cases as to the quality of goods, in which it is clear there is, by law, no implied warranty; yet, if goods are ordered of a tradesman, in the way of his trade, for a particular purpose, he may be considered as engaging that the goods supplied are reasonably fit for that purpose. We do not suppose that there would be any doubt, if the articles are bought in a shop professedly carried on for the sale of goods, that the shopkeeper must be considered as warranting that those who purchase will have a good title to keep the goods purchased. In such a case the vendor sells "as his own," and that is what is equivalent to a warranty of title. But in the case now under consideration, the defendant can be made responsible only as on a sale of a forfeited pledge *eo nomine.* Though the harp may not have been distinctly stated in the auctioneer's catalogue to be a forfeited pledge, yet the auctioneer had no authority from the defendant to sell it except as such. The defendant, therefore, cannot be taken to have sold it with a more extensive liability than such a sale would have imposed upon him; and the question is, whether on such a sale, accompanied with possession, there is any assertion of an absolute title to sell, or only an assertion that the article has been pledged with him, and the time allowed for redemption has passed. On this question we are without any light from decided cases.

In our judgment, it appears unreasonable to consider the pawnbroker, from the nature of his occupation, as undertaking anything more than that the subject of sale is a pledge and irredeemable, and that he is not cognizant of any defect of title to it. By the statute law (see 1 Jac. 1, c. 21), he gains no better title by a pledge than the pawner had; and as the rule of the common law is, that there is no implied warranty from the mere contract of sale itself, we think, that where it is to be implied from the nature of the trade carried on, the mode of carrying on the trade should be such as clearly to raise that inference. In this case we think it does not. The vendor must be considered as selling merely the right to the pledge which he himself had; and therefore we think the rule must be absolute.

Since the argument, we find that there was a count for money had and received, as well as the count on the warranty, in the declaration. But the attention of the judge at the trial was not drawn to this count, nor was it noticed on the argument in court.

It may be, that though there is no implied warranty of title, so that the vendor would not be liable for a breach of it to unliquidated damages, yet the purchaser may recover back the purchase-money, as on a consideration that failed, if it could be shown that it was the understanding of both parties that the bargain should be put an end to if the purchaser should not have a good title. But if there is no implied warranty of title, some circumstances must be shown to enable the plaintiff to recover for money had and received. This case was not made at the trial, and the only question is, whether there is an implied warranty. *Rule absolute.*

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EICHHOLZ *v.* BANNISTER.

IN THE COMMON PLEAS, NOVEMBER 17, 1864.

[*Reported in* 17 *Common Bench, New Series,* 708.]

ERLE, C. J. I am of opinion that this rule should be discharged. The plaintiff brings his action to recover back money which he paid for goods bought by him in the shop of the defendant, which were afterwards lawfully claimed from him by a third person, the true owner, from whom they had been stolen. The plaintiff now claims to recover back the money as having been paid by him upon a consideration which has failed. The jury at the trial found a verdict for the plaintiff, under the direction of the learned judge who presided; and a rule has been obtained on behalf of the defendant to set aside that verdict and to enter a nonsuit, on the ground that it is part of the common law of England that the vendor of goods by the mere contract of sale does not warrant his title to the goods he sells, that the buyer takes them at his peril, and that the rule *caveat emptor* applies. The case has been remarkably well argued on both sides; and the court are much indebted to the learned counsel for the able assistance they have rendered to them. The result I have arrived at is that the plaintiff is entitled to retain his verdict. I consider it to be clear upon the ancient authorities, that, if the vendor of a chattel by word or conduct gives the purchaser to understand that he is the owner, that tacit representation forms part of the contract, and that, if he is not the owner, his contract is broken. So is the law laid down in the very elaborate judgment of Parke, B., in Morley *v.* Attenborough, 3 Exch. 500, 513, where that learned judge puts the case upon which I ground my judgment. A difference is taken in some of the cases between a warranty and a condition; but that is foreign to the present inquiry. In Morley *v.* Attenborough, Parke, B., says: "We do not suppose that there would be any doubt, if the articles are bought in a shop professedly carried on for the sale of goods, that the shopkeeper must be considered as warranting that those who purchase will have a good title to keep the goods purchased. In such a case the vendor sells 'as his own,' and that is what is equivalent to a warranty of title." No doubt, if a shopkeeper in words or by his conduct affirms at the time of the sale that he is the owner of the goods, such affirmation becomes part of the contract, and, if it turns out that he is not the owner, so that the goods are lost to the buyer, the price which he has received may be recovered back. I ventured to throw out some remarks in the course of the argument upon the doctrine relied on by Mr. Holker, which he answered by assertion after assertion coming no doubt from judges of great authority in the law, to the effect that upon a sale of goods there is no implied warranty of title. The passage cited from Noy certainly puts the proposition in a manner that must shock the understanding of any ordinary person. But I take the principle intended to be illustrated to be this, — I am in possession of a horse or other chattel: I neither affirm or deny that I am the owner; if you choose to take it as it is, without more, *caveat emptor;* you have no remedy, though it should turn out that I have no title. Where that is the whole of the transaction, it may be that there is no warranty of title. Such seems to have been the principle on which Morley *v.* Attenborough was decided. The pawnbroker, when he sells an unredeemed pledge, virtually says, — I have under the provisions of the statute a right to sell. If you choose to buy the article, it is at your own peril. So, in the case of the sale by the sheriff of goods seized under a *fi. fa.*, — Chapman *v.* Speller, 14 Q. B. 621 (E. C. L. R. vol. 68). The fact of the sale taking place under such circumstances is notice to buyers that the sheriff has no knowledge of the title to the goods; and the buyers consequently buy at their own peril. Many contracts of sale tacitly express the same sort of disclaimer of warranty. In this sense it is that I understand the decision of this court in Hall *v.* Conder, 2 C. B. N. S. 22 (E. C. L. R. vol. 89). There, the plaintiff merely professed to sell the patent-right such as he had it, and the 3. court held that the contract might still be enforced, though the patent was ultimately defeated on the ground of want of novelty. The thing which was the subject of the contract there was not matter, it was rather in the nature of mind. These are some of the cases where the conduct of the seller expresses at the time of the contract that he merely contracts to sell such a title as he himself has in the thing. But, in almost all the transactions of sale in common life, the seller by the very act of selling holds out to the buyer that he is the owner of the article he offers for sale. The sale of a chattel is the strongest act of dominion that is incidental to ownership. A purchaser under ordinary circumstances would naturally be led to the conclusion, that, by offering an article for sale, the seller affirms that he has title to sell, and that the buyer may enjoy that for which he parts with his money. Such a case falls within the doctrine stated by Blackstone, and is so recognized by Littledale, J., in Early *v.* Garrett, 9 B. & C. 928 (E. C. L. R. vol. 17), 4 M. & R. 687, and by Parke, B., in Morley *v.* Attenborough, *supra*. I think justice and sound sense require us to limit the doctrine so often repeated, that there is no implied warranty of title on the sale of a chattel. I cannot but take notice, that, after all the research of two very learned counsel, the only semblance of authority for this doctrine from the time of Noy and Lord Coke consists of mere *dicta*. These *dicta*, it is true, appear to have been adopted by several learned judges, amongst others by my excellent Brother Williams, whose words are almost obligatory on me; but I cannot find a single instance in which it has been more than a repetition of barren sounds, never resulting in the fruit of a judgment. This very much tends to show the wisdom of Lord Campbell's remark in Sims *v.* Marryat, 17 Q. B. 291 (E. C. L. R. vol. 79), that the rule is beset with so many exceptions that they well nigh eat it up. It is to be hoped that the notion which has so long prevailed will now pass away, and that no further impediment will be placed in the way of a buyer recovering back money which he has parted with upon a consideration which has failed. *Rule discharged.*[1]

NOTE. — In Raphael *v.* Burt, Cab. & Ellis, 325, it was held broadly by Stephen, J., that a sale of personal property implies an affirmation of title. See also Page *v.* Cowasjee Eduljee, L. R. 1 P. C. 127, 144; Bagnlley *v.* Hawley, L. R. 2 C. P. 625.

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In the United States the distinction between sales of property in the vendor's possession and sales of property in the possession of a third person, upheld by Holt, J., in Medina *v.* Stoughton, 1 Salk. 210, 1 Ld. Raym. 593, and denied by Buller, J., in Pasley *v.* Freeman, 3 T. R. 51, has found some support. It is universally held that where the vendor is in possession a warranty of title is implied.. Williamson *v.* Sammons, 34 Ala. 691; Lindsay *v.* Lamb, 24 Ark. 224; Gross *v.* Kierski, 41 Cal. 111; Starr *v.* Anderson, 19 Conn. 338; Lines *v.* Smith, 4 Fla. 47; Morris *v.* Thompson, 85 Ill. 16; Marshall *v.* Duke, 51 Ind. 62; Paulsen *v.* Hall, 39 Kan. 365; Maxfield *v.* Jones, 76 Me. 135, 137; Rice *v.* Forsyth, 41 Md. 389; Shattuck *v* Green, 104 Mass. 42; Hunt *v.* Sackett, 31 Mich. 18; Davis *v.* Nye, 7 Minn. 414; Storm *v.* Smith, 43 Miss. 497; Matheny *v.* Mason, 73 Mo. 667; Hall *v.* Aitkin, 25 Neb. 360; Sargent *v.* Currier, 49 N. H. 310; Wood *v.* Sheldon, 42 N. J. L. 421; Gould *v.* Bourgeois, 51 N. J. L. 361; Cohen *v.* Ammidown, 120 N. Y. 398; Inge *v.* Bond, 3 Hawks, 101; Krumbhaar *v.* Birch, 83 Pa. 426; Colcock *v.* Goode, 3 McC. 513; Word *v.* Cavin, 1 Head, 506; Gilchrist *v.* Hilliard, 53 Vt. 592; Byrnside *v.* Burdett, 15 W. Va. 702; Edgerton *v.* Michels, 66 Wis. 124. On the other hand, where a sale is made by a judicial officer, auctioneer, mortgagee, or other person, of property belonging legally or equitably to a third person, it is well settled that no such warranty is implied. The Monte Allegre, 9 Wheat. 616; Ricks *v.* Dillahunty, 8 Port. 133; Bingham *v.* Maxcy, 15 Ill. 295, Neal *v.* Gillaspy, 56 Ind. 451; Harrison *v.* Shanks, 13 Bush, 620; Mockbee's Adm. *v.* Gardner, 2 Harr. & G. 176; Storm *v.* Smith, 43 Miss. 497; Hensley *v.* Baker, 10 Mo. 157; Baker *v.* Arnot, 67 N. Y. 448; Hicks *v.* Skinner, 71 N. C. 539; Corwin *v.* Benham, 2 Ohio St. 36; Bostick *v.* Winton, 1 Sneed, 524. Further it has been frequently said and sometimes decided that there is no implied warranty when the vendor is out of possession. Huntingdon *v.* Hall, 36 Me. 501; Long *v.* Hickingbottom, 28 Miss. 773; Storm *v.* Smith, *supra*; Edick *v.* Crim, 10 Barb. 445; Hopkins *v.* Grinnell, 28 Barb. 533, 537; Scranton *v.* Clark, 39 N. Y. 220; Andres *v.* Lee, 1 Dev. & Bat. Eq. 318; Scott *v.* Hix, 2 Sneed, 192. But this has been doubted. In Gould *v.* Bourgeois, *supra*, Depue, J., delivering the opinion of the court, said: "In this country the distinction between sales where the vendor is in possession and where he is out of possession, with respect to implied warranty of title, has been generally recognized, but the tendency of later decisions is against the recognition of such a distinction and favorable to the modern English rule. 2 Benj. Sales (Corbin's ed.), § 962, note 21; Biddle, Warranty, §§ 246, 247. The American editor of the ninth edition of Smith's Leading Cases, in the note to Chandelor *v.* Lopus, after citing the cases in this country which have held that the rule of *caveat emptor* applies to sales where the vendor is out of possession, remarks that, in most of them, what was said on that point was *obiter dicta*, and observes 'that there seems no reason why, in every case where the vendor purports to sell an absolute and perfect title, he should not be held to warrant it.' 1 Sm. Lead. Cas. (Edson's ed.) 344." In Whitney *v.* Heywood, 6 Cush. 82, 86, Dewey, J., says "possession here must be taken in its broadest sense," and "the excepted cases must be substantially cases of sales of the mere naked interest of persons having no possession, actual or constructive, and in such cases no warranty of title is implied;" and this language is quoted with approval in Shattuck *v.* Green, 104 Mass 42, 45.

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There can be no doubt that whether a vendor is in or out of possession, he may by appropriate words sell simply his interest in property without warranty. First National

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[1] BYLES and KEATING, JJ., delivered concurring opinions.

Bank *v.* Massachusetts Loan & Trust Co., 123 Mass. 330; Gould *v.* Bourgeois, *supra;* Krumbhaar *v.* Birch, *supra;* Peuchen *v.* Imperial Bank, 20 Ont. Rep. 325.

In some jurisdictions it is held that no action lies for breach of a warranty of title until the vendee's possession has been interfered with Gross *v.* Kierski, *supra;* Linton *v.* Porter, 31 Ill. 107; Wanser *v.* Messler, 29 N. J. L. 256; Burt *v.* Dewey, 40 N. Y. 283 (compare McGiffin *v.* Baird, 62 N. Y. 329; Cahill *v.* Smith, 101 N. Y. 355); Krumbhaar *v.* Birch, *supra.* See also Randon *v.* Toby, 11 How. 493. In other jurisdictions the fact that a superior title or encumbrance exists is sufficient ground for action. Chancellor *v.* Wiggins, 4 B. Mon. 201; Perkins *v.* Whelan, 116 Mass. 542; Matheny *v.* Mason, 73 Mo. 677, 680; Word *v.* Cavin, *supra.* See also Harper *v.* Dotson, 43 Ia. 232; Sargent *v.* Currier, 49 N. H. 310.

(*b*) WARRANTY OF QUALITY.

JONES *v.* JUST.

OK

IN THE QUEEN'S BENCH, FEBRUARY 17, 1868.

[*Reported in Law Reports,* 3 *Queen's Bench,* 197.]

THE judgment of the court (Cockburn, C. J., Blackburn and Mellor, JJ.), was delivered by

MELLOR, J. In this case, on the trial before Blackburn, J., at Liverpool, it appeared that the plaintiffs, through Messrs. Beneke & Co., their brokers, entered into a contract with the defendant for the purchase of a quantity of Manilla hemp, to arrive.

The sold note was in the following terms: "Liverpool, 19th Oct., 1865. We have this day sold for you the following goods to Messrs. J. A. Beneke & Co. J. H. V. 200 bales Manilla hemp, expected to arrive p. 'Richard Cobden,' @ Singapore, for Liverpool, . . . 309 . . . expected to arrive pr. 'Christopher Newton,' @ Singapore for Liverpool, . . . 209 . . . expected to arrive pr. 'Fortitude' . . . @ Singapore for London, $\left\{\begin{matrix}\text{H 193}\\ \text{H H 1}\end{matrix}\right\}$ . . . expected to arrive pr. 'Opher,' @ Singapore for Liverpool, @ £38 10*s.* pr. ton of 2,240 lbs., cost freight and insurance. Shipping weights. Payment, cash against shipping documents on 21st Oct., 1865, less 2½% discount."

The shipping documents were duly delivered to the plaintiffs, and the price was paid. All the vessels named in the contract arrived in due course, with the respective numbers of bales of hemp having marks corresponding to those specified in the contract on board; and the bales were delivered to the plaintiffs. On examination of the bales it was found that the whole of those marked J. H. V. were in such a state as to afford strong evidence that they had at some time, probably from a shipwreck when on the voyage from Manilla to Singapore, been wetted through with salt water, had afterwards been unpacked and dried, and then repacked in the bales which were afterwards shipped at Singapore.

Manilla hemp is divided into several qualities. The hemp in the bales in question, if in good condition, would have been what is called "fair current Manilla hemp," which is not the lowest quality; but in all the bales the hemp was damaged to some extent, though not so far as to make it lose the character of hemp.

After some correspondence between the parties, the hemp was sold by auction by the plaintiffs' orders as "Manilla hemp, with all faults," and at the auction it realized about 75 per cent of the price which similar hemp would have fetched if undamaged. The price of hemp had risen considerably since the contract, so that the proceeds of the sale were very nearly equal to the invoice price. There was no attempt to show that the defendant knew of the state in which the hemp had been shipped at Singapore.

At the close of the plaintiffs' case, Mr. Brett, for the defendant, contended that, in point of law, under this written contract, there was no further condition or warranty than that the bales on their arrival should answer the description of bales of Manilla hemp, which they did, as was proved by the fact that the hemp, though sold with a stigma upon it, fetched a price only 25 per cent below that of sound hemp; and that as to quality or condition there was no warranty; that consequently the maxim *caveat emptor* applied.

The learned judge expressed an opinion adverse to this view. He said: "I think that the question is for the jury, whether what was supplied under this contract was, when shipped at Singapore, such as to answer the description of reasonably merchantable Manilla hemp, that being the warranty which, I think, the law implies in a contract to supply, as this is: though it would be different in a sale of specific things which the purchaser might examine, or of things sold by sample. And I think the question whether it is fairly and reasonably merchantable, is a question of more or less, which must be left to the jury as reasonable men to determine." The judge then reserved leave to move to enter the verdict for the defendant, if there was no evidence to go to the jury of a breach of warranty.

Upon this intimation of opinion, the counsel addressed the jury, and the case was left to them substantially to the effect above stated; and the jury were further told that if they found for the plaintiffs, the damages should be measured by the rate which the hemp was worth when it arrived compared with the rate which the same hemp would have realized had it been shipped in the state in which it ought to have been shipped: thus, in effect, giving the plaintiffs the benefit of the rise in the market.

The jury found for the plaintiffs, damages £756.

Mr. Brett, in the ensuing term, obtained a rule to enter the verdict for the defendant, pursuant to the leave reserved; or for a new trial, on the ground of misdirection as to the measure of damages, which he contended ought at most to have been the difference between the value of the article actually delivered, viz., fair average Manilla hemp in a damaged state, and the value of sound Manilla hemp of the lowest quality which might have been supplied at Singapore under this contract. The other objections to the direction were substantially only varied modes of putting the point reserved.

We thought that if the contract had the effect which the direction stated it to have, the true measure of the damages was given, as it put the plaintiffs in the position in which they would have been if the contract had been fulfilled; but we took time to consider the question as to what the contract really was, which is no doubt one of importance and difficulty.

After careful consideration, we are of opinion that Blackburn, J.'s, direction was substantially correct. On the argument before us, it was contended that the contract was performed on the part of the defendant by the shipping at Singapore of an article which answered the description of "Manilla hemp," although at that time it was so damaged as to have become unmerchantable. It was said that there being no fraud on the part of the vendor, and both parties being equally ignorant of the past history and actual condition of the article contracted for, and neither of them having had the opportunity of inspecting it, it was the duty of the vendees to have stipulated for a merchantable article if that was what they intended to contract for. In other words, it was said that the maxim, *caveat emptor*, applied in such a case, in the same way as on a sale of a specific article by a person not being the manufacturer or producer, even though the defect was latent and not discoverable upon examination.

We are of opinion that there is a great distinction between the present case and the sale of goods *in esse*, which the buyer may inspect, and in which a latent defect may exist, although not discoverable on inspection.

The cases which bear upon the subject do not appear to be in conflict, when the circumstances of each are considered. They may, we think, be classified as follows: —

First, where goods are *in esse*, and may be inspected by the buyer, and there is no fraud on the part of the seller, the maxim *caveat emptor* applies, even though the defect which exists in them is latent, and not discoverable on examination, at least where the seller is neither the grower nor the manufacturer: Parkinson *v.* Lee, 2 East, 314. The buyer in such a case has the opportunity of exercising his judgment upon the matter; and if the result of the inspection be unsatisfactory, or if he distrusts his own judgment, he may if he chooses require a warranty. In such a case, it is not an implied term of the contract of sale that the goods are of any particular quality or are merchantable.[1] So in the case of the sale in a market of meat, which the buyer had inspected, but which was in fact diseased, and unfit for food, although that fact was not apparent on examination, and the seller was not aware of it, it was held that there was no implied warranty that it was fit for food, and that the maxim *caveat emptor* applied: Emmerton *v.* Mathews, 7 H. & N. 586; 31 L. J. (Ex.) 139.

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[1] The only jurisdictions in the United States where the rule of *caveat emptor* is wholly disregarded are Louisiana, where the civil law prevails, McLellan *v.* Williams, 11 La. An. 721; and South Carolina, where it has been held from a very early day till the present time that a warranty of soundness is implied in a sale for a "sound price." Timrod *v.* Shoolbred, 1 Bay, 324; Bulwinkle *v.* Cramer, 27 S. C. 376.

Secondly, where there is a sale of a definite existing chattel specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty: Barr *v.* Gibson, 3 M. & W. 390.

Thirdly, where a known described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still if the known, described, and defined thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer: Chanter *v.* Hopkins, 4 M. & W. 399; Ollivant *v.* Bayley, 5 Q. B. 288.

Fourthly, where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied: Brown *v.* Edgington, 2 Man. & G. 279; Jones *v.* Bright, 5 Bing. 533. In such a case the buyer trusts to the manufacturer or dealer, and relies upon his judgment and not upon his own.

Fifthly, where a manufacturer undertakes to supply goods, manufactured by himself, or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article: Laing *v.* Fidgeon, 4 Camp. 169; 6 Taunt. 108. And this doctrine has been held to apply to the sale by the builder of an existing barge, which was afloat but not completely rigged and furnished; there, inasmuch as the buyer had only seen it when built, and not during the course of the building, he was considered as having relied on the judgment and skill of the builder that the barge was reasonably fit for use: Shepherd *v.* Pybus, 3 Man. & G. 868.

If, therefore, it must be taken as established that, on the sale of goods by a manufacturer or dealer to be applied to a particular purpose, it is a term in the contract that they shall reasonably answer that purpose, and that on the sale of an article by a manufacturer to a vendee who has not had the opportunity of inspecting it during the manufacture, that it shall be reasonably fit for use, or shall be merchantable, as the case may be, it is difficult to understand why a similar term is not to be implied on a sale by a merchant to a merchant or dealer who has had no opportunity of inspection. Accordingly in the case of Bigge *v.* Parkinson, 7 H. & N. 955; 31 L. J. (Ex.) 301, upon a contract to supply provisions and stores to a ship guaranteed to pass the survey of the East India Company's officers, it was held by the

Court of Exchequer Chamber that there was an implied term in the contract, that the stores should be reasonably fit for the purpose for which they were to be supplied, notwithstanding that the vendor had specially contracted that they should pass the survey of the East India Company's officers.

We are aware of no case in which the maxim, *caveat emptor*, has been applied where there has been no opportunity of inspection, or where that opportunity had not been waived. The case of Gardiner *v.* Gray, 4 Camp. 144, 145, appears strongly in point to the present. The contract was for the sale of twelve bales of waste silk imported from the continent, and before it was landed, samples were shown to plaintiff's agent, and the bargain was then made, but without reference to the sample. It was purchased in London, and sent to Manchester, and on its arrival there was found to be of a quality not salable under the denomination of "waste silk." Lord Ellenborough expressed his opinion that "the purchaser under such circumstances had a right to expect a salable article answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity the maxim *caveat emptor* does not apply."

In general, on the sale of goods by a particular description, whether the vendee is able to inspect them or not, it is an implied term of the contract that they shall reasonably answer such description. and if they do not, it is unnecessary to put any other question to the jury; thus, in Wieler *v.* Schilizzi, 17 C. B. 619; 25 L. J. (C. P.) 89, and in Josling *v.* Kingsford, 13 C. B. (N. S.) 447; 32 L. J. (C. P.) 94, the substantial question put to the jury was, did the goods delivered reasonably answer the description in the contract? And the answer of the jury being that they did not, that answer sufficed to determine each case. In one of those cases there was no opportunity to inspect, in the other there was. So in the case of Nichol *v.* Godts, 10 Ex. 191; 23 L. J. (Ex.) 314, where the contract was for the sale of "foreign refined rape oil, warranted only equal to sample," it was held in an action for not accepting the article tendered, that it was necessary for the vendor to establish that it was not only equal to the sample as to quality, but that it was in fact such an article as answered the description of foreign refined rape oil. In Wieler *v.* Schilizzi, *supra*, in which there was no opportunity to inspect, and no express stipulation as to quality, it would have been necessary, had the finding of the jury affirmed that the article delivered did in fact answer the description of "Calcutta linseed," to determine whether the judge ought not to have put the further question, was it reasonably merchantable? It certainly was not determined that such a question would have been wrong, though perhaps the words "tale quale" in that contract might have the effect of excluding any such warranty; and Willes, J., in his judgment, 17 C. B. at p. 624, said that the purchaser in that case "had a right to expect, not a perfect article, but an article which would be *salable* in the market as Calcutta linseed."

It appears to us that, in every contract to supply goods of a specified description which the buyer has no opportunity to inspect, the goods must not only in fact answer the specific description, but must also be salable or merchantable under that description. In the words of Lord Ellenborough in Gardiner *v.* Gray, 4 Camp. at p. 145, "Without any particular warranty this is an implied term in every such contract." In the present case the question appears to be, was the article as delivered at Singapore merchantable or salable in the market under the description of "Manilla hemp"? Blackburn, J., appears to have divided that question into two, viz.: Was the article, in fact, Manilla hemp? Secondly, was it merchantable? The precise mode of submitting the question is not material, provided the substantial direction was correct, as we think it was.

The counsel for the defendant relied upon a case of Turner *v.* Mucklow, 8 Jur. (N. S.) 870; 6 L. T. (N. S.) 690, tried before Mellor, J., in the year 1862, at Liverpool. In that case the plaintiffs were calico printers, and had contracted to sell to the defendant, who was a drysalter and dye extract manufacturer, a boat-load of "spent madder." The defendant, not finding the spent madder supplied suitable for his purpose, repudiated the contract, and refused to pay for it. It appeared that the plaintiffs, in their trade as calico printers, used large quantities of madder roots, having extracted from which the finer coloring matter by chemical processes they placed the refuse or spent madder in a large heap in their yard. They occasionally used portions of it, and by the application of other chemical processes extracted from it a coloring matter called garancine, but they did not manufacture spent madder for sale. On a previous occasion they had sold to the defendant, who was a manufacturer of garancine, a small quantity of spent madder from their accumulation; and on the occasion in question the defendant, by letter, bargained with the plaintiffs for a quantity of their spent madder, which he did not inspect before delivery, and upon a portion of it being used by the defendant for the purpose of manufacturing garancine, it turned out that the garancine produced by it was of very inferior quality and unmarketable. The jury were directed that if the article supplied fairly and reasonably answered the description of "spent madder," there was no implied warranty that it was of any particular quality or fitness for any particular use, and upon that direction the jury found a verdict for the plaintiffs; and upon the argument on a rule which was obtained for a new trial, on the ground of misdirection, the Court of Exchequer held the direction to be right; Martin, B., declaring his opinion to be "that no direction was ever more correct."

In that case it is to be observed that the defendant had the opportunity, if he had chosen to avail himself of it, to inspect the heap of spent madder; he knew that it was the refuse madder after it had gone through the plaintiffs' processes, and that it was not manufactured for sale. These circumstances entirely distinguish that case from the present.

The counsel for the defendant also relied upon the Statute 19 & 20 Vict. c. 60, s. 5, as a sort of implied legislative declaration of the law of England upon that subject in favor of his argument; but, upon examining the section referred to, it does not appear to bear out that view, for all that it declares is, that a seller of goods, without knowledge that they are defective or of bad quality, shall not be held to have warranted their quality or sufficiency.

It has already appeared that there is not in general, on the sale of goods in England to be supplied, an implied warranty that they shall be of any particular quality or sufficiency for any particular purpose, but merely that they shall be merchantable goods of the description bargained for. The present case depends on the distinction between a sale of particular articles and a contract to supply articles of a particular kind.

The authority of Chancellor Kent was also appealed to; but as the American cases which he cites are generally adverse to his opinion, it can at most be said that the opinion of an eminent writer is opposed to the authority of the cases which he cites.

It appears to us, in the result of this case, that the maxim of *caveat emptor* cannot apply, and that it must be assumed that the buyer and seller both contemplated a dealing in an article which was merchantable. The buyer bought for the purpose of sale, and the seller could not on any other supposition than that the article was merchantable have found a customer for his goods, and the buyer must be taken to have trusted to the judgment, knowledge, and information of the seller, as it is clear that he could exercise no judgment of his own; and this appears to us to be at the root of the doctrine of implied warranty, and that in this view it makes no difference, whether the sale is of goods specially appropriated to a particular contract, or to goods purchased as answering a particular description.

It was contended further by the defendant's counsel that the shippers at Singapore were the persons who selected the goods in question, and that the defendant, who merely sold them to arrive, was as little aware of their true condition when shipped as the plaintiffs; but it is clear that the defendant, if not directly connected with the shippers as his correspondents, must at least have purchased from them, and had recourse against them for not supplying an article reasonably merchantable.

The remarks of Cockburn, C. J., on the argument in Bigge *v.* Parkinson, 7 H. & N. at p. 959, though not in terms repeated by him in delivering the judgment of the Court of Exchequer Chamber, are really involved in it, and are very closely in point here.

We are therefore of opinion that Blackburn, J.'s, direction was right, and that this rule must be discharged. *Rule discharged.*

O.K

RANDALL *v.* NEWSON.

In the Queen's Bench Division, Court of Appeal, January 22, 1877.

[*Reported in* 2 *Queen's Bench Division*, 102.]

Statement of claim, that plaintiff bought of defendant, a carriage-manufacturer, a phaeton for two horses, the pole made and supplied for which was so carelessly and negligently made, and of such bad and improper wood, that while the plaintiff was driving the phaeton the pole broke and caused the horses to run away, and the horses were damaged.

Defence, denying that the pole was carelessly or negligently made, or of bad or improper wood; and not admitting that the pole broke by reason of any defect in the wood, or that the defendant sold the phaeton under such circumstances as to render him liable for the consequences of a latent defect. Issue joined.

At the trial before Archibald, J., at the Middlesex Hilary sittings, 1876, it appeared that the plaintiff bought of the defendant, who was a carriage-builder, a phaeton, in August, 1874; it was only fitted with shafts for one horse, and the plaintiff gave orders to the defendant for a pole and splinter-bar to be made and fitted to it.

The phaeton was sent home with the pole and splinter-bar, and while the plaintiff was driving it with two horses in October, 1875, the horses swerved and the pole broke short off at the carriage. The horses in consequence became restive and were much damaged.

There was much contradictory evidence as to the cause of the breaking of the pole, the plaintiff's witnesses saying it was of bad wood, while the defendant's stated that the wood was perfectly good. The value of a new pole was agreed at £3, and the plaintiff gave evidence that his horses were damaged to between £130 and £140. The learned judge expressed it as his opinion, that if there were no negligence on the part of the defendant in making the pole, or in the selection of the materials, the plaintiff could not recover more than the £3; and he left to the jury two questions: 1. Was the pole reasonably fit and proper for the carriage? 2. Was the defendant guilty of any negligence? And he asked the jury also to assess the consequential damages, in case they should become material. The learned judge was obliged to leave the court to attend a meeting of the judges, before the jury had returned their verdict.

The jury answered both questions in the negative, and as to the damages, said they understood from the judge that £3 was all they could find.

On these findings, the verdict and judgment were entered for the plaintiff for £3, with leave to move to enter judgment for the defendant.

The defendant gave notice of motion accordingly; and the plaintiff obtained an order for a new trial on the ground of misdirection by the learned judge as to the measure of damages.

Sills (*Cave,* Q. C., with him), for the defendant.
Gates, Q. C., and *Edward Pollock*, for the plaintiff.

Cur. adv. vult.

The judgment of the court (Kelly, C. B., Mellish, L. J., and Brett and Amphlett, JJ. A.) was delivered by

BRETT, J. A. This case was tried upon the footing that it was an action brought against the defendant, a coachbuilder, to recover damages in respect of injuries to the plaintiff's horses and carriage, by reason of the defendant having supplied to the plaintiff a defective carriage pole. The jury found that the pole was not reasonably fit and proper for the use of the carriage; but that there was no negligence on the part of the defendant (including, of course, his servants or agents) in supplying the pole. The price of a new pole was £3. The damage done to the horses and carriage was much more. But the only damages found by the jury were £3. Upon these findings the Court of Queen's Bench, applying to this contract the principle laid down in Readhead *v.* Midland Ry. Co., Law Rep. 2 Q. B. 412; in error 4 Q. B. 379, gave judgment for the defendant. No dispute was made at the trial, or in argument, as to the nature of the order given and accepted; the questions argued were whether the defendant was liable at all, and what was the extent of damages to which he might be subjected, if he was liable at all. Now as to these questions, it is to be taken, although nothing specific seems to have been said, that the order given and accepted was not merely for a pole in general, but for the supply of a pole for the plaintiff's carriage; and that the contract therefore was for the purchase and sale, or supply, of an article for a specific purpose. In other words, the subject-matter of the contract was not merely a pole, but a pole for the purchaser's carriage; or, to state the proposition in an equivalent form, the thing which would, if the contract were formally drawn up, be described in it as the subject-matter of it, would not be merely a pole generally, but a pole to be purchased for a specific purpose, namely, to be used in the plaintiff's carriage. The question is, what, in such a contract, is the implied undertaking of the seller as to the efficiency of the pole? Is it an absolute warranty that the pole shall be reasonably fit for the purpose, or is it only partially to that effect, limited to defects which might be discovered by care and skill?

In order to decide this question it seems advisable to ascertain the primary or governing principle on which the earlier cases were decided, and to see whether the principle on which they were decided ought to be modified by the decision in Readhead *v.* Midland Ry. Co., *supra.* The earliest case seems to be Parkinson *v.* Lee, 2 East, 314, in 1802. It is sufficient to say of it that, either it does not determine the extent of a seller's liability on the contract, or it has been overruled. Neither can the case of Fisher *v.* Samuda, 1 Camp. 190, in 1808, be said to decide anything. The first cases of importance are Gardiner *v.* Gray, 4 Camp. 144, and Laing *v.* Fidgeon, 6 Taunt. 108, in 1815. In Gardiner *v.* Gray, *supra,* the contract was for the purchase and sale of "waste silk." The silk was imported, and the bulk had not been seen either by the defendant, the seller, or the plaintiff, the buyer. Lord Ellenborough said: "I am of opinion that, under such circumstances" (*i. e.* a sale of silk as waste silk) "the purchaser has a right to expect a salable article, answering the description in the contract. Without any particular warranty, this is an implied term in every such contract." The contract was for the purchase and sale of a commodity described generally, not described to be ordered or supplied for a particular purpose. The description of it was that it was waste silk. From that it is implied that it is, or in other words it is assumed that it might be, specifically described as salable waste silk. The decision, therefore, is that the commodity offered and delivered must answer the description of it and be salable waste silk. The principle is that the commodity offered must answer the description of it in the contract. Laing *v.* Fidgeon, *supra,* is to the same effect. In Gray *v.* Cox, 4 B. & C. 108, 115, in 1825, the case was decided on a variance; but Abbott, C. J., stated that he was of opinion, "that if a person sold a commodity for a particular purpose, he must be understood to warrant it reasonably fit and proper for such purpose." The commodity ordered was copper for sheathing the ship "Coventry." It was proved that no defect could be discovered by inspection of the article, and it was admitted that the defendants were ignorant of the defective quality of the copper. It is obvious that Lord Tenterden did not consider the seller relieved by reason of the defect being latent.

This ruling of Lord Tenterden was adopted in the decision of Jones *v.* Bright, 5 Bing. 533, 540, in 1829. The contract was for copper sheathing for a ship. The question proposed by Ludlow, Serjt., in argument was, "whether the law will, according to the *dictum* of Lord Tenterden, in Gray *v.* Cox, *supra,* lay upon the seller or manufacturer an obligation to warrant in all cases that the article which he sells shall be reasonably fit and proper for the purpose for which it is intended, and render him responsible for all the consequences which may result, if it shall be found not to answer the purpose for which it was designed, and that, on account of some latent defect of which he was ignorant, and which shall not be proved to have arisen from any want of skill on his part, or the use of improper materials, or any accident against which human prudence might have been capable of guarding him." Here, therefore, the whole proposition, with and without limitations, was plainly laid before the judges for their consideration.

The answer given by Best, C. J., was: "I wish to put the case on a broad principle. If a man sells an article he thereby warrants that it is merchantable, — that it is fit for some purpose. If he sells it for that particular purpose, he thereby warrants it fit for that purpose. . . . Whether or not an article has been sold for a particular purpose is, indeed, a question of fact; but if sold for such purpose, the sale is an undertaking that it is fit. . . . The law then resolves itself into this, —

that if a man sells generally, he undertakes that the article sold is fit for some purpose; if he sells it for a particular purpose, he undertakes that it shall be fit for that particular purpose." Nothing can be more clear than that the rule is advisedly enunciated as a warranty without limitation. Brown v. Edgington, 2 M. & G. 279, is to the same effect.

In Wieler v. Schilizzi, 17 C. B. 619, 622; 25 L. J. (C. P.) 89, the contract was for "Calcutta linseed." Jervis, C. J., told the jury that the question for them to consider was, "whether there was such an admixture of foreign substances in it as to alter the distinctive character of the article, and prevent it from answering the description of it in the contract." Cresswell, J., said, "They were to say whether the article delivered reasonably answered the description of Calcutta linseed." Crowder, J., said, "The jury in effect found that the article delivered did not reasonably answer the description in the contract." Willes, J., said, "The purchaser had a right to expect, not a perfect article, but an article which would be salable in the market as Calcutta linseed. If he got an article so adulterated as not reasonably to answer that description, he did not get what he bargained for." In this case it is to be observed that all the judges adopted the form of stating the principle which was used by Lord Ellenborough in Gardiner v. Gray, *supra.* In Nichol v. Godts, 10 Ex. 191; 23 L. J. (Ex.) 314, the contract was for "foreign refined rape oil, warranted only equal to samples." The oil offered was equal to samples, but both samples and oil were adulterated. Parke, B., told the jury "that the statement in the sold note as to the samples related to the quality only of the article, and that according to the contract the defendant was entitled to have rape oil delivered to him." Platt, B., in banc, said: "I understand that the oil to be delivered was to be equal to the samples in quality. But the defendant did not refuse to accept the oil tendered to him on the ground that it did not equal the samples, but on account of its not being foreign refined rape oil at all. And the learned judge told the jury that if they should think that was so, the defendant was not bound to accept it. That direction was perfectly correct. If the jury had found that the article which the plaintiff tendered was known in the market under the name and description of foreign refined rape oil, the plaintiff would have been entitled to succeed; but the question was put to the jury, and they were of opinion that it was not known as such." And Parke, B., said "the evidence went to show that the oil offered did not answer the description of the article sold."

This form of stating the rule was distinctly adopted in Josling v. Kingsford, 13 C. B. (N. S.) 447; 32 L. J. (C. P.) 94, by Erle, C. J., and Willes, J. Erle, C. J., told the jury "that the defendant could only perform his part of the contract by delivering that which in commercial language might properly be said to come under the denomination of oxalic acid; and that if they should be of opinion that the article delivered by the defendant as oxalic acid did not properly fulfil that description they should find for the plaintiff."

I have cited these cases, and the principles laid down in them, in order clearly to ascertain what is the primary or ultimate rule from which the rules which have been applied to contracts of purchase and sale of somewhat different kinds have been deduced. Those different rules, as applied to such different contracts, are carefully enumerated and recognized in Jones *v.* Just, Law Rep. 3 Q. B. 197. In some contracts the undertaking of the seller is said to be only that the article shall be merchantable; in others, that it shall be reasonably fit for the purpose to which it is to be applied. In all, it seems to us, it is either assumed or expressly stated, that the fundamental undertaking is, that the article offered or delivered shall answer the description of it contained in the contract. That rule comprises all the others; they are adaptations of it to particular kinds of contracts of purchase and sale. You must, therefore, first determine from the words used, or the circumstances, what, in or according to the contract, is the real mercantile or business description of the thing which is the subject-matter of the bargain of purchase or sale, or, in other words, the contract. If that subject-matter be merely the commercial article or commodity, the undertaking is, that the thing offered or delivered shall answer that description, that is to say, shall be that article or commodity, salable or merchantable. If the subject-matter be an article or commodity to be used for a particular purpose, the thing offered or delivered must answer that description, that is to say, it must be that article or commodity, and reasonably fit for the particular purpose. The governing principle, therefore, is that the thing offered and delivered under a contract of purchase and sale must answer the description of it which is contained in words in the contract, or which would be so contained if the contract were accurately drawn out. And if that be the governing principle, there is no place in it for the suggested limitation. If the article or commodity offered or delivered does not in fact answer the description of it in the contract, it does not do so more or less because the defect in it is patent, or latent, or discoverable. And accordingly there is no suggestion of any such limitation in any of the judgments in cases relating to contracts of purchase and sale. Unless, therefore, there is some binding authority to the contrary, we ought not now to introduce by implication a limitation into contracts of purchase and sale which has never been introduced before.

It is said that the case of Readhead *v.* Midland Ry. Co., Law Rep. 4 Q. B. 379, 386, in error is such a binding authority. But in answer to the cases cited of the implied undertaking in contracts of purchase and sale, Montague Smith, J., says: "The counsel for the plaintiff referred to some of the cases in which it had been held that in contracts for the supply of goods for a particular purpose, there is an implied warranty that the goods supplied shall be reasonably fit for that purpose. . . . But the agreement to sell and supply for a price which may be assumed to represent their value is a contract of a different nature from a contract to carry, and has essentially different incidents attaching to it." It is true that the learned judge afterwards says: "Even in the cases of contracts to supply goods it may be a question, on which it is not now necessary to express an opinion, how far and to what extent the vendor would be liable to the vendee in the case of a latent defect of the kind existing in the present case which no skill or care could prevent or detect." But it seems impossible logically to hold that a case, — in which the court declined to follow the decisions on contracts of purchase and sale, on the ground that those contracts are of a different nature and have essentially different incidents from the contract to carry, which was in discussion in that case — can be fairly binding on this court, so as to oblige it to introduce a particular limitation into a contract of purchase and sale, because, in that case, it was introduced into a contract to carry passengers.

The case of Francis *v.* Cockrell, Law Rep. 5 Q. B. 501, 503, is based upon Readhead *v.* Midland Ry. Co., *supra*, and is therefore of itself no more a binding authority on us in this case than the other. It is true, however, that the Lord Chief Baron, going further than the doubt expressed by Montague Smith, J., does recognize the limitation as applicable to contracts of purchase and sale (Law Rep. 4 Q. B. 503). But the statement of the learned judge was not necessary, and therefore is not binding, though of course inviting a careful consideration of the older cases. After such consideration, for the reasons before given, we are of opinion that the undertaking of the present defendant was not restricted by the limitations applied to the contract of carriage in Readhead *v.* Midland Ry. Co., *supra*, and that so long as the verdict in this case stands it imposes a liability on the defendant. We are, therefore, of opinion that the judgment of the Court of Queen's Bench directing the judgment to be entered for the defendant was wrong.

In the Court of Queen's Bench a cross rule had been obtained on behalf of the plaintiff for a new trial, on the ground of misdirection as to the measure of damages. In consequence of the decision that the defendant was not liable at all, it became useless to argue the point. But Mr. Gates has renewed it before us, and has asked for a new trial on the ground of such misdirection, desiring to have such new trial confined to the question of damage only. We think that a question should have been left to the jury similar to that which was left in Smith *v.* Green, 1 C. P. D. 92, namely, whether the injury to the horses was or was not a natural consequence of the defect in the pole. There has been a miscarriage in this respect at all events. We are asked to confine the new trial to the question of damages, but considering that the real question is not whether the pole was perfect, but only whether it was reasonably fit, we cannot think that the findings of the jury as to the questions left to them in order to determine the liability of the defendant are so satisfactory as to authorize us to confine the question to be raised on a new trial to the damages only. We think that the judgment of the Court of Queen's Bench should be reversed, and that the order should be for a new trial generally, if the plaintiff elects to have a new trial at all. If he does not, the verdict and judgment for the plaintiff for £3 will stand.

The plaintiff has succeeded on the appeal, and should therefore have the costs of the appeal.

Judgment reversed.[1]

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JAMES DRUMMOND & SONS *v.* E. H. VAN INGEN & Co.

IN THE HOUSE OF LORDS, APRIL 1, 1887.

[*Reported in* 12 *Appeal Cases*, 284.]

APPEAL from a decision of the Court of Appeal.

The following statement of the facts and pleadings is taken from the judgment of the Earl of Selborne.

The respondents, in July, 1883, ordered from the appellants, who are worsted cloth manufacturers at Bradford, certain goods, described in the contracts as, "mixt worsted coatings," which were to be, in "quality and weight," equal to certain numbered samples, which the appellants had previously furnished to the respondents. The goods were of a class well-known in the trade under the denomination of "corkscrew twills." They were delivered to the respondents, whose object (known to the appellants) was to sell them to clothiers or tailors in the United States of America. All, or great part of them, were, in fact, disposed of to various customers of the respondents in the United States; but they were returned upon the respondents' hands, as not suitable for the purposes of that trade. They were afterwards sold by auction, at a loss; and an action (for the price of the goods) having been brought by the appellants against the respondents, a counter-claim was made by the respondents to recover damages against the appellants, on the ground that the goods were not merchantable, as they ought to have been.

The goods were, in point of fact, made exactly in the same manner as the samples; and the defect alleged to exist in them, viz., that of "slipperiness" (or want of such cohesion in the texture of the cloth, between the warp and weft, as was requisite to prevent them from giving way under the strain of ordinary wear when made up into coats in the usual manner) existed equally in those samples.

The defence to the counter-claim was, in substance, that the goods were exactly what had been ordered; that there was no implied warranty that they should be merchantable for any purpose, for which goods of such a make and texture would not be fit; that goods of that particular make and texture were not wholly salable, or incapable of being made up (if the tailor did his work in a manner suitable to their quality) into coats which might endure reasonable wear; that the defect, such as it was, was one of degree only, and was so far patent, that by such examination of the sample as the manufacturer had a right, under the circumstances, to assume the merchant to have made, it might, and ought to, have been known.

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[1] Kelly, C. B. delivered a brief concurring opinion.

Preist *v.* Last, [1903] 2 K. B. 148; Frost *v.* Aylesbury Dairy Co., [1905] 1 K. B. 608; Rodgers *v.* Niles, 11 Ohio St. 48; Leopold *v.* Van Kirk, 27 Wis. 152, *acc.* But see Hoe *v.* Sanborn, 21 N. Y. 552.

An order having been made for the trial of certain preliminary issues in fact by Day, J., without a jury, before any of the other questions of fact, that learned judge found upon the issues as follows: —

1. That there was an implied warranty on the sale of the goods that the cloth should be merchantable generally as worsted coatings, and should be properly manufactured, and should be suitable to be made up into coats in the ordinary course of tailors' work. 2. That the plaintiffs did sell the cloth for the purpose of being made up into coats in the ordinary course of tailors' work. 3. That it was an express term of the contract of sale that the cloth should be efficiently woaded and dyed so as not to fade unduly. 4. That the cloth was not merchantable as worsted coating, and was not properly manufactured and suitable to be made up into coats in the ordinary course of tailoring, and was not efficiently woaded and dyed within the meaning of the contract. 5. That the cloth was sold by sample in the sense that it was to be similar to a sample produced in respect of weight and quality, and that the term "quality" covers strength as distinguished from rottenness in cloth, but the judge is not satisfied that the term quality has been ordinarily applied to such a defect as is alleged to exist in the cloth delivered under the contract, that is to say, slipperiness of weft under warp. 6. That the cloth did correspond with the sample. 7. That the sample was made to the defendants' order, and was seen and approved of by them as to pattern, color, and generally as to handle. 8 and 9. That the defects both of structure and color in the cloth and in the sample were latent, and were not apparent or discoverable upon such inspection as was ordinary and usual upon sales of worsted cloths of this class.

The Court of Appeal (Lord Esher, M. R., and Fry, L. J.) affirmed the findings of Day, J., upon the ground that there having been a conflict of evidence the court was not so well able to decide as the learned judge to which set of witnesses credit ought to be given, and ought not therefore to overrule his finding. From this decision the present appeal was brought.

Sir R. Webster, A.-G., and *R. O. B. Lane*, for the appellants.

Waddy, Q. C., and *E. Tindal Atkinson*, Q. C. (*Wilberforce*, with them), for the respondents.

LORD HERSCHELL. My Lords, I think that the general principles of law which have to be applied to the facts of this case are well settled and beyond question. It was laid down in Jones *v.* Bright, 5 Bing. 533, that where goods are ordered of a manufacturer for a particular purpose, he impliedly warrants that the goods he supplies are fit for that purpose. This view of the law has been constantly acted upon from the time of that decision, and was not impeached by the learned counsel for the appellants. It is equally well settled that upon a sale of goods of a specified description, which the purchaser has no opportunity of examining before the sale, the goods must not only answer that specific description, but must be merchantable under that description. This doctrine was laid down in Jones *v.* Just, Law Rep. 3 Q. B. 197, where all the previous authorities on the point were reviewed. In the case of Mody *v.* Gregson, Law Rep. 4 Ex. 49, in the Exchequer Chamber, the decision in Jones *v.* Just was approved of and acted upon, and it was further held that the implied warranty that the goods supplied are merchantable was not absolutely excluded by the fact that the goods were sold by sample, and that the bulk precisely corresponded with it, but was only excluded as regards those matters which the purchaser might, by due diligence in the use of all ordinary and usual means, have ascertained from an examination of the sample. I think that the law enunciated in these cases is sound and not open to doubt. I proceed to consider its application to the facts of the case before us.

The plaintiffs were manufacturers at Bradford; the defendants were merchants dealing in woollen and worsted cloths, carrying on business in Huddersfield and New York.

The order for the goods in respect of which the present litigation has arisen was given by the defendants to the plaintiffs in 1883. The goods ordered were described as "worsted coatings," and they were to correspond in quality and weight with patterns which had been supplied by the plaintiffs. They were of a description known in the trade as "corkscrew," having the warp on either side and the weft not exposed to view. The goods, when delivered, were shipped to the United States, and sold by the defendants to various purchasers there. It turned out, as I think the evidence establishes, that owing to the mode of manufacture there was a great tendency in the warp to slip, and this to so serious an extent that when made into garments in the ordinary manner the seams gave way with no more than ordinary tension and the braid became detached from the cloth. In consequence of this defect many purchasers from the defendants returned the goods to them, or compelled them to make allowances, for which they sought compensation by counter-claim in the present action. It is important to observe that the contract for 1883 was not the first dealing between the parties. The defendants had purchased of the plaintiffs a quantity of "corkscrew" worsted coatings in the previous year, and I cannot see any evidence in the correspondence which passed, or in the oral communications, to show that it was intended by either of the parties to the contract of 1883 that the goods should be of a different character to those of the previous year in any particular material to the controversy which has to be determined in this action. It is true that the purchasers desired goods of a somewhat softer "handle;" but I think it is abundantly clear on the evidence that this was a matter of "finish," and that it was not the endeavor to give a softer "handle" which led to the defect of excessive slipping.

I have said that the goods were, by the order, to conform to certain patterns supplied by the plaintiffs to the defendants, and approved of by them. There is no doubt that the bulk of the goods corresponded in every particular with these patterns; and this the plaintiffs allege, is a complete answer to the defendants' claim. The tendency to slip is not, they insist, properly to be called a defect but a characteristic of the manufactured article, which existed in the sample just as much as in the bulk of the goods. I do not think it is very material what name is given to it; but I confess it strikes me that a characteristic arising from a particular mode of manufacture which renders the manufactured article less useful for the purpose for which such an article is ordinarily used, without, as far as appears, any counterbalancing advantage, may well be called a defect.

I think it is proved by the evidence that this defect existed to such an extent that the worsted coatings could not be used for the purpose of being made into coats in the manner usual with goods of the same general description and quality, and that they could only be made into garments capable of resisting ordinary tension by the adoption of special precautions both in regard to breadth of seam and method of sewing. The question arises whether, in these circumstances, the plaintiffs have complied with their contract by delivering coatings precisely corresponding in quality and weight with the patterns, or whether they are liable to the defendants.

Let me consider, first, how the case would have stood if no samples had been supplied. Suppose the defendants had simply ordered worsted coatings similar to those they had purchased in the previous year, but with a difference of color, design, and handle. Could the plaintiffs have justified supplying under such an order coatings such as those which have given rise to this litigation? It is true that the purpose for which the goods were required was not, as in Jones *v.* Bright, *supra*, stated in express terms, but it was indicated by the very designation of the goods, "coatings." I think that upon such an order the merchant trusts to the skill of the manufacturer, and is entitled to trust to it, and that there is an implied warranty that the manufactured article shall not by reason of the mode of manufacture be unfit for use in the manner in which goods of the same quality of material, and the same general character and designation, ordinarily would be used. I think too that where the article does not comply with such a warranty it may properly be said to be unmerchantable in the sense in which that word is used in relation to transactions of this nature.

It was urged for the appellants by the Attorney-General, in his able argument at the bar, that it would be unreasonable to require that a manufacturer should be cognizant of all the purposes to which the article he manufactures might be applied, and that he should be acquainted with all the trades in which it may be used. I agree. Where the article may be used as one of the elements in a variety of other manufactures, I think it may be too much to impute to the maker of this common article a knowledge of the details of every manufacture into which it may enter in combination with other materials. But no such question arises here. There seems nothing unreasonable in expecting that the maker of "coatings" should know that they are to be turned into coats and other garments, and that he should further know what coatings will and what will not be capable of use for this purpose in the ordinary methods.

It seems to me not open to doubt that in the case which I have supposed the manufacturer would be liable. Does it then make any difference that the plaintiffs furnished patterns which were approved of by the defendants, and that the goods delivered were in complete conformity with their patterns? Except upon the assumption (with which I will deal presently) that the patterns ought to have conveyed to the defendants knowledge of the defect of which they complain, I cannot think that it does.

When a purchaser states generally the nature of the article he requires, and asks the manufacturer to supply specimens of the mode in which he proposes to carry out the order, he trusts to the skill of the manufacturer just as much as if he asked for no such specimens. And I think he has a right to rely on the samples supplied representing a manufactured article which will be fit for the purposes for which such an article is ordinarily used, just as much as he has a right to rely on manufactured goods supplied on an order without samples complying with such a warranty.

I adopt what was said by Willes, J., in Mody *v.* Gregson, Law Rep. 4 Ex. 49, 53: "The object and use of either inspection of bulk or sample alike are to give information, disclosing directly through the senses what any amount of circumlocution might fail to express. It seems difficult, therefore, to ascribe any greater effect to a sample in excluding implication than would be ascribed to express words in the contract giving, as far as words could give, the same amount of information; and as to such words, the doctrine that an express provision excludes implication, does not affect cases in which the express provision appears on the true construction of the contract to have been superadded for the benefit of the buyer."

There is no doubt that the implied warranty will be excluded as regards any defects which the sample would disclose to a buyer of ordinary diligence and experience. The inquiry, therefore, arises whether the defendants by "due diligence in the use of all ordinary and usual means" would have detected in the patterns the defects of which they now complain. I think not. What is "due diligence" must depend upon the circumstances. Having regard to the order given in the previous year, and the mode in which that order was fulfilled, I think that when the defendants made the contract there was nothing which could reasonably lead them to anticipate that the patterns represented goods possessing the defect which was, in fact, inherent in them. And I am satisfied upon the evidence that the defendants, who undoubtedly did not discern the defect, did not fail to do so from neglecting to use the means usually adopted by buyers under like circumstances.

I have therefore arrived at the conclusion that the learned judge who tried the case took a correct view of the facts on this part of it, and that his decision was properly affirmed by the Court of Appeal.

As regards the other complaint, viz., that the goods were not woaded according to contract, I have nothing to add to what has been said by the noble Earl on the woolsack. It depended entirely upon disputed questions of fact, and I am not satisfied that they have been erroneously determined.

I therefore concur in the motion that has been made.

Order appealed from affirmed; and appeal dismissed with costs.[1]

BARNARD *v.* KELLOGG.

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UNITED STATES SUPREME COURT, DECEMBER, 1870.

[*Reported in* 10 *Wallace*, 383.]

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ERROR to the Circuit Court for the District of Connecticut, the case being this: —

In the summer of 1864, Barnard, a commission merchant residing in Boston, Massachusetts, placed a lot of foreign wool, received from a shipper in Buenos Ayres, and on which he had made advances, in the hands of Bond & Co., wool brokers in Boston, to sell, with instructions not to sell unless the purchaser came to Boston and examined the wool for himself. These brokers sent to E. N. Kellogg & Co., merchants and dealers in wool, in Hartford, Connecticut, at their request, samples of the different lots of wool, and communicated the prices at which each lot could be obtained. Kellogg & Co., in reply, offered to take the wool, all round, at fifty cents a pound, if equal to the samples furnished, and Bond & Co., for their principal, on Saturday, the 6th day of August, by letter and telegram, accepted this offer, provided Kellogg & Co. examined the wool on the succeeding Monday and reported on that day whether or not they would take it. Kellogg & Co. acceded to this condition, and the senior member of the firm repaired to Boston on the day named and examined four bales in the broker's office as fully as he desired, and was offered an opportunity to examine all the bales, and have them opened for his inspection. This he declined to do, and concluded the purchase on the joint account of all the plaintiffs. Some months after this, on opening the bales it was ascertained that a portion of them were falsely and deceitfully packed, by placing in the interior rotten and damaged wool and tags, which were concealed by an outer covering of fleeces in their ordinary state. This condition of things had been unknown to Barnard, who had acted in good faith. It was, however, communicated to him, and he was asked to indemnify the purchaser against the loss he sustained in consequence of it. This he declined to do, and the purchaser brought this suit. The declaration counted: —

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[1] The Earl of SELBORNE and Lord MACNAGHTEN delivered concurring opinions.

1st. Upon a sale by sample.

2d. Upon a promise, express or implied, that the bales should not be falsely packed.

3d. Upon a promise, express or implied, that the wool inside of the bales should not differ from the samples by reason of false packing.

The court below, trying the cause without the intervention of a jury, held that there was no express warranty that the bales not examined should correspond to those exhibited at the brokers' store, and that the law under the circumstances could not imply any. But the court found as matters of fact, that the examination of the interior of the bulk of bales of wool generally, put up like these, is not customary in the trade; and though possible, would be very inconvenient, attended with great labor and delay, and for these reasons was impracticable; and that by the custom of merchants and dealers in foreign wool in bales in Boston and New York, the principal markets of this country where such wool is sold, there is an implied warranty of the seller to the purchaser that the same is not falsely or deceitfully packed, and the court held, as a matter of law, that the custom was valid and binding on the parties to this contract, and gave judgment for the purchaser.

This writ of error was taken to test the correctness of this ruling.

Mr. N. Shipman, in support of it.

Mr. Charles E. Perkins, contra.

MR. JUSTICE DAVIS delivered the opinion of the court.

No principle of the common law has been better established, or more often affirmed, both in this country and in England, than that in sales of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity, and the seller is guilty of no fraud, and is neither the manufacturer nor grower of the article he sells, the maxim of *caveat emptor* applies. Such a rule, requiring the purchaser to take care of his own interests, has been found best adapted to the wants of trade in the business transactions of life. And there is no hardship in it, because if the purchaser distrusts his judgment he can require of the seller a warranty that the quality or condition of the goods he desires to buy corresponds with the sample exhibited. If he is satisfied without a warranty, and can inspect and declines to do it, he takes upon himself the risk that the article is merchantable. And he cannot relieve himself and charge the seller on the ground that the examination will occupy time, and is attended with labor and inconvenience. If it is practicable, no matter how inconvenient, the rule applies. One of the main reasons why the rule does not apply in the case of a sale by sample, is because there is no opportunity for a personal examination of the bulk of the commodity which the sample is shown to represent. Of such universal acceptance is the doctrine of *caveat emptor* in this country, that the courts of all the States in the Union where the common law prevails, with one exception (South Carolina), sanction it.

Applying this acknowledged rule of law to this case, it is easy to settle the rights of the parties, and to interpret the contract which they made. That the wool was not sold by sample clearly appears. And it is equally clear that both sides understood that the buyer, if he bought, was to be his own judge of the quality of the article he purchased. Barnard expressly stipulated, as a condition of sale, that Kellogg should examine the wool, and he did examine it for himself. If Kellogg intended to rely on the samples as a basis of purchase, why did he go to Boston and inspect the bales at all, after notice that such inspection was necessary before the sale could be completed? His conduct is wholly inconsistent with the theory of a sale by sample. If he wanted to secure himself against possible loss, he should either have required a warranty or taken the trouble of inspecting fully all the bales. Not doing this, he cannot turn round and charge the seller with the consequences of his own negligence. Barnard acted in good faith, and did not know or have reason to believe that the wool was falsely packed. The sale on his part was intended to be upon the usual examination of the article. and the proceeding by Kellogg shows that he so understood it, and it is hard to see what ground of complaint even he has against Barnard. It will not do to say that it was inconvenient to examine all the bales. because if inconvenient it was still practicable, and that is all, as we have seen, that the law requires. The case of Salisbury *v.* Stainer, reported in 19th Wendell, page 158, is similar in its facts to this case, and the court applied to it the rule of *caveat emptor.* There bales of hemp were sold which turned out to be falsely packed. The purchaser wished to treat the sale as a sale by sample; but the court said to him, "You were told to examine for yourself, and having opened one bale, and at liberty to open all, and omitting to do it, you cannot be permitted to allege that the sale was a sale by sample, nor to recover damages as on an implied warranty." It is, therefore, clear by the general principles of law, adopted in the interests of trade and commerce, that the seller in this instance was not answerable over for any latent defects in the bales of wool.

But the learned court below having found that by the custom of dealers in wool in New York and Boston there is a warranty by the seller implied from the fact of sale, that the wool is not falsely packed, and having held Barnard bound by it, the inquiry arises whether such a custom can be admitted to control the general rules of law in relation to the sale of personal property.

It is to be regretted that the decisions of the courts, defining what local usages may or may not do, have not been uniform. In some judicial tribunals there has been a disposition to narrow the limits of this species of evidence, in others to extend them, and on this account mainly the conflict in decision arises. But if it is hard to reconcile all the cases, it may be safely said they do not differ so much in principle, as in the application of the rules of law. The proper office of a custom or usage in trade is to ascertain and explain the meaning and intention of the parties to a contract, whether written or in parol, which could not be done without the aid of this extrinsic evidence. It does not go beyond this, and is used as a mode of interpretation on the theory that the parties knew of its existence, and contracted with reference to it. It is often employed to explain words or phrases in a contract of doubtful signification, or which may be understood in different senses, according to the subject-matter to which they are applied. But if it be inconsistent with the contract, or expressly or by necessary implication contradicts it, it cannot be received in evidence to affect it. Usage, says Lord Lyndhurst, "may be admissible to explain what is doubtful; it is never admissible to contradict what is plain." And it is well settled that usage cannot be allowed to subvert the settled rules of law. Whatever tends to unsettle the law, and make it different in the different communities into which the state is divided, leads to mischievous consequences, embarrasses trade, and is against public policy. If, therefore, on a given state of facts, the rights and liabilities of the parties to a contract are fixed by the general principles of the common law, they cannot be changed by any local custom of the place where the contract was made. In this case the common law did not, on the admitted facts, imply a warranty of the good quality of the wool, and no custom in the sale of this article can be admitted to imply one. A contrary doctrine, says the court, in Thompson *v.* Ashton, 14 Johnson, 317, "would be extremely pernicious in its consequences, and render vague and uncertain all the rules of law on the sales of chattels."

In Massachusetts, where this contract was made, the more recent decisions on the subject are against the validity of the custom set up in this case. In Dickinson *v.* Gay, 7 Allen, 29, which was a sale of cases of satinets made by samples, there were in both the samples and the goods a latent defect not discoverable by inspection, nor until the goods were printed, so that they were unmerchantable. It was contended that by custom there was in such a case a warranty implied from the sale that the goods were merchantable. But the court, after a full review of all the authorities, decided that the custom that a warranty was implied, when by law it was not implied, was contrary to the rule of the common law on the subject, and therefore void. If anything, the case of Dodd *v.* Farlow, 11 Allen, 426, is more conclusive on the point. There forty bales of goat-skins were sold by a broker, who put into the memorandum of sale, without authority, the words "to be of merchantable quality and in good order."

It was contended that by custom, in all sales of such skins, there was an implied warranty that they were of merchantable quality, and, therefore, the broker was authorized to insert the words, but the court held the custom itself invalid. They say, "It contravenes the principle, which has been sanctioned and adopted by this court, upon full and deliberate consideration, that no usage will be held legal or binding on parties, which not only relates to and regulates a particular course or mode of dealing, but which also engrafts on a contract of sale a stipulation or obligation which is inconsistent with the rule of the common law on the subject." It is clear, therefore, that in Massachusetts, where the wool was sold and the seller lived, the usage in question would not have been sanctioned.

In New York there are some cases which would seem to have adopted a contrary view, but the earlier and later cases agree with the Massachusetts decisions. The question in Frith *v.* Barker, 2 Johnson, 327, was, whether a custom was valid that freight must be paid on goods lost by peril of the sea, and Chief Justice Kent, in deciding that the custom was invalid, says: "Though usage is often resorted to for explanation of commercial instruments, it never is, or ought to be, received to contradict a settled rule of commercial law." In Woodruff *v.* Merchants' Bank, 25 Wendell, 673, a usage in the city of New York, that days of grace were not allowed on a certain description of commercial paper, was held to be illegal. Nelson, Chief Justice, on giving the opinion of that court, says: "The effect of the proof of usage in this case, if sanctioned, would be to overturn the whole law on the subject of bills of exchange in the city of New York;" and adds, "if the usage prevails there, as testified to, it cannot be allowed to control the settled and acknowledged law of the State in respect to this description of paper." And, in Beirne *v.* Dord, 1 Selden, 95, the evidence of a custom that in the sale of blankets in bales, where there was no express warranty, the seller impliedly warranted them all equal to a sample shown, was held inadmissible, because contrary to the settled rule of law on the subject of chattels. But the latest authority in that State on the subject is the case of Simmons *v.* Law, 3 Keys, 219. That was an action to recover the value of a quantity of gold-dust shipped by Simmons from San Francisco to New York on Law's line of steamers, which was not delivered. An attempt was made to limit the liability of the common carrier beyond the terms of the contract in the bill of lading by proof of the usage of the trade, which was well known to the shipper, but the evidence was rejected. The court, in commenting on the question, say: "A clear, certain, and distinct contract is not subject to modification by proof of usage. Such a contract disposes of all customs by its own terms, and by its terms alone is the conduct of the parties to be regulated, and their liability to be determined."

In Pennsylvania this subject has been much discussed, and not always with the same result. At an early day the Supreme Court of the State allowed evidence of usage, that in the city of Philadelphia the seller of cotton warranted against latent defects, though there were neither fraud on his part or actual warranty. Chief Justice Gibson, at the time, dissented from the doctrine, and the same court, in later cases, has disapproved of it, and now hold that a usage, to be admissible, "must not conflict with the settled rules of law, nor go to defeat the essential terms of the contract."

It would unnecessarily lengthen this opinion to review any further the American authorities on this subject. It is enough to say, as a general thing, that they are in harmony with the decisions already noticed. See the American note to Wigglesworth *v.* Dallison, 1 Smith's Leading Cases, where the cases are collected and distinctions noticed.

The necessity for discussing this rule of evidence has often occurred in the highest courts of England on account of the great extent and variety of local usages which prevail in that country, but it would serve no useful purpose to review the cases. They are collected in the very accurate English note to Wigglesworth *v.* Dallison, and are not different in principle from the general current of the American cases. If any of the cases are in apparent conflict, it is not on account of any difference in opinion as to the rules of law which are applicable.

These rules, says Chief Justice Wilde, in Spartali *v.* Benecke, 10 Common Bench, 222, "are well settled, and the difficulty that has arisen respecting them has been in their application to the varied circumstances of the numerous cases in which the discussion of them has been involved." But this difficulty does not exist in applying these rules to the circumstances of this case. It is apparent that the usage in question was inconsistent with the contract which the parties chose to make for themselves, and contrary to the wise rule of law governing the sales of personal property. It introduced a new element into their contract, and added to it a warranty, which the law did not raise, nor the parties intend it to contain. The parties negotiated on the basis of *caveat emptor*, and contracted accordingly. This they had the right to do, and by the terms of the contract the law placed on the buyer the risk of the purchase, and relieved the seller from liability for latent defects. But this usage of trade steps in and seeks to change the position of the parties, and to impose on the seller a burden which the law said, on making his contract, he should not carry. By this means a new contract is made for the parties, and their rights and liabilities under the law essentially altered. This, as we have seen, cannot be done. If the doctrine of *caveat emptor* can be changed by a special usage of trade, in the manner proposed by the custom of dealers of wool in Boston, it is easy to see it can be changed in other particulars, and in this way the whole doctrine frittered away.

It is proper to add, in concluding this opinion, that the conduct of the parties shows clearly that they did not know of this custom, and could not therefore have dealt with reference to it.

Judgment reversed, and the cause remanded with directions to award a *Venire de novo.*

BRADLEY and STRONG, JJ., dissented.

KELLOGG BRIDGE COMPANY *v.* HAMILTON.

UNITED STATES SUPREME COURT, OCTOBER 31, 1883 – JANUARY 14, 1884.

[*Reported in* 110 *United States*, 108.]

THE Kellogg Bridge Company, the defendant below, undertook to construct, for the Lake Shore and Southern Michigan Railroad Company an iron bridge across Maumee River at Toledo, Ohio. After doing a portion of the work it entered into a written contract with the defendant in error, for the completion of the bridge under its directions, containing, among others, these stipulations: —

> "That the said party of the first part [Hamilton] hereby agrees to furnish and prepare all the necessary false work and erect the iron bridge now being constructed by the said party of the second part [the Kellogg Bridge Company] for the Lake Shore and Michigan Southern Railroad Company at Toledo, Ohio, over the Maumee River, receiving said bridge material as it arrives on the cars at the site of said bridge, and erecting the same in the best manner, according to the design of said bridge and the directions of said second party from time to time, commencing the erection of said work when required to do so by said second party, and proceeding with the same with a force sufficient to complete the entire work on or before the first day of March next; the said first party also agrees to assume and pay for all work done and materials furnished up to the time of executing this contract, including piling and piles, timber, and other materials and labor done on the same, but not including bolts and washers which have been furnished by the party of the second part, but to return said bolts and washers to the said second party, or pay for the same on completion of said bridge.
>
> "And the said first party, in consideration of the payments hereinafter mentioned to be made by said second party, agrees to perform all the stipulations of this agreement in a thorough and workmanlike manner and to the satisfaction of the second party.
>
> "And if at any time the said second party is not satisfied with the manner of performing the work herein described, or the rapidity with which it is being done, the second party shall have full power and liberty to put on such force as may be necessary to complete the work within the time named, and provide such tools or materials for false work as may be necessary, and charge the cost of the same to the said first party, who agrees to pay therefor."

In consideration of the faithful performance of these stipulations, Hamilton was to receive from the Bridge Company $900 on the completion of the first span, a like sum on the completion of the second span, $800 on the completion of the third span, and $1,403 on the completion of the draw and the entire work; such payments to be made only on the acceptance of each part of the work by the chief engineer of the Lake Shore and Michigan Southern Railroad Company.

The bridge which Hamilton undertook to erect consisted of three independent fixed spans, each to be one hundred and seventy-five feet six inches in length, suspended between and resting at each end of the span upon stone piers, which had been prepared to receive the same, and one draw span of one hundred and eighty-five feet in length, resting upon a pier in the centre, also then prepared. In erecting the several spans it was necessary to build and use what the contract described as "false work," which consisted of piles driven in the river between the piers upon which the spans were to rest, and upon which was placed a platform.

As indicated in the written contract, the Bridge Company had previously constructed a part of this false work between the first and second spans, the cost of which Hamilton paid, as by the contract he agreed to do. Assuming this work to be sufficient for the purposes for which it was designed, Hamilton proceeded to complete the erection of the bridge according to the plans furnished him.

There was evidence before the jury tending to establish the following facts: —

A part of the false work or scaffolding put up by the company sank under the weight of the first span, and was replaced by Hamilton. When the second fixed span was about two thirds completed, the ice, which before that had formed in the river, broke up in consequence of a flood, carrying away the false work under that span, and causing the whole of the iron material then in place on the span, or on the span ready to be put in place, to fall in the river, which at that place was about sixteen feet deep. If the piles driven by the Bridge Company had been driven more firmly into the bed of the river, they would have withstood the force of the ice and flood. In consequence of the insufficiency of the false work done by that company, Hamilton was delayed in the completion of the bridge and subjected to increased expense.

The bridge being completed, Hamilton brought suit in the State court to recover the contract price of the bridge, extra work claimed to have been done on it, and damages sustained by reason of the insufficiency of the false work constructed by the Bridge Company, — in all $3,693.78. The cause was removed to the Circuit Court of the United States, where the Bridge Company answered, setting up a counter-claim for $6,619.70. Trial was had with verdict and judgment for plaintiff for $3,039.89. The defendant below brought a writ of error to reverse that judgment.

Mr. Richard Waite and *Mr. E. T. Waite*, for plaintiff in error.

Mr. John C. Lee, for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

After reciting the foregoing facts, he continued: It is insisted by the defendant in error that the value of the matter really in dispute here is less than the amount requisite to give this court jurisdiction. Upon this ground a motion to dismiss was heretofore made, and was denied. To that ruling we adhere. Upon the pleadings it is apparent that the defendant asserts its right to judgment for $6,619.70, after crediting plaintiff, not only with the sum specified in the contract, but with every other sum to which he is entitled in the accounting. This is conclusive as to our jurisdiction upon this writ of error.

It was not claimed on the trial, nor is it contended here, that the company made any statement or representation as to the nature or character of the false work it did, and which, by the contract, Hamilton agreed to assume and pay for. But there was evidence tending to show that the insufficiency of that false work was unknown to Hamilton at the time the contract was made; was not apparent upon any examination he then made, or could have made; and was not discovered, indeed, could not have been discovered, until, during the progress of the erection of the bridge, the false work was practically tested.

The court, among other things, instructed the jury, at the request of plaintiff, and over the objections of the defendant, that by the contract — looking at all the circumstances attending its execution and giving to its terms a fair and reasonable interpretation — there was an implied warranty upon the part of the company that the false work it did, and which plaintiff agreed to assume and pay for, was suitable and proper for the purposes for which the Bridge Company knew it was to be used. This instruction was accompanied by the observation that if the evidence showed "that the particular work which was said to be defective was such that the plaintiff could not by examination ascertain its defects — for if they were apparent by mere examination of the false work it was the duty of the plaintiff to make that good — he had the right to rely upon the implied warranty; that is, if the defects were such that they could not be, by ordinary observation and care on behalf of the plaintiff, ascertained and found out." That instruction presents the only question we deem it necessary to determine. Although there are several assignments of error, they depend, as counsel for plaintiff in error properly concede, upon the inquiry whether the court erred in ruling that by the terms of the contract there was an implied warranty that the false work constructed by the Bridge Company was suitable and proper for the purposes for which it was to be used by Hamilton.

The argument in behalf of plaintiff in error proceeds upon the ground that there was a simple transfer by the company of its ownership of the work and materials as they existed at the time of the contract; that Hamilton took the false work for what it was, and just as it stood; consequently, that the rule of *caveat emptor* applies with full force. The position of counsel for Hamilton is that, as in cases of sales of articles by those manufacturing or making them, there was an implied warranty by the Bridge Company that the work sold or transferred to Hamilton was reasonably fit for the purposes for which it was purchased.

The cases in which the general rule of *caveat emptor* applies are indicated in Barnard *v.* Kellogg, 10 Wall. 383, 388, where, speaking by Mr. Justice Davis, the court observed, that "no principle of the common law has been better established, or more often affirmed, both in this country and in England, than that in sales of personal property, in the absence of express warranty, where the buyer has an opportunity to inspect the commodity, and the seller is guilty of no fraud, and is neither the manufacturer nor grower of the article he sells, the maxim of *caveat emptor* applies."

An examination of the ground upon which some of the cases have placed the general rule, as well as the reasons against its application, under particular circumstances, to sales of articles by those who have manufactured them, will aid us in determining how far the doctrines of those cases should control the one before us.

The counsel for the Bridge Company relies upon Parkinson *v.* Lee, 2 East, 314, as illustrating the rule applicable in ordinary sales of merchandise. That case arose out of a sale of five pockets of hops, samples of which were taken from each pocket and exhibited at the time of sale. The question was whether, under the circumstances of that case, — there being no express warranty and no fraud by the seller, — there was an implied warranty that the commodity was merchantable. It was resolved in the negative, upon the ground that it was the fault of the buyer that he did not insist on a warranty; the commodity was one which might or might not have a latent defect, a fact well known in the trade; and since a sample was fairly taken from the bulk, and the buyer must have known, as a dealer in the commodity, that it was subject to the latent defect afterwards appearing, he was held to have exercised his own judgment and bought at his own risk. But of that case, it was observed by Chief Justice Tindal, in Shepherd *v.* Pybus, 3 Man. & Gr. 868, that two of the judges participating in its decision laid "great stress upon the fact that the seller was not the grower of the hops, and that the purchaser, by the inspection of the hops, had as full an opportunity of judgment of the quality of the hops as the seller himself." There was, consequently, nothing in the circumstances to justify the buyer in relying on the judgment of the seller as to the quality of the commodity. It is also worthy of remark, that in Randall *v.* Newson, 2 Q. B. 102, it was said of Parkinson *v.* Lee, that "either it does not determine the extent of the seller's liability on the contract, or it has been overruled."

In Brown *v.* Edgington, 2 Man. & Gr. 279, the plaintiff sought to recover damages resulting from the insufficiency of a rope furnished by the defendant upon plaintiff's order, to be used, as defendant knew, in raising pipes of wine from a cellar. The defendant did not himself manufacture the rope, but procured another to do so, in order that he, defendant, might furnish it in compliance with the plaintiff's request. Tindal, C. J., said: "It appears to me to be a distinction well founded, both in reason and on authority, that if a party purchases an article upon his own judgment, he cannot afterwards hold the vendor responsible on the ground that the article turns out to be unfit for the purpose for which it was required; but if he relies upon the judgment of the seller, and informs him of the use to which the article is to be applied, it seems to me the transaction carries with it an implied warranty that the thing furnished shall be fit and proper for the purpose for which it was designed."

In Shepherd *v.* Pybus, already referred to, the question was whether, upon the sale of a barge by the builder, there was a warranty of fitness for the purpose for which it was known by the builder to have been purchased. It was held that the law implied such a warranty. The ground of the decision was that the purchaser had no opportunity of inspecting the barge during its construction, having seen it only after completion; that the defects afterwards discovered were not apparent upon inspection, and could only be detected upon trial.

In Jones *v.* Just, L. R. 3 Q. B. 197, upon an extended review of the authorities, the court classified the adjudged cases bearing upon the subject of implied warranty, and said that "it must be taken as established that on the sale of goods by a manufacturer or dealer, to be applied to a particular purpose, it is a term in the contract that they shall reasonably answer that purpose, and that on the sale of an article by a manufacturer to a vendee who has not had the opportunity of inspecting it during the manufacture, that it shall be reasonably fit for use or shall be merchantable, as the case may be."

Other cases might be cited, but these are sufficient to show the general current of decision in the English courts.

The decisions in the American courts do not indicate any substantial difference of doctrine. A leading case upon the subject, where the authorities were carefully examined and distinguished, is Hoe *v.* Sanborn, 21 N. Y. 552. The decision there was that "where one sells an article of his own manufacture which has a defect produced by the manufacturing process itself, the seller must be presumed to have had knowledge of such defect, and must be holden, therefore, upon the most obvious principles of equity and justice — unless he informs the purchaser of the defect — to indemnify him against it."

In Cunningham *v.* Hall, 4 Allen, 268, the cases of Hoe *v.* Sanborn, and Shepherd *v.* Pybus, and Brown *v.* Edgington, *supra*, are cited with approval. In Rodgers *v.* Niles, 11 Ohio St. 48, 53, the Supreme Court of Ohio recognizes among the exceptions to the general rule, cases "where it is evident that the purchaser did not rely on his own judgment of the quality of the article purchased, the circumstances showing that no examination was possible on his part, or the contract being such as to show that the obligation and responsibility of ascertaining and judging of the quality was thrown upon the vendor, as where he agrees to furnish an article for a particular purpose or use."

So in Leopold *v.* Vankirk, 27 Wis. 152: "The general rule of law with respect to implied warranties is well settled that when the manufacturer of an article sells it for a particular purpose, the purchaser making known to him at the time the purpose for which he buys it, the seller thereby warrants it fit and proper for such purpose and free from latent defects."

So also in Brenton *v.* Davis, 8 Blackf. 317, 318: "We consider the law to be settled that if a manufacturer of an article sells it at a fair market price, knowing the purchaser designs to apply it to a particular purpose, he impliedly warrants it to be fit for that purpose; and that if, owing to some defect in the article not visible to the purchaser, it is unfit for the purpose for which it is sold and bought, the seller is liable on his implied warranty."

2 Story on Contracts, § 1077, 5th ed., by Bigelow; 1 Chitty on Contracts, 11th American ed., 631, 632, note *m*; Addison on Contracts, ch. 7, § 1, p. 212.

The authorities to which we have referred, although differing in the form of stating the qualifications and limitations of the general rule, yet indicate with reasonable certainty the substantial grounds upon which the doctrine of implied warranty has been made to rest. According to the principles of decided cases, and upon clear grounds of justice, the fundamental inquiry must always be whether, under the circumstances of the particular case, the buyer had the right to rely and necessarily relied on the judgment of the seller, and not upon his own. In ordinary sales the buyer has an opportunity of inspecting the article sold; and the seller not being the maker, and therefore having no special or technical knowledge of the mode in which it was made, the parties stand upon grounds of substantial equality. If there be, in fact, in the particular case any inequality, it is such that the law cannot or ought not to attempt to provide against; consequently, the buyer in such cases — the seller giving no express warranty and making no representations tending to mislead — is holden to have purchased entirely on his own judgment. But when the seller is the maker or manufacturer of the thing sold, the fair presumption is that he understood the process of its manufacture, and was cognizant of any latent defect caused by such process, and against which reasonable diligence might have guarded. This presumption is justified, in part, by the fact that the manufacturer or maker by his occupation holds himself out as competent to make articles reasonably adapted to the purposes for which such or similar articles are designed. When, therefore, the buyer has no opportunity to inspect the article, or when, from the situation, inspection is impracticable or useless, it is unreasonable to suppose that he bought on his own judgment, or that he did not rely on the judgment of the seller as to latent defects of which the latter, if he used due care, must have been informed during the process of manufacture. If the buyer relied, and under the circumstances had reason to rely, on the judgment of the seller, who was the manufacturer or maker of the article, the law implies a warranty that it is reasonably fit for the use for which it was designed, the seller at the time being informed of the purpose to devote it to that use.

Whether these principles control, or to what extent they are applicable, in the present case, we proceed to inquire.

Although the plaintiff in error is not a manufacturer in the common acceptation of that word, it made or constructed the false work which it sold to Hamilton. The transaction, if not technically a sale, created between the parties the relation of vendor and vendee. The business of the company was the construction of bridges. By its occupation, apart from its contract with the railroad company, it held itself out as reasonably competent to do work of that character. Having partially executed its contract with the railroad company, it made an arrangement with Hamilton, whereby the latter undertook, among other things, to prepare all necessary false work, and, by a day named, and in the best manner, to erect the bridge then being constructed by the Bridge Company, — Hamilton to assume and pay for such work and materials as that company had up to that time done and furnished. Manifestly, it was contemplated by the parties that Hamilton should commence where the company left off. It certainly was not expected that he should incur the expense of removing the false work put up by the company and commence anew. On the contrary, he agreed to assume and pay for, and therefore it was expected by the company that he should use, such false work as it had previously prepared. It is unreasonable to suppose that he would buy that which he did not intend to use, or that the company would require him to assume and pay for that which it did not expect him to use, or which was unfit for use. It is suggested that, as Hamilton undertook to erect the bridge in a thorough and workmanlike manner, he was not bound to use the false work put up by the company, and that if he used it in execution of his contract, he did so at his own risk. This is only one mode of saying that, in the absence of an express warranty or fraud upon the part of the company, the law will not, under any circumstances, imply a warranty as to the quality or sufficiency of this false work. But the answer to this argument is that no question was raised as to its sufficiency; that, while Hamilton must be charged with knowledge of all defects apparent or discernible upon inspection, he could not justly be charged with knowledge of latent defects which no inspection or examination, at or before the sale, could possibly have disclosed. The jury have, in effect, found the false work to have been insufficient, in that the piles were not driven deep enough; that had they been properly driven, the work would have answered the purposes for which Hamilton purchased it; and that he could not have ascertained such defects in advance of an actual test made during the erection of the bridge. It must be assumed that the company knew, at the time of sale, that Hamilton could not, by inspection, have discovered the latent defects which were subsequently disclosed. And if it be also assumed, as it fairly may be, that Hamilton, being himself a bridge builder, knew that there might be latent defects in this false work, caused by the mode of its construction, and beyond his power by mere inspection to ascertain, it must not be over looked that he also knew that the company, by its agents or servants, were or should have been informed as to the mode in which the work had been done. That he did not exact an express warranty against latent defects not discoverable by inspection, constitutes, under the circumstances, no reason why a warranty may not be implied against such defects as were caused by the mode in which this false work was constructed. In the cases of sales by manufacturers of their own articles for particular purposes, communicated to them at the time, the argument was uniformly pressed that, as the buyer could have required an express warranty, none should be implied. But, plainly, such an argument impeaches the whole doctrine of implied warranty, for there can be no case of a sale of personal property in which the buyer may not, if he chooses, insist on an express warranty against latent defects.

All the facts are present which, upon any view of the adjudged cases, must be held essential in an implied warranty. The transaction was, in effect, a sale of this false work, constructed by a company whose business it was to do such work, to be used in the same way the maker intended to use it, and the latent defects in which, as the maker knew, the buyer could not, by any inspection or examination at the time, discover; the buyer did not, because in the nature of things he could not, rely on his own judgment; and, in view of the circumstances of the case, and the relations of the parties, he must be deemed to have relied on the judgment of the company, which alone of the parties to the contract had or could have knowledge of the manner in which the work had been done. The law, therefore, implies a warranty that this false work was reasonably suitable for such use as was contemplated by both parties. It was constructed for a particular purpose, and was sold to accomplish that purpose; and it is intrinsically just that the company, which held itself out as possessing the requisite skill to do work of that kind, and therefore as having special knowledge of its own workmanship, should be held to indemnify its vendee against latent defects, arising from the mode of construction, and which the latter, as the company well knew, could not, by any inspection, discover for himself.

For the reasons stated, we are of opinion that the court did not err in the law of the case, and the judgment must be *Affirmed.*

MURCHIE *v.* CORNELL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER 28 — NOVEMBER 25, 1891.

[*Reported in* 155 *Mass.* 60.]

CONTRACT, for a cargo of ice sold by the plaintiffs to the defendants.

At the trial in the Superior Court, before Dunbar, J., there was evidence that Pardon Cornell, as representing a firm composed of the other defendant and himself which dealt in ice, went to Calais, Maine, and had several conversations with William A. Murchie, one of the plaintiffs, who formed a firm also dealing in ice, in relation to the purchase of a cargo of ice.

The plaintiffs' evidence tended to show that the ice which the plaintiffs were proposing to sell to the defendants was in Pembroke, a town upon the coast of Maine, about eighteen miles distant from Calais, with which the only communication was by stage-coach; that Murchie suggested to Cornell that he should go to Pembroke and see the ice; that at the time of the first conversation between them in regard to ice the plaintiffs did not own the ice, but proposed to buy it and ship it to the defendants, but before the negotiations were completed they had purchased the ice; that there was no express warranty of the ice; and that the ice on its arrival was sound and merchantable.

The defendants' evidence tended to show that Murchie proposed to Cornell to sell him a cargo of ice to be shipped from Pembroke; that the negotiations were not completed at Calais, and Cornell left there for Bangor and New Bedford; that the contract for the purchase of the ice was completed by telegrams which passed between Calais and Bangor, and finally between Calais and New Bedford; that by the terms of the contract the plaintiffs were to ship a cargo of ice, of three hundred and sixty tons, from Pembroke, Maine, by vessel to New Bedford, at a certain price per ton; and that the ice on its arrival was unsound and unmerchantable.

The plaintiffs introduced evidence tending to show that the first complaint they had from the defendants as to the quality or condition of the ice, was a telegram from Cornell: "Schooner arrived, — shortage needs adjusting, — come at once;" and that the defendants never notified them of any fault with the ice excepting as to the quantity until after the bringing of this action, and no complaint was made by the defendants to them as to the quality or condition of the ice. The defendants, having introduced evidence tending to show that Cornell went to the office of a notary public the day the discharging of the ice was completed, and there signed and made oath to a statement in writing, which was duly recorded by the notary in his book of protests, thereupon offered this written statement for the purpose of rebutting any claim on the part of the plaintiffs that the defendants had no fault to find with the quality and condition of the ice prior to the bringing of the action, and of rebutting any argument which might be made therefrom that there was no fault to be found with the quality or the condition of the ice, and not as evidence of the contents of such written instrument. The judge excluded the evidence offered, and the defendants excepted.

The defendants asked the judge to rule as follows; "In a contract for the sale of ice at wholesale by a dealer in the article to one to be sold again, where there is no opportunity for inspection of the ice, and no express warranty is made, there is an implied warranty that the ice sold is merchantable and salable as ice for ordinary retail use."

The judge declined to give the ruling asked for, but instructed the jury in relation thereto as follows: "There is no implied warranty of the quality of goods, — by implied warranty I mean a warranty which arises out of the sale itself, nothing being said as to quality, — unless the kind or species of article is such that an affirmation is necessarily implied in the making of the sale of that article, that it is of a particular quality. In ordinary sales, in the sales of ordinary articles, such an implied warranty does not arise; and speaking strictly of quality in this case, there is no implied warranty. What is quality and what is condition in the case of ice is a matter perhaps very difficult to determine, when there is no question of the purity of the water contained in the ice. If we had here before us a question of the purity of the water of which the ice had been frozen, you might say without any qualification it was a question of quality. Here the quality relied upon depends largely upon the condition of the ice. As it is a matter of common knowledge that ice is cut in cakes, and that it is sold and handled and delivered in cakes, at wholesale at least, and as by this contract all parties contemplated the ice was to be shipped on board a schooner and sent by sea to New Bedford, there to be discharged and stacked or housed, there must be an implied affirmation that the ice was of such a kind that it could be so shipped, transported, and discharged; that is as far as there can be an implied warranty in this case, if that can be said to be an implied warranty."

The jury returned a verdict for the plaintiffs; and the defendants alleged exceptions.

H. M. Knowlton, for the defendants.

W. Clifford, for the plaintiffs.

HOLMES, J. 1. The plaintiffs agreed to sell, and the defendants agreed to buy, a cargo of ice of three hundred and sixty tons, to be shipped from Pembroke, Maine. From some of the evidence it would seem that the ice was not identified by the contract, but was to be supplied and appropriated to the contract by the plaintiffs, the sellers. From other parts of the testimony it might be inferred that the ice was identified by the contract, but at a time and under circumstances when the defendants had no opportunity to inspect it before shipment. The judge instructed the jury generally that there was an implied affirmation that the ice was of such a kind that it could be shipped, transported by sea, and discharged at New Bedford, as contemplated by the contract, and no other implied affirmation or warranty. If the instruction is wrong in either view which the jury might have taken of the facts, the exceptions must be sustained, and it is unnecessary to consider whether the implication would be more extensive in the former case than in the latter.

In some contracts of the latter kind, when the sale is of specific goods, but the buyer has no chance to inspect them, the name given to the goods in the contract, taken in its commercial sense, may describe all that the purchaser is entitled to demand. So it was held with regard to "Manila sugar," in Gossler *v.* Eagle Sugar Refinery, 103 Mass. 331.

But in many cases like the present, the inference is warranted that the thing to be furnished must be not only a thing of the name mentioned in the contract, but something more. How much more may depend upon circumstances, and at times the whole question may be for the jury. If a very vague generic word is used, like "ice," which taken literally may be satisfied by a worthless article, and the contract is a commercial contract, the court properly may instruct the jury that the word means more than its bare definition in the dictionary, and calls for a merchantable article of that name. If that is not furnished the contract is not performed. Warner *v.* Arctic Ice Co., 74 Maine, 475; Swett *v.* Shumway, 102 Mass. 365, 369; Whitmore *v.* South Boston Iron Co., 2 Allen, 52, 58.

In a sale of "Manilla hemp," like that of the sugar in Gossler *v.* Eagle Sugar Refinery, it was held in England that the hemp must be merchantable. Jones *v.* Just, L. R. 3 Q. B. 197; Gardiner *v.* Gray, 4 Camp. 144; Howard *v.* Hoey, 23 Wend. 350, 351; Merriam *v.* Field, 39 Wis. 578; Fish *v.* Roseberry, 22 Ill. 288, 299; Babcock *v.* Trice, 18 Ill. 420. See Hight *v.* Bacon, 126 Mass. 10, 12; Hastings *v.* Lovering, 2 Pick. 214, 220.

2. The plaintiffs put in evidence tending to show that the defendants never notified them of any defect in the quality or condition of the ice until after this suit. To meet this the defendants offered a protest signed and sworn to by one of them on the day the ice arrived. This protest was no evidence that the statements contained in it were true, or that the defendants' story was not false. So far as the plaintiffs' evidence was introduced for the purpose of showing such an acceptance of the ice as to bar the defendants from alleging that it did not satisfy the contract (Morse *v.* Moore, 83 Maine, 473, and Gaylord Manuf. Co. *v.* Allen, 53 N. Y. 515, 519), the protest of course had no bearing. And although it did show that the defendant's story was not an afterthought, it was properly excluded, the plaintiffs, so far as appears, not having taken that specific point. Wallace *v.* Story, 139 Mass. 115. *Exceptions sustained.*

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WILLIAM J. DOUNCE *v.* BENJAMIN F. DOW ET AL.

NEW YORK COURT OF APPEALS, FEBRUARY 18—MARCH 21, 1876.

[*Reported in* 64 *New York*, 411.]

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department in favor of plaintiff, entered upon an order denying motion for a new trial and directing judgment upon a verdict. (Reported below, 6 T. & C. 653.)

This action was upon a promissory note made by defendants, to the order of the plaintiff, payable at four months at the Genesee Valley National Bank.

The defence was that the note was given for ten tons of "XX pipe iron," which defendants bought of plaintiff, to be used in making castings for agricultural implements, in the manufacture of which defendants were engaged at Fowlerville, in this State. The iron was shipped to, and received by the defendants, and, without making any test or examination of it, it was mixed with other varieties of pig-iron and converted into such castings. The iron so purchased of plaintiff was so rotten and worthless that the castings made from it were valueless, and the defendants were put to great expense in the effort to use said iron, and to great loss in utter worthlessness of the machinery made therefrom. This loss and expense they set up as a counter-claim to the note.

It appeared upon the trial that the plaintiff was a dealer in pig metals, at Elmira, and the defendants were, and had for a number of years been, manufacturers of castings for agricultural implements at Fowlerville. Prior to the 27th of January, 1869, several letters had passed between the parties as to pig-iron of various sorts, in one of which letters defendants ask plaintiff the price for "XX pipe iron." On the twenty-eighth of January plaintiff wrote to defendants a letter, in which he acknowledged the receipt of a letter from them, and told them he could supply them XX pipe through the season, but would not fix any certain price for the same. He said he could sell XX pipe then at forty-two dollars and fifty cents, and would sell all the season that brand at the lowest figure he could. He also gave the time and manner in which he required payment. On the twenty-ninth of January defendants wrote to the plaintiff to enter their order for ten tons of XX pipe iron, and send to them at Caledonia as soon as received. On the 12th of February, 1869, plaintiff shipped to defendants, as directed, ten tons branded and billed as XX pipe, addressed to them at Fowlerville. On or about the fifteenth of February, and before the iron was received, defendants sent to plaintiff their note for the amount of the bill. It did not conform entirely to the terms of sale, and plaintiff returned it to defendants, who corrected the error and returned the same to plaintiff. A few days thereafter the iron was received by defendants. When they came to use the castings made, they were found to be brittle and worthless, and, on examination, the XX pipe iron was found to be brittle, rotten, and worthless.

Five tons of the XX iron were used before its worthlessness was discovered, and then defendants wrote to plaintiff complaining of the injury done to them by reason of the bad quality of the iron sold to them, refusing to use any more of it and offering to return what remained unused. The iron in question was manufactured at a furnace in Pennsylvania, and purchased by plaintiff to be sold by him. He had none on hand when he received defendants' order, but ordered it from the manufactory, received and shipped it as "XX pipe iron." The quality of pig iron cannot be ascertained by merely examining it externally. There are two tests by which to determine the quality. One is melting it; the other, breaking the pig so that the internal surface may be examined, and from the appearance of that surface a person acquainted with pig-iron could determine its quality quite accurately without using it. The iron sent to defendants was not broken and examined, and the effect of it upon the castings was not ascertained for several weeks, as defendants cast a large quantity before they prepared them for use.

There was some conflict in the evidence as to whether the iron was, in fact, "XX pipe."

Counsel for the defendants asked permission to go to the jury upon the questions of the market value of the iron in question; as to whether the iron was worth anything for the purposes of the defendants' business, and as to whether there was not a warranty on the part of the plaintiff, express or implied, that the iron shipped upon the order of defendants was fit and suitable for use in the manufacturing business of the defendants. The court declined to grant the requests; to which ruling and decision counsel for the defendants duly excepted.

The court directed a verdict for plaintiff for the amount of the note. Exceptions were ordered to be heard at first instance at General Term.

J. B. Adams, for the appellants.

J. R. Ward, for the respondent.

Church, C. J. The article ordered was "XX pipe iron," and the same was forwarded and billed as such. This was a warranty of the character of the article within the decision in Hawkins *v.* Pemberton, 51 N. Y. 198, which modified, to some extent, the earlier decisions of Seixas *v.* Woods, 2 Caines, 48, and Swett *v.* Colgate, 20 J. R. 196. The words "pipe iron" referred to the furnace where manufactured, and "XX" to the brand indicating the quality. The plaintiff was not a manufacturer, but a dealer in "pig metals," and was not presumed to know the precise quality of every lot of pigs bought and sold by him, bearing that brand, and hence cannot be held to have warranted that the pigs in question were of any certain quality. Hoe *v.* Sanborn, 21 N. Y. 552. There was no fraud. Both parties supposed, doubtless, that the iron was first quality for the purpose for which it was intended. But it is not enough that the plaintiff knew such purpose. 34 N. Y. 118. The defendant should have exacted a specific warranty, and then both parties would have acted understandingly. If the defendants had ordered XX pipe iron, which was tough and soft, and fit for manufacturing agricultural implements, and the plaintiff had agreed to deliver iron of that quality, a warranty would have been established, which, probably, within the case of Day *v.* Pool, 52 N. Y. 416, would have survived the acceptance of the article. Here both parties acted in good faith. The defendants ordered simply XX pipe iron, supposing that such iron was always tough and soft. The plaintiff forwarded the iron under the same impression. The iron proved to be brittle and hard, and the question is, which party is to bear the loss? The plaintiff (in the absence of fraud) was only bound by his contract, which was to deliver XX pipe iron, and we are now assuming that such iron was delivered. If so, he was relieved from liability. The only other liability which can be claimed that he incurred was of an implied warranty that the iron was merchantable, and this could not be affirmed unless the contract was executory. 2 Kent's Com. (11th ed.), note *c*, p. 634. Without inquiring whether such a warranty would be implied under the circumstances of this case, or if it would, what in this case the term "merchantable" would import, it is sufficient to say that the defendants, by using a large portion of the iron after an opportunity to examine and ascertain whether it was merchantable, must be deemed to have accepted it, and to have waived the alleged implied warranty within the general rule which, to this extent, is not impaired by Day *v.* Pool, *supra.*

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The only serious question in the case is, whether the court erred in directing a verdict. There was, as we have seen, an express warranty that the iron was XX pipe iron, and there was some evidence, although slight, that it was not. This point, however, was waived. The counsel for the defendants asked to go to the jury upon several questions, but did not include among them the question whether this warranty was broken. 43 N. Y. 85, and cases cited.

The ruling in rejecting the letter of the 28th March, 1868, to the defendants' predecessors, with this point out of the case, was not erroneous. That letter was not a warranty that the iron in question was tough and soft, but might have been admissible as a declaration of the party, if the iron had not been XX pipe iron. The same brand of iron is not always of the same quality, and the statement, the year before, by the plaintiff that he was receiving iron of that brand, which was tough and soft, would not inure as a warranty that all the iron which he might thereafter sell of that brand was of that quality.

We think that the judgment must be affirmed.

All concur; ANDREWS, J., concurring in result.

Judgment affirmed.[1]

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[1] See further the following recent decisions on the implication of warranties: Seitz *v.* Brewers' Refrigerating Co., 141 U. S. 510; Grand Avenue Hotel Co. *v.* Wharton, 79 Fed. Rep. 43 (C. C. A.); Carpenter *v.* Gage, 107 Fed. Rep. 886 (C. C. A.); Cleveland Oil Co. *v.* Buchanan, 120 Fed. Rep. 906 (C. C. A.); Fredrick Mfg. Co. *v.* Devlin, 127 Fed. Rep. 71 (C. C. A.); Troy Co. *v.* Potter, 139 Ala. 359; Wells *v.* Gress, 118 Ga. 566; Martin *v.* Roehm, 92 Ill. App. 87; Horwich *v.* Western Brewery Co., 95 Ill. App. 162; Spring *v.* Slayden-Kirksey Mills, 106 Ill. App. 579; Telluride Co. *v.* Crane Co., 208 Ill. 218; Burnett *v.* Hensley, 118 Ia. 575; Parsons Co. *v.* Mallinger, 98 N. W. Rep. 580 (Ia.); Gardener *v.* Winter, 25 Ky. L. Rep. 1472; White *v.* Oakes, 88 Me. 367; Queen City Glass Co. *v.* Pittsburg Clay Pot Co., 97 Md. 429; Day *v.* Mapes-Reeve Co., 174 Mass. 412; West Michigan Co. *v.* Diamond Glue Co., 87 N. W. Rep. 92 (Mich.); Miamisburgoe Co. *v.* Wohlhuter, 71 Minn. 484; St. Louis Brewing Assoc. *v.* McEnroe, 80 Mo. App. 429; Creasy *v.* Gray, 88 Mo. App. 454; Gregg *v.* Page Belting Co., 69 N. H. 247; Ivans *v.* Laury, 67 N. J. L. 153; Carleton *v.* Lombard, 149 N. Y. 137; Bierman *v.* City Mills Co., 151 N. Y. 482; Prentice *v.* Fargo, 53 N. Y. App. Div. 608; Smith *v.* Coe, 55 N. Y. App. Div. 585; Bell *v.* Mills, 78 N. Y. App. Div. 42; Piel *v.* Nat. Cooperage Co., 85 N. Y. App. Div. 613; Southern Brass Co. *v.* Exeter Mach. Works, 109 Tenn. 67; McQuaid *v.* Ross, 85 Wis. 492.

BURNBY *v.* BOLLETT.

IN THE EXCHEQUER, APRIL 21, 1847.

[*Reported in* 16 *Meeson & Welsby,* 644.]

PARKE, B., now delivered the judgment of the Court. This case was tried before my Brother Patteson, at the last Summer Assizes for the county of Lincoln. It was an action on the case, alleging that the defendant publicly offered the carcase of a pig for sale, as and for food for man, and by falsely and fraudulently warranting it to be wholesome, and fit for food for man, sold it to the plaintiff, who paid the defendant the price.

It appeared on the trial, that the carcase of the pig was exposed for sale in the public street of Lincoln, in the shop of one Penrose, a butcher, when the defendant bought it, but did not take it away. The plaintiff afterwards applied to Penrose to purchase it, but being informed it was already sold to the defendant, he applied to him, and agreed with him to buy it, and paid him for it. It turned out that the pig was measly; it became afterwards putrid, was unfit for food, and the plaintiff, having called on the defendant to repay the sum given to him, which was refused, brought this action.

It did not appear that the defendant had any knowledge of the unsound state of the pig; and he was not a butcher, or dealer in meat. He had not exposed it publicly for sale. He had bought the pig for his own use, and left it till it should be delivered; but when he sold it to the plaintiff, there was a reasonable presumption for the consideration of the jury that he knew it was to be used for human food.

On this state of facts. Mr. Whitehurst, for the defendant, prayed for a nonsuit at the close of the plaintiff's case. The learned judge permitted the case to proceed, reserving the point, whether he ought to have nonsuited. The plaintiff had a verdict, and a rule *nisi* for a nonsuit having been obtained, the case was fully argued at the sittings after last term.

The argument for the plaintiff was, that the sale of victuals to be used as food for man differed from the sale of other commodities, and that the vendor of such, if they were unwholesome, was liable to the vendee, without fraud or warranty. This position is laid down, apparently in general terms, in Keilway, 91; but the cases there referred to, in the Year Books, 9 Hen. 6, 37, pl. 53, and 11 Edw. 4, Trin. 10, pl. 6, and other authorities, when considered, lead to this conclusion, that there is no other difference between the sale of victuals for food, and other articles, than this, that victuallers, butchers, and other common dealers in victuals are not merely in the same situation that common dealers in other commodities are, and liable under the same circumstances as they are, so that, if an order be sent to them to be executed, they are presumed to undertake to supply a good and merchantable article; but they are also liable to punishment for selling corrupt victuals, by virtue of an ancient statute (certainly if they do so knowingly, and probably if they do not), and are therefore responsible civilly to those customers to whom they sell such victuals, for any special or particular injury by the breach of the law which they thereby commit. That they, the common dealers, not all persons, are liable criminally for selling corrupt victuals, is clear; for Lord Coke says, in 4 Inst. 261: "This court of the leet may inquire of corrupt victual, as a common nuisance, whereof some have doubted, both for that it is omitted in the statute of the leet, and of the weak authority of the book of the 9 Hen. 6, where Martyn saith that it is ordained that none should sell corrupt victual. And Cottismore held the opinion that it is *actio popularis,* whereupon it is collected that the conusance thereof belongeth to the leet; and Martyn and Neal (11 Hen. 4), agreeing with him, said truly; for, by the statute of 51 Hen. 3, Stat. 'pillor', et tumbrel', et assiss' panis et cervis',' and by the statute made in the reign of Edw. 1, intituled Stat. 'de pistoribus et brasiatoribus, et aliis vitellariis,' it is ordained that none shall sell corrupt victuals."

The statute of 51 Hen. 3, of the Pillory and Tumbril, and Assize of Bread and Ale, applies only to vintners, brewers, butchers, and cooks. Amongst other things, inquiry is to be made of the vintners' names, and how they sell a gallon of wine, or if any corrupted wine be in the town, or such is not wholesome for man's body; and if any butcher sell contagious flesh, or that died of the murrain, or cooks that seethe unwholesome flesh, &c. Lord Coke goes on to say, that Britton, who wrote after the statute 51 Hen. 3, and following the same, saith, "Puis soit inquise de ceux queux achatent per un manner de measure, et vendent per meinder measure faux, et ceux sont punis come vendors des vines, et auxi ceux que serront atteint de faux aunes, et faux poys, et auxi les macegrieves (*macellarii*, butchers), et les gents que de usage vendent a trespassants (passengers) mauvaise vians corrumpus et wacrus, et autrement perillous a la saunty de home, encountre le forme de nous statutes."

This view of the case explains what is said in the Year Book, 9 Hen. 6, 53, that "the warranty is not to the purpose; for it is ordained that none shall sell corrupt victuals;" and what is said by Tanfield, C. B., and Altham, B., Cro. Jac. 197, "that if a man sells corrupt victuals, without warranty, an action lies, because it is against the commonwealth;" and also explains the note of Lord Hale, in 1st Fitzherbert's Natura Brevium, 94, that there is diversity between selling corrupt wines as merchandise; for there an action on the case does not lie without warranty; otherwise, if it be for a taverner or victualler, if it prejudice any.

The defendant in this case was not dealing in the way of a common trade, and was not punishable in the leet for what he did. He merely transferred his bargain to the plaintiff. He falls within the reason of the former part of Lord Hale's distinction; and there being no evidence of a warranty, or of any fraud, he is not liable. The plaintiff ought, therefore, to have been nonsuited at the trial, and this rule must be made absolute. *Rule absolute.*[1]

C.

Remedies for Breach of Warranty.

POULTON v. LATTIMORE.

In the King's Bench, Hilary Term, 1829.

[*Reported in* 9 *Barnewall & Cresswell,* 259.]

Assumpsit for goods sold and delivered. Plea, general issue. At the trial before Garrow, B., at the Summer Assizes for the county of Hertford, 1828, it appeared that the action was brought to recover the price of eight quarters of cinq foin seed sold by the plaintiff to the defendant at £3 per quarter, and warranted to be good new growing seed. The defence was, that it did not correspond with the warranty. It was proved that soon after the seed had been purchased by the defendant, it had been examined and tasted by a person of skill, and that he had declared it not to be good growing seed; that the defendant did not communicate this to the plaintiff or return the seed; but, on the contrary, sowed part, and sold the residue to two individuals, who were called as witnesses, and they stated that the seed had proved wholly unproductive, and was not worth anything, and that they neither had paid nor would pay for it. It was insisted, on the part of the plaintiff, that as the defendant had not returned the seed, but had sown part of it, and had sold the residue to two persons who had sown it, he had adopted the contract in part; that he could not adopt it in part by keeping the seed, and reject it in part by refusing to pay the stipulated price; but that having adopted it in part, he was bound to adopt it altogether, and therefore to pay the stipulated price; and that being so, that it was not competent to the defendant to insist on the breach of warranty as a defence to this action. The learned Judge received the evidence, but reserved liberty to the plaintiff, in case the verdict of the jury should be against him, to move to enter a verdict in his favor, if the Court should be of opinion that the breach of warranty was no defence to the action; and he directed the jury to find for the defendant if upon the evidence they were of opinion that the seed did not correspond with the warranty. The jury having found for the defendant, a rule *nisi* was obtained in last Michaelmas term by Brodrick for entering a verdict for the plaintiff for the value of the seed, against which

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[1] In a few jurisdictions it has been decided in accordance with a statement in 3 Blackstone's Commentaries, 165, that there is always an implied warranty in the sale of provisions. Hoover *v.* Peters, 18 Mich. 51; Sinclair *v.* Hathaway, 57 Mich. 60; Copas *v.* Anglo-American Provision Co., 73 Mich. 541; Van Bracklin *v.* Fonda, 12 Johns. 468; Divine *v.* McCormick, 50 Barb. 116 (compare Moses *v.* Mead, 1 Denio, 378, 5 Denio, 617; Fairbank Canning Co. *v.* Metzger, 118 N. Y. 267). But it is doubtful if it would generally be held that there was such a warranty, unless the seller was a dealer, and the buyer was buying for immediate consumption. Humphreys *v.* Comline, 8 Blackf. 516; Giroux *v.* Stedman, 145 Mass. 439 (citing earlier Massachusetts cases); Ryder *v.* Neitge, 21 Minn. 70.

Andrews, Serjt, now showed cause.

Brodrick and *Ryland*, contra.

LITTLEDALE, J. It seems to me that it was competent to the defendant, in answer to this action, which is brought by the plaintiff to recover the price or value of the seed, to show that it did not correspond with the warranty. It is said, that the buyer cannot insist on that as a defence, because he neither returned the seed to the seller, nor gave any notice to him that it was defective in quality. I am of opinion, that where goods are warranted, the vendee is entitled, although he do not return them to the vendor, or give notice of their defective quality, to bring an action for breach of the warranty; or if an action be brought against him by the vendor for the price, to prove the breach of the warranty, either in diminution of damages, or in answer to the action, if the goods be of no value. In *Fielder* v. *Starkin*, 1 H. Bl. 17, a horse had been sold, warranted sound. It was proved to have been unsound at the time of the sale. Soon after the sale, the defendant discovered him to be unsound, but kept him three months after the discovery. It was decided that the seller was liable to an action on the warranty, although the purchaser had not returned the horse, or given notice of the unsoundness, on the ground that there had been a breach of the contract on the part of the seller. The not giving notice, indeed, raises a strong presumption that the article at the time of the sale corresponded with the warranty, and calls for strict proof of breach of the warranty. But if that be clearly established, the seller will be liable in an action brought for breach of his contract, notwithstanding any length of time which may have elapsed since the sale. And if that be so, it is reasonable and just, when an action is brought by the seller to recover the price or value of the goods, that the buyer should be at liberty to show the breach of the warranty in defence to the action. Then the only question is, was the seller entitled to recover anything. There may be cases where a buyer may keep goods which, though they do not correspond with the warranty, may be worth something, and the seller may be entitled to recover. Suppose one hundred bushels of seed had been sold, and warranted good, and one bushel turned out to be bad, the seller would be entitled to recover the value of the ninety-nine. The question in this case is, was the article worth anything? And secondly, if it was, should the learned judge have left the question of value to the jury? His attention was not called to that point, and if it had, taking the whole evidence together, I think that the jury would have found that the seed was worth nothing. *Rule discharged.*[1]

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[1] BAYLEY and PARKE, JJ., delivered concurring opinions.

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STREET *v.* BLAY.

IN THE KING'S BENCH, TRINITY TERM, 1831.

[*Reported in 2 Barnewall & Adolphus*, 456.]

LORD TENTERDEN, C. J., delivered the opinion of the court.[1]

The facts of the case were these: The plaintiff, on the 2d of February, sold the horse to the defendant for £43, with a warranty of soundness. The defendant took the horse, and on the same day sold it to Bailey for £45. Bailey, on the following day, parted with it in exchange to Osborne; and Osborne, in two or three days afterwards, sold it to the defendant for £30. No warranty appeared to have been given on any of the three last sales. The horse was, in fact, unsound at the time of the first sale; and on the 9th of February the defendant offered to return it to the plaintiff, who refused to accept it. The question for consideration is, whether the defendant, under these circumstances, had a right to return the horse, and thereby exonerate himself from the payment of the whole price?

It is not necessary to decide, whether in any case the purchaser of a specific chattel, who, having had an opportunity of exercising his judgment upon it, has bought it, with a warranty that it is of any particular quality or description, and actually accepted and received it into his possession, can afterwards, upon discovering that the warranty has not been complied with, of his own will only, without the concurrence of the other contracting party, return the chattel to the vendor, and exonerate himself from the payment of the price, on the ground that he has never received that article which he stipulated to purchase. There is, indeed, authority for that position. Lord Eldon, in the case of Curtis *v.* Hannay, 3 Esp. N. P. C. 83, is reported to have said, that "he took it to be clear law, that if a person purchases a horse which is warranted sound, and it afterwards turns out that the horse was unsound at the time of the warranty, the buyer might, if he pleased, keep the horse and bring an action on the warranty, in which he would have a right to recover the difference between the value of a sound horse and one with such defects as existed at the time of the warranty; or he might return the horse and bring an action to recover the full money paid; but in the latter case, the seller had a right to expect that the horse should be returned in the same state he was when sold, and not by any means diminished in value;" and he proceeds to say, that if it were in a worse state than it would have been if returned immediately after the discovery, the purchaser would have no defence to an action for the price of the article. It is to be implied that he would have a defence in case it were returned in the same state, and in a reasonable time after the discovery. This *dictum* has been adopted in Mr.

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[1] Lord TENTERDEN, C. J., LITTLEDALE, PARKE, and PATTESON, JJ

Starkie's excellent work on the Law of Evidence, part iv. p. 645; and it is there said that a vendee may, in such a case, rescind the contract altogether by returning the article, and refuse to pay the price, or recover it back if paid. It is, however, extremely difficult, indeed impossible, to reconcile this doctrine with those cases in which it has been held, that where the property in the specific chattel has passed to the vendee, and the price has been paid, he has no right, upon the breach of the warranty, to return the article and revest the property in the vendor, and recover the price as money paid on a consideration which has failed, but must sue upon the warranty, unless there has been a condition in the contract, authorizing the return, or the vendor has received back the chattel, and has thereby consented to rescind the contract, or has been guilty of a fraud, which destroys the contract altogether. Weston *v.* Downes, 1 Doug. 23; Towers *v.* Barrett, 1 T. R. 133; Payne *v.* Whale, 7 East, 274; Power *v.* Wells, Doug. 24 n.; and Emanuel *v.* Dane, 3 Campb. 299, where the same doctrine was applied to an exchange with a warranty, as to a sale, and the vendee held not to be entitled to sue in trover for the chattel delivered, by way of barter, for another received. If these cases are rightly decided, and we think they are, and they certainly have been always acted upon, it is clear that the purchaser cannot by his own act alone, unless in the excepted cases above mentioned, revest the property in the seller, and recover the price when paid, on the ground of the total failure of consideration; and it seems to follow that he cannot, by the same means, protect himself from the payment of the price on the same ground. On the other hand, the cases have established, that the breach of the warranty may be given in evidence in mitigation of damages, on the principle, as it should seem, of avoiding circuity of action, Cormack *v.* Gillis, cited 7 East, 480; King *v.* Boston, 7 East, 481 n.; and there is no hardship in such a defence being allowed, as the plaintiff ought to be prepared to prove a compliance with his warranty, which is part of the consideration for the specific price agreed by the defendant to be paid.

It is to be observed, that although the vendee of a specific chattel, delivered with a warranty, may not have a right to return it, the same reason does not apply to cases of executory contracts, where an article, for instance, is ordered from a manufacturer, who contracts that it shall be of a certain quality, or fit for a certain purpose, and the article sent as such is never completely accepted by the party ordering it. In this and similar cases the latter may return it as soon as he discover the defect, provided he has done nothing more in the mean time than was necessary to give it a fair trial, Okell *v.* Smith, 1 Stark. N. P. C. 107; nor would the purchaser of a commodity, to be afterwards delivered according to sample, be bound to receive the bulk, which may not agree with it; nor after having received what was tendered and delivered as being in accordance with the sample, will he be precluded by the simple receipt from returning the article within a reasonable time for the purpose of examination and comparison. The observations above stated are intended to apply to the purchase of a certain specific chattel, accepted and received by the vendee, and the property in which is completely and entirely vested in him.

But whatever may be the right of the purchaser to return such a warranted article in an ordinary case, there is no authority to show that he may return it where the purchaser has done more than was consistent with the purpose of trial, where he has exercised the dominion of an owner over it, by selling and parting with the property to another, and where he has derived a pecuniary benefit from it. These circumstances concur in the present case; and even supposing it might have been competent for the defendant to return this horse, after having accepted it, and taken it into his possession, if he had never parted with it to another, it appears to us that he cannot do so after the re-sale at a profit.

These are acts of ownership wholly inconsistent with the purpose of trial, and which are conclusive against the defendant, that the particular chattel was his own; and it may be added, that the parties cannot be placed in the same situation by the return of it, as if the contract had not been made, for the defendant has derived an intermediate benefit in consequence of the bargain, which he would still retain. But he is entitled to reduce the damages, as he has a right of action against the plaintiff for the breach of warranty. The damages to be recovered in the present action have not been properly ascertained by the jury, and there must be a new trial, unless the parties can agree to reduce the sum for which the verdict is to be entered; and if they do agree, the verdict is to be entered for that sum.

Rule absolute on the above terms.

MONDEL *v.* STEEL.

In the Exchequer, Trinity Vacation, 1841.

[*Reported in* 8 *Meeson & Welsby*, 858.]

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The judgment of the court (Parke, B., Alderson, B., Gurney, B., and Rolfe, B.) was now delivered by

Parke, B. In this case, the declaration is in special assumpsit on a contract to build a ship for the plaintiff, at a certain rate per ton, and according to a certain specification: and the breach assigned is for not building a vessel with scantlings, fastenings, and planking, according to such specification; by reason whereof the ship, on a voyage from London to New South Wales and back, was so much strained that it became necessary to re-fasten and repair her.

To this declaration there was one plea, to which it is unnecessary to allude, as it was admitted to be bad on special demurrer, and is to be amended; and a second plea, on which the question, which we have taken time to consider, arises.

This plea states in substance, that the defendant had sued the plaintiff for the balance of the agreed price of the vessel, after payment of £3,500, and also for a sum of £134 odd for extra work, in the form of an action for work and labor, and for goods sold and delivered; that issue was joined, and, on the trial of the cause, the plaintiff gave evidence in his defence of the same breach of contract alleged in the declaration; and insisted, that if the amount of compensation to which he was entitled, exceeded or equalled the balance of the price and the value of the extra work, the now plaintiff was entitled to a verdict; if it was less, that he was entitled to a deduction from the amount of both, of such amount of compensation. The plea proceeds to state (and, we must assume, correctly, for the purposes of this argument, though the statement has arisen from mistake), that the learned judge before whom the cause was tried, my brother Rolfe, so directed the jury; and that the jury found that the now defendant had committed a breach of contract, and was entitled to some compensation, which they deducted from the price of the vessel and value of the extra work; and the now defendant had judgment for the amount, after such deduction had been made, since the commencement of this suit.

The plaintiff demurred to this plea, assigning several causes of special demurrer, which it is not necessary to notice, as we are all of opinion that it is bad in substance.

The ground on which it was endeavored to support the plea, in a very ingenious argument, was this: that a defendant in an action for the stipulated price of a chattel, which the plaintiff had contracted to make for the defendant of a particular quality, or of a specific chattel sold with a warranty, and delivered, had the option of setting up a counter claim for breach of the contract in the one instance, or the warranty in the other, in the nature of a cross-action; and that if he exercised that option, he was in the same situation as if he had brought such an action; and consequently, could not, after judgment in one action, bring another; and the case was likened to a set-off under the statutes. This argument was founded on no other authority than an expression of Lord Tenterden in giving the judgment of the court in the case of Street *v.* Blay, 2 B. & Ald. 462, his lordship having said that a breach of warranty might be given in evidence in an action for the price of a specific article sold, in mitigation of damages, "on the principle, it should seem, of avoiding circuity of action." But we are all of opinion that no such inference is to be drawn from that expression; what was meant was, that the sum to be recovered for the price of the article might be reduced by so much as the article was diminished in value, by reason of the non-compliance with the warranty; and that this abatement was allowed in order to save the necessity of a cross-action. Formerly, it was the practice, where an action was brought for an agreed price of a specific chattel, sold with a warranty, or of work which was to be performed according to contract, to allow the plaintiff to recover the stipulated sum, leaving the defendant to a cross-action for breach of the warranty or contract; in which action, as well the difference between the price contracted for and the real value of the articles or of the work done, as any consequential damage, might have been recovered; and this course was simple and consistent. In the one case, the performance of the warranty not being a condition precedent to the payment of the price, the defendant, who received the chattel warranted, has thereby the property vested in him indefeasibly, and is incapable of returning it back; he has all that he stipulated for as the condition of paying the price, and therefore it was held that he ought to pay it, and seek his remedy on the plaintiff's contract of warranty. In the other case, the law appears to have construed the contract as not importing that the performance of every portion of the work should be a condition precedent to the payment of the stipulated price, otherwise the least deviation would have deprived the plaintiff of the whole price; and therefore the defendant was obliged to pay it, and recover for any breach of contract on the other side. But after the case of Basten *v.* Butter, 7 East, 479, a different practice, which had been partially adopted before in the case of King *v.* Boston, 7 East, 481, n., began to prevail, and being attended with much practical convenience, has been since generally followed; and the defendant is now permitted to show that the chattel by reason of the non-compliance with the warranty in the one case, and the work in consequence of the non-performance of the contract in the other, were diminished in value; Kist *v.* Atkinson, 2 Camp. 64; Thornton *v.* Place, 1 M. & Rob. 218, &c. The same practice has not, however, extended to all cases of work and labor, as for instance, that of an attorney, Templer *v.* M'Lachlan, 2 Bos. & P. N. R. 136, unless no benefit whatever has been derived from it; nor in an action for freight; Shiels *v.* Davies, 4 Camp. 119. It is not so easy to reconcile these deviations from the ancient practice with principle, in those particular cases above-mentioned, as it is in those where an executory contract, such as this, is made for a chattel, to be manufactured in a particular manner, or goods to be delivered according to a sample; Germaine *v.* Burton, 3 Stark. 32; where the party may refuse to receive, or may return in a reasonable time, if the article is not such as bargained for; for in these cases the acceptance or non-return affords evidence of a new contract on a *quantum valebat;* whereas, in a case of a delivery with a warranty of a specific chattel, there is no power of returning, and consequently no ground to imply a new contract; and in some cases of work performed, there is difficulty in finding a reason for such presumption. It must, however, be considered, that in all these cases of goods sold and delivered with a warranty, and work and labor, as well as the case of goods agreed to be supplied according to a contract, the rule which has been found so convenient is established; and that it is competent for the defendant, in all of those, not to set-off, by a proceeding in the nature of a cross-action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by showing how much less the subject-matter of the action was worth, by reason of the breach of contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent; but no more.

The opinion, therefore, attributed on this record to the learned judge, is, we think, incorrect, and not warranted by law; and all the plaintiff could by law be allowed in diminution of damages, on the former trial, was a deduction from the agreed price, according to the difference, at the time of the delivery, between the ship as she was, and what she ought to have been according to the contract: but all claim for damages beyond that, on account of the subsequent necessity for more extensive repairs, could not have been allowed in the former action, and may now be recovered.

We have already observed in the course of the argument, that the defence made in the second plea cannot be supported on the ground that it discloses a mutual agreement by the plaintiff and defendant to leave the amount of the cross-claim to the jury as arbitrators, and that they have made an award. The plea does not state any such agreement, or an equivalent thereto. Our judgment must therefore be for the plaintiff. *Judgment for the plaintiff.*

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HEYWORTH v. HUTCHINSON.

IN THE QUEEN'S BENCH, APRIL 17, 1867.

[*Reported in Law Reports*, 2 *Queen's Bench*, 447.]

AT the trial, before Shee, J., at the Spring Assizes at Liverpool, it appeared that the action was brought for the non-acceptance by the defendant of certain wool which he had agreed at Liverpool to purchase of the plaintiffs, through their brokers, Messrs. Perkins & Robinson; the following being the material parts of the contract or sale note: —

VICTORIA BUILDINGS, HACKIN'S HEY,
Liverpool, 7 April, 1866.

MR. RICHARD HUTCHINSON.

DEAR SIR, — We have this day bought on your account from our principals the following wool, viz. [then followed an enumeration of different lots of wool, making altogether] 413 bales greasy Entré Rios, at 10¼*d.* per lb., to arrive ex "Stige," or any vessel they may be transshipped in, and subject to the wool not being sold in New York before advice reaches the consignees to send the wool forward here. The wool to be guaranteed about similar to samples in Perkins & Robinson's possession, and if any dispute arises it shall be decided by the selling brokers, whose decision shall be final . . . &c.

We are, your obedient servants,

PERKINS & ROBINSON.

The 413 bales arrived in Liverpool from New York by the "Sunrise," in June, 1866, of which the brokers informed the defendant, and after examination they sent an account to him, stating that, as to 180 bales (specifically described), "these wools are not so good as the original samples by 2*d.* per lb.;" as to 201 bales, "this parcel is not so good as sample by 1¼*d.* per lb.;" and as to 37 bales, "this parcel is not so good as sample by ½*d.* per lb." The defendant afterwards inspected the wool, and refused to take it; and after due notice to, and under protest from, the defendant, on the 9th of August, 1866, the brokers formally awarded that the 413 bales "should be taken by the defendant at the following allowances," as set out in the second count.

Mr. Robinson, one of the brokers, was called as a witness, and said that the wool was not "about similar to samples," and that was the reason he made the allowances.

Certain disputed facts, which are immaterial for the present report, were left to the jury, and a verdict was taken by consent for £1,747, with leave to move to enter a nonsuit or verdict for the defendant, if the court should think him entitled on the true construction of the contract, the court to amend any of the pleadings if necessary.

E. James, Q. C. (*Baylis* with him), moved accordingly, and contended that, under the contract, all the brokers had to decide was, whether the wool was or was not "about similar to samples;" that the evidence showed that, although the wool was not about similar to samples, they had not decided this, but had awarded that the defendant should take the wool at a certain abatement in the price. They had no authority to do this, and therefore in any view the plaintiffs could not succeed in the present action.

BLACKBURN, J. The contract relates to the particular bales of wool specified, and to those only; and the additional clause that the contract is to be off if the bales are previously sold in New York, shows that the contract is confined to this particular cargo. Then the wools are "guaranteed about similar to samples." Now, such a clause may be a simple guarantee or warranty, or it may be a condition. Generally speaking, when the contract is as to any goods, such a clause is a condition going to the essence of the contract; but when the contract is as to specific goods, the clause is only collateral to the contract, and is the subject of a cross-action, or matter in reduction of damages, according to the case of Mondel *v.* Steel, 8 M. & W. 858, 870. Here there is, I think, merely a warranty as distinguished from a condition; so that, if an action were brought, the question would be, was the contract broken or not? and if so, how much reduction ought there to be made, in estimating the damages, from the contract price in consequence of the inferiority of the goods? But instead of leaving the parties simply to an action, the contract goes on to say: "If any dispute arises it shall be decided by the selling brokers." Mr. James says, they are merely to decide the question, aye or no, are the goods "about similar to samples?" But I think the meaning is, that the brokers are to proceed and decide the case on the principle enunciated in Mondell *v.* Steel, *supra.* If the inferiority were so great as to amount in effect to a different article, possibly the brokers might have power to decide that the contract was off, and the buyer not bound to accept; but they certainly were not bound so to decide. It seems to me clear that they had power to reduce the prices to be paid; that they have done in effect, though they call it an allowance. *Rule refused.*[1]

AZÉMAR *v.* CASELLA.

In the Common Pleas, February 9, 1867.

[*Reported in Law Reports,* 2 *Common Pleas,* 431.]

Action for refusal to accept 128 bales of cotton and for refusal to submit to arbitration.

The defendants, through brokers, bought of the plaintiff "the following cotton, viz., $\frac{\text{D C}}{\text{C}}$ 128 bales, at 25*d.* per lb., expected to arrive in London per 'Cheviot' from Madras. The cotton guaranteed equal to sealed sample in our (the brokers') possession. Should the quality prove inferior to the guarantee, a fair allowance to be made." The sample was of "Long-staple Salem" cotton. The 128 bales marked $\frac{\text{D. C.}}{\text{C.}}$ which arrived by the "Cheviot" contained "Western Madras" cotton. Upon a special case, it was stated that "the cotton was therefore not in accordance with the sample; that Western Madras cotton is inferior to Long-staple Salem, and requires machinery for its manufacture different to that which is used for Long-staple Salem; and that the market-price of Western Madras was at the date of the contract only 23*d.* per lb."[2]

Sir G. Honyman, Q. C. (with him *McLeod*), for the plaintiff.

J. Brown, Q. C. (with him *Hawkins*, Q. C., and *Hannen*), for the defendants.

Willes, J. I am of opinion that the defendants are entitled to judgment. The action is brought upon a contract for the purchase of cotton to arrive by the "Cheviot," from Madras, and guaranteed equal to sealed sample in the possession of the seller's brokers. Upon the arrival of the cotton, it was rejected by the purchaser, on the ground that it was not in accordance with the sample referred to in the contract;

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[1] A statement of the pleadings is omitted. Cockburn, C. J., and Shee and Lush, JJ., delivered concurring opinions.

[2] At the trial a verdict was found for the plaintiff subject to a special case setting forth these facts at greater length. The court was given liberty to draw inferences of fact in the same way as a jury would be entitled to do.

and an arbitration was suggested by the seller, to be limited to the question whether the quality equalled the sample; but the defendants insisted that there was another question to be determined, viz., whether the cotton tendered was the thing bought by them; and consequently the attempt to arbitrate failed. It is obvious to my mind that the defendants are not answerable for the failure of the arbitration; and indeed it was not insisted for the plaintiff that there could be any recovery for the second breach. The defendants clearly were not bound to refer less than the whole dispute. The sole question to be decided is, whether the defendants were right in their ground of rejection, viz., that the 128 bales by the "Cheviot" were not the cotton they contracted to receive and to pay for. Whether they were right in that contention, or the plaintiff right in saying that the defendants were bound to receive that cotton subject to an allowance for any inferiority of quality, must depend upon the terms of the contract itself. That was a contract by which Messrs. Barber, acting as brokers for both parties, bought for the defendants of the plaintiff 128 bales of cotton, marked $\frac{\text{D C.}}{\text{C}}$, expected to arrive in London per "Cheviot" from Madras, at 25*d.* per lb. If it had stopped there, it would have been, as was insisted by Sir George Honyman, a bargain for the purchase of 128 bales of cotton arriving with a particular mark in London from Madras. The description would extend to cotton generally coming so marked from Madras on board the ship named. The contract, however, goes on, "The cotton guaranteed equal to sealed sample in our possession." There we have for the first time a complete description of what the parties are bargaining about. Messrs. Barber, the brokers who signed for both sides, had in their hands a sample with reference to which the bargain was made. That, when looked at, turns out to be a sample of "Long-staple Salem cotton," and we must therefore take it that the defendants bargained for "Long-staple Salem cotton." Then come the words: "Should the quality prove inferior to the guarantee, a fair allowance to be made." The subsequent parts of the contract are clear to show that the property in the cotton was not meant to vest in the buyers by the bargain alone. If it had been otherwise, there would have been considerable plausibility in the argument of Sir George Honyman, that, this being a sale of specific cotton, the property passed, and the defendants would have to resort to a cross-action in respect of any breach of the collateral warranty. It seems to me, however, that the contrary construction is the correct one, and that the property in the cotton did not pass by the contract. There was no delivery and no acceptance. The only questions, therefore, which we have now to consider are, first, whether the description "equal to sealed sample in our possession," refers to the species of cotton to which the sample belonged, and whether the cotton which arrived by the "Cheviot" answered that description; and, if so, secondly, it would be necessary to refer to the subsequent clause in the contract, to see how far it affected the question whether species was in the contemplation of the parties; and, lastly, we have to make up our minds on the construction of the contract, regard being had to the facts of the case, and particularly to those stated in the eighth paragraph.

First, as to the question whether the contract was for cotton of a particular species, I cannot entertain a moment's doubt. I exclude the words "Should the quality prove inferior to the guarantee," because they refer to an allowance to be made in money in respect of the article being of less value than that represented by the sample. In terms they do not extend to enforce on the buyers the acceptance of an article different from that which they bought. I would add that I am not led to this conclusion by any supposed similarity between a case of this sort and the cases as to the purchase of lands; for, in truth, those cases have very little bearing upon the question; but I found my judgment upon this, apart from all the authorities, that the stipulation as to allowance being made for inferiority of quality does not relate to a difference in kind, affecting the identity of the article itself. That being so, let us see whether the contract was for the purchase of a specific sort of cotton, or applies to cotton in general. That depends upon the language of the guarantee clause, "The cotton guaranteed equal to sealed sample in our possession," which is to be construed by the facts existing at the time of the bargain, and by the surrounding circumstances so far as they are relevant to the dealings of the parties. Now, the first remarkable fact is the description of the sample itself; it was a sort of cotton well known, called Long-staple Salem cotton, which might have been expected to be shipped from Madras. What did the bulk consist of? and was it "Long-staple Salem cotton," or was it a thing of the same species as Long-staple Salem cotton, so that the parties must be taken to have intended that it should be taken in satisfaction of the contract? Now, as to this the case (par. 8) finds that "the cotton was not Long-staple Salem, but was a particularly good sample of Western Madras; the cotton, therefore, was not in accordance with the sample." Was that a mere difference in value which could be compensated for under the allowance clause? or was it an essential difference in the species, so that the contract was for one thing, and the article tendered another? That seems to me to be determined by what follows in the case: "Western Madras cotton is inferior to Long-staple Salem, and requires machinery for its manufacture different to that which is used for Long-staple Salem; and the market-price of Western Madras was at the date of the contract only 23*d.* per lb." Inferiority of quality and value might be compensated for by an allowance; but the question is whether difference of kind or species may be. I must own that it would have been more satisfactory to my mind to have had these questions disposed of by the verdict of a jury. In determining the question, it is impossible to exclude from one's mind the fact that, when a man bargains for Long-staple Salem cotton, and the seller offers him cotton of a totally different kind, and cotton which requires a different description of machinery for its manufacture, he is seeking to compel him to accept X. when he bargained for Y.

The conclusion at which, upon the whole, I feel myself compelled to come, is, that, taking the contract and the sample together, what the defendants agreed to buy was 128 bales of the species of cotton contained in the sealed sample. The allowance was to be in respect of inferiority of quality, and not of difference of kind; and the defendants were not bound to accept with an allowance cotton of a description different from that which they bargained for. I am confirmed in this view by the absence of any statement in the case (which has evidently been drawn with great care) that the cotton in question was not such as might have been expected to be produced at Salem. It would no doubt have been so stated if it could have been. Then, taking up the opposite phase of the question, I find that, though the bulk was a particularly good sample of Western Madras, it was inferior in value to Long-staple Salem by 2½*d.* per pound. I should therefore infer that Western Madras did not come within the description of the cotton which was contained in the sample; and I come to the conclusion that the cotton tendered to the defendants was not that which they contracted to buy, and consequently that they are entitled to judgment.

Judgment accordingly.[1]

VARLEY *v.* WHIPP.

IN THE QUEEN'S BENCH DIVISION, FEBRUARY 8, 1900.

[*Reported in* [1900] 1 *Queen's Bench*, 513.]

APPEAL by the defendant from the judgment of the judge of the county court of Yorkshire holden at Huddersfield, in an action brought to recover 21*l.* as the price of a second-hand self-binder reaping machine. The material facts proved at the trial were as follows. Near the end of June, 1899, the plaintiff and the defendant met in Huddersfield, when the plaintiff offered to sell to the defendant for 21*l.* a second-hand self-binder reaping machine, which the plaintiff said was then at Upton, and he also said that it had been new the previous year, and had only been used to cut fifty or sixty acres. The plaintiff was to put the machine on the railway to send to Beverley, and the defendant was to pay the carriage. The defendant had not then seen the machine. The defendant said he would have the machine. The machine was not then the plaintiff's property, but he bought it immediately afterwards for 18*l.* On June 28 the plaintiff put the machine on the railway to send to Beverley. On July 2 the defendant wrote a letter to the plaintiff, as follows: "I have had a look at the 'self-binder' you sent me, but it is not what I expected; it is a very old one, and has been mended, and you told me that it had only cut about fifty acres, and was practically new. I think you must never have seen it. It will be no use to me, as I don't care about old things, and especially machinery, but I shall be at Huddersfield this week . . . . where I shall be pleased to see you." After some further correspondence the defendant, on August 14, returned the machine, and the plaintiff brought this action to recover the price. At the trial the judge of the county court held that the contract was for sale by description, and that the defendant could only treat the misdescription as a breach of warranty, but not as on a ground for rejecting the machine, and gave judgment for the plaintiff for the amount claimed. The defendant appealed.

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[1] The statement of facts has been abbreviated and the concurring opinion of MONTAGUE SMITH, J., omitted. KEATING, J., also concurred. The decision was affirmed in the Exchequer Chamber. L. R. 2 C. P. 677.

Danckwerts, Q. C., for the defendant.

C. C. Scott, for the plaintiff.

Channell, J. I am of opinion that this appeal ought to be allowed. The case turns on a fine point, namely, whether the words used by the seller with regard to the machine were part of the description, or merely amounted to a collateral warranty. If the property in the machine passed prior to July 2, nothing that the buyer could do afterwards would divest it. The question is, did the property pass? The machine which was to be sold had never been seen by the buyer, and it was not the property of the seller at the time. It was described as being at Upton, as being a self-binder, as being nearly new, and as having been used to cut only about fifty or sixty acres. All these statements were made with regard to the machine, and we have to consider how much of these statements was identification of the machine, and how much was mere collateral warranty. If a man says that he will sell the black horse in the last stall in his stable, and the stall is empty, or there is no horse in it, but only a cow, no property could pass. Again, if he says he will sell a four-year old horse in the last stall, and there is a horse in the stall, but it is not a four-year old, the property would not pass. But if he says he will sell a four-year old horse, and there is a four-year old horse in the stall, and he says that the horse is sound, this last statement would only be a collateral warranty. The term "sale of goods by description" must apply to all cases where the purchaser has not seen the goods, but is relying on the description alone. It applies in a case like the present, where the buyer has never seen the article sold, but has bought by the description. In that case, by the Sale of Goods Act, 1893, s. 13, there is an implied condition that the goods shall correspond with the description, which is a different thing from a warranty. The most usual application of that section no doubt is to the case of unascertained goods, but I think it must also be applied to cases such as this where there is no identification otherwise than by description. Then the sale being a sale by description, when did the property pass, if it did not pass when the bargain was made? The section of the Sale of Goods Act dealing with the passing of the property is s. 17, by which "(1.) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. (2.) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case." It is impossible to imagine a clause more vague than this, but I think it correctly represents the state of the authorities when the Act was passed. Sect. 18 does not apply; the only clause in that section which could possibly apply would be rule 1, but I do not think that this was "an unconditional contract for the sale of specific goods." Then when did the property pass? Not when the machine was put on the railway, for the vendor could not make the property pass by putting on the railway that which did not fulfil the implied condition. The earliest date therefore at which the property could be said to pass would be when the machine was accepted by the purchaser. But it never was accepted. I am doubtful whether the letter of July 2 could be treated as amounting to a rejection, but the purchaser certainly did not accept the machine by that letter, and therefore the property never had passed. The result is that the defendant is entitled to judgment, and the appeal must be allowed. *Appeal allowed.*[1]

JOSEPH H. LYON v. JOHN BERTRAM AND OTHERS.

UNITED STATES SUPREME COURT, DECEMBER TERM, 1857.

[*Reported in* 20 *Howard,* 149.]

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the district of California.

The facts are particularly stated in the opinion of the court.

It was argued by *Mr. Brent* and *Mr. Poe* for the plaintiff in error, and *Mr. Fessenden* for the defendants.

MR. JUSTICE CAMPBELL delivered the opinion of the court.

This suit was commenced by the defendants in error, to recover the price for a cargo of flour, bargained and sold to the plaintiff in error, in the city of San Francisco. The judgment of the Circuit Court was rendered upon a special verdict in favor of the plaintiffs in that court. The verdict finds that on the 13th January, 1853, the plaintiffs, and Flint, Peabody, & Co., were, jointly, the owners of a cargo of flour, consisting of two thousand barrels, branded, and which were in fact Gallego, then being on the bark "Ork," lying at a public wharf in San Francisco, and composing its entire cargo of flour, which inspected 1,771 barrels superfine, and 229 bad.

The firm of Flint, Peabody, & Co., as agents and part-owners, on the day aforesaid, concluded the following agreement with the defendant: —

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[1] Bucknill, J., delivered a brief concurring opinion. Gill v. McDowell, [1903] 2 Ir. 463, *acc.*

San Francisco, January 13, 1853.

Sold this day to Joseph H. Lyon, Esq., a cargo of Haxall flour, now on board the bark "Ork," lying in this harbor, being about two thousand barrels, on the following terms and conditions, viz.: Joseph H. Lyon, Esq., agrees to pay Messrs. Flint, Peabody, & Co. thirty dollars per barrel for such as shall inspect superfine, and twenty-seven dollars per barrel for such as shall inspect bad; payment to be made as it may be delivered, and to be received and paid for on or before the expiration of three weeks from date.

If Messrs. Flint, Peabody, & Co. elect, they can land and store the flour at the expiration of one week, or so much as may remain on board at that time, Mr. Lyon paying storage and drayage expenses.

J. H. Lyon.
Flint, Peabody, & Co.

On the 25th January, 1853, the defendant applied to Flint, Peabody, & Co. for fifty barrels of flour so purchased by him, by a written order, as follows: —

San Francisco, January 25, 1853.

Messrs. Flint, Peabody, & Co. will please deliver Mr. William R. Gorham, or bearer, fifty barrels of flour, out of the lot purchased from the ship "Ork," and oblige J. H. Lyon.

Paying them therefor the contract price, amounting to the sum of $1,500 and received from Flint, Peabody, & Co. the following order: —

San Francisco, January 25, 1853.

Captain of Bark "Ork," — Please deliver the bearer fifty barrels superfine flour, and oblige Flint, Peabody, & Co.

Fifty barrels of Gallego flour, inspecting superfine, being part of said cargo of flour on board the bark "Ork," was delivered from the bark to William R. Gorham, a baker, to whom the defendant had sold and transferred the delivery order and the said flour. When the order was made for William R. Gorham, the defendant represented that the flour was Haxall. On the 29th January, 1853, the defendant sold to Dunne & Co. fifty barrels of flour, which he represented to be Haxall, and gave the following order, bearing date on that day: —

Messrs. Grey & Doane will please deliver Messrs. Dunne & Co. fifty barrels of Haxall flour from "Ork." J. H. Lyon.

The said Dunne & Co., on discovering that the flour was not Haxall, but Gallego, refused to take it, and so notified the defendant. On the 31st of January, 1853, the defendant made further application for one hundred barrels of flour, being part of the flour so purchased as aforesaid, and gave his check on his bankers for the price, and received the following delivery order from Flint, Peabody, & Co., bearing that date: —

CAPTAIN HUTCHINGS, Bark "Ork," — Please deliver to J. H. Lyon, or to the order of Grey & Doane, one hundred barrels superfine flour, and oblige, &c.

The check was not paid on presentation. Upon the refusal of Dunne & Co. to take the flour, the defendant, on learning the fact, notified the plaintiffs that he would not take the flour, and countermanded the payment of the check he had given for the one hundred barrels last mentioned.

On the 3d of February, 1853, the plaintiffs informed the defendant that they were prepared to deliver the remainder of the cargo, and requested the defendant to receive it. And subsequently, on the same day, they addressed him a note, in which they advised him they would sell the flour on the 5th February, at public auction, for his account, and would hold him responsible for the difference there might be in the net proceeds of the proposed sale and the contract price, and for charges and expenses, he (Lyon) having declined to take the flour under the contract. All the flour on the bark was of the brand known as Gallego, and the barrels were branded Gallego in printed characters from two to two and one-half inches in length, on both heads. In the opinion of some experts, there existed no difference in the quality or price of the flour of either brand (Haxall and Gallego), each inspecting superfine; but, in the opinion of other experts, there was a difference, some preferring the one brand and some the other.

Subsequently to the sale, and up to and including the 28th January, 1853, Gallego and Haxall flour had advanced to $35 per barrel in San Francisco; and between that and the 5th of February the price of both declined to $18 per barrel. On the 5th of February the plaintiffs caused the remainder of the cargo to be sold at public auction, according to their notice to the defendant, for his account, and at a great reduction of price. The verdict does not find any fact to impugn the fairness of this sale. Before this suit was commenced, Flint, Peabody, & Co. assigned their interest in this suit to the plaintiffs, of which the defendant had notice.

The verdict is silent in reference to the negotiations that preceded the contract, and does not inform us whether the cargo was at any time visible to the defendant; nor does it discriminate with exactness the qualities of Haxall and Gallego flour, or affirm that there is any specific difference between them.

It is evident, from the verdict, that the error in the description of the cargo did not bear on the substance, or on any substantial quality of the subject of the sale. The subject of the sale was a cargo of flour of about two thousand barrels, on board of a vessel lying at a wharf in the city; of a quality to be ascertained by an inspection; and from that inspection, and not from the brand, the price was to be ascertained. The brands Haxall and Gallego are understood to refer to different mills in Richmond, Virginia, at which flour is manufactured.

The verdict sufficiently determines that the difference between them in the market of San Francisco is inappreciable, at least by the mass of purchasers and consumers. The case clearly does not belong to that class in which the subject-matter of the contract was of a nature wholly different from that concerning which the parties to the contract made their engagements. The brand on the exterior of the barrels of flour was certainly not of the substance of the contract. Young *v.* Cole, 3 Bing. N. C. 724; Gompertz *v.* Bartlett, 2 Ell. and B., 19 Vt. R. 202.

The defendant does not resist the fulfilment of his agreement for any fraud; nor does the verdict impute any *mala fides* to the plaintiffs.

The case rests upon these facts. There was a sale of a cargo of flour, at a price dependent upon the fact whether the component parts inspected superfine or bad, which was described as of one brand, but which proved to be of another. There was no material difference in the credit of the brands, and the market price of the flour was but little affected by the question whether the brand was of the one or the other mill.

A portion of the flour has been delivered to, and paid for, and consumed by, the defendant. He made no offer to return this flour. This flour remained in the "Ork" from the 13th of January till the 31st of January, subject to the exigencies of the contract. During that period there was no complaint on the part of the defendant. From the 28th of January till the 5th of February, when the refusal to accept the remainder of the flour and the sale of it on account took place, the price of flour was steadily declining.

It may be admitted that the description of the flour as Haxall imported a warranty that it was manufactured at mills which used that brand; and that the purchaser would have been entitled to recover the amount of difference in the value of that and an inferior brand. Powell *v.* Horton, 2 Bing. N. C. 668; Henshaw *v.* Robbins, 9 Met. 83.

But it cannot be admitted that the purchaser was entitled to abandon this contract.

In the note to Cutter *v.* Powell, in Smith's Leading Cases, the annotator says: "It is settled, by Street *v.* Blay and Poulton *v.* Lattimore, where an article is warranted, and the warranty is not complied with, the vendee has three courses, any one of which he may pursue. 1. He may refuse to receive the article at all. 2. He may receive it, and bring a cross-action for the breach of the warranty. 3. He may, without bringing a cross-action, use the breach of warranty in reduction of damages in an action brought by the vendor for the price." The annotator proceeds to say, "that it was once thought, and, indeed, laid down by Lord Eldon, in Curtis *v.* Hanney, 3 Esp. 83, that he might, on discovering the breach of warranty, rescind the contract, return the chattel, and, if he had paid the price, recover it back. This doctrine, which was opposed to Weston *v.* Downes, Doug. 23, is overruled by Street *v.* Blay, 2 B. and Adol., and Gompertz *v.* Denton, 1 C. and Mee. 205; and it is clear that, though the non-compliance with the warranty will justify him in refusing to receive the chattel, it will not justify him in returning it, and suing to recover back the price."

The second and third propositions of this learned author are indisputable, and have received the sanction of this court. Thornton *v.* Wynn, 12 Wheat. 183, as modified by Withers *v.* Greene, 9 How. S. C. R. 213.[1] The first proposition, concerning the right of the purchaser to reject the article because it varies from the warranty, is an open question. In Dawson *v.* Collins, 10 C. B. R. 527 (70 E. C. L. R.) the judges dissent from it. The Chief Justice expressed his favor for the conclusion, "that the buyer has no right to repudiate the article," because it did not correspond to the warranty; and Cresswell, Justice, said, "Where the sale is of an individual and specific thing, the vendee can only defend himself, altogether, against an action for not accepting it, if the thing be utterly worthless, as in Poulton and Lattimore; or, in part, by giving the breach of warranty in evidence in reduction of damages." And this corresponds with the conclusions of this court in the case of Thornton *v.* Wynn, 12 Wheat. 183, where very similar language is used.

But while the first proposition of the note in the Leading Cases is a matter of dispute, there is none in respect to the conclusion that the purchaser who has received and used the article, and derived a benefit from it, cannot then rescind the contract. This principle is stated in Hunt *v.* Silk, 5 East, 449, in which Lord Ellenborough says: "Where a contract is to be rescinded at all, it must be rescinded *in toto*, and the parties put *in statu quo*." And, "if the plaintiff might occupy the premises two days beyond the time when the repairs were to have been done and the lease executed, and yet rescind the contract, why might he not rescind it after a twelvemonth on the same account? This objection cannot be gotten rid of. The parties cannot be put *in statu quo.*" In Perley *v.* Balch, 23 Pick., the same principle is applied to contracts of sale of chattels. The court say: "The purchaser cannot rescind the contract, and yet retain any portion of the consideration. The only exception is, where the property is entirely worthless to both parties. The purchasers cannot derive any benefit from the purchase, and yet rescind the contract. It must be nullified *in toto* or not at all. It cannot be rescinded in part and enforced in part." In Burnett *v.* Stanton, 2 Ala. R. 183, the court say: "A contract cannot be rescinded without mutual consent, when circumstances have been so altered by a part execution that the parties cannot be put *in statu quo;* for if it be rescinded at all, it must be rescinded *in toto.*" To the same effect is Christy *v.* Cummins, 3 McLean, R. 386; 2 Hill, N. Y. R. 288, per C. J. Nelson; Kase *v.* John, 10 Watts, 107. In Thornton *v.* Wynn, *supra*, this court say: "That if the sale of a chattel be absolute, and there be no subsequent agreement or consent of the vendor to take back the article, the contract remains open, and the vendee is put to his action upon the warranty, unless it be proved that the vendor knew of the unsoundness of the article, and the vendee tendered a return in a reasonable time."

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[1] In Thornton *v.* Wynn, 12 Wheat. 183, 193, the court say: "If, upon a sale with a warranty, or if, by the special terms of the contract, the vendee is at liberty to return the article sold, an offer to return it is equivalent to an offer accepted by the vendor, and, in that case, the contract is rescinded and at an end, which is a sufficient defence to an action brought by the vendor for the purchase money, or to enable the vendee to maintain an action for money had and received in case the purchase money has been paid. The consequences are the same where the sale is absolute, and the vendor afterwards consents, unconditionally, to take back the property; because, in both, the contract is rescinded by the agreement of the parties, and the vendee is well entitled to retain the purchase money in the one case, or to recover it back in the other. But if the sale be absolute, and there be no subsequent agreement or consent of the vendor to take back the article, the contract remains open, and the vendee is put to his action upon the warranty, unless it be proved that the vendor knew of the unsoundness of the article, and the vendee tendered a return of it within a reasonable time."

In Withers *v.* Greene, 9 How. 213, 227, the court quote with approval from the decision of the Supreme Court of Alabama in Peden *v.* Moore, 1 Stewart & Porter, 71, the following statement: "We are of opinion that wherever a defendant can maintain a cross-action for damages on account of a defect in personal property purchased by him, or of a non-compliance by the plaintiff with his part of the contract, he may, in defence to an action upon his note made in consequence of such purchase or contract claim a deduction corresponding with the injury he has sustained."

If the verdict had found that the defendant had sustained any damage from the difference in the brands on the flour, the price would have been diminished accordingly; and so the defendant might have been indemnified upon an action commenced by himself, alleging a breach of the contract. But, without considering whether he could refuse to accept any portion of the flour for the variance from the letter of his contract, we decide that he lost this power when he applied to have, paid for, and sold the parcels, on the 25th and 31st of January, 1853.

The defendant pleaded that the several causes of action in the complaint mentioned did not accrue within two years before the commencement of the suit. The code of California provides, that "an action upon any contract, obligation, or liability, founded upon an instrument of writing, except those mentioned in a preceding section, shall be brought within three years, and within two years if founded upon a contract, obligation, or liability, not in writing, except in actions on an open account, for goods, wares, and merchandises, and for any article charged in a store account." The plea of the defendant does not allege that the cause of action is founded upon a contract, obligation, or liability, not in writing, nor show that it falls within the limitation of two years, as pleaded. The complaint is framed so as to admit evidence of a contract in writing quite as well as an oral contract, and the evidence shows this action is founded on a written contract. The plea should have contained an averment that the cause of action was not in writing, with such other averments as to show that the bar of the statute pleaded was applicable.

A plea cannot be sustained, which rests for its validity upon a supposed state of facts which may not exist. The plea must be an answer to any case which may be legally established under the declaration. Winston *v.* The Trustees' University, &c., 1 Ala. R. 124.

It was objected that the proof shows that the assignment by Flint, Peabody, & Co., was made to the plaintiffs in the suit, and that the declaration alleges that they assigned their interest in the claim to John Bertram, one of the plaintiffs. The code of California requires that actions shall be prosecuted in the name of the real party in interest, and that all parties having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs. The plaintiffs are shown to be the parties jointly interested in the subject of the action, and in the claim for relief. It is quite immaterial in what proportions they may be concerned. Their case is substantially established, when their joint interest is shown, and the error in respect to the degree of the interest of the several parties is not such a variance as will be considered. *Judgment affirmed.*

POPE & ANOTHER *v.* ALLIS.

UNITED STATES SUPREME COURT, OCTOBER 29 — NOVEMBER 9, 1885.

[*Reported in* 115 *United States,* 363.]

EDWARD P. ALLIS, the defendant in error, was the plaintiff in the Circuit Court. He brought his suit to recover from the defendants, Thomas J. Pope and James E. Pope, now the plaintiffs in error, the sum of $17,840, the price of five hundred tons of pig iron, which he alleged he had bought from them and paid for, but which he refused to accept because it was not of the quality which the defendants had agreed to furnish. The plaintiff also demanded $1,750, freight on the iron, which he alleged he had paid.

The facts appearing upon the record were as follows: The plaintiff carried on the business of an iron-founder in Milwaukee, Wisconsin, and the defendants were brokers in iron in the city of New York. In the month of January, 1880, by correspondence carried on by mail and telegraph, the defendants agreed to sell and deliver to the plaintiff five hundred tons of No. 1 extra American and three hundred tons No. 1 extra Glengarnock (Scotch) pig iron. The American iron was to be delivered on the cars at the furnace bank at Coplay, Pennsylvania, and the Scotch at the yard of the defendants in New York. By a subsequent correspondence between the plaintiff and the defendants it fairly appeared that the latter agreed to ship the iron for the plaintiff at Elizabethport, New Jersey. It was to be shipped as early in the spring as cheap freights could be had, consigned to the National Exchange Bank at Milwaukee, which in behalf of the plaintiff, agreed to pay for the iron on receipt of the bills of lading. That quantity of American iron was landed at Milwaukee and delivered to the plaintiff about July 15. Before its arrival at Milwaukee the plaintiff had not only paid for the iron but also the freight from Coplay to Milwaukee. Soon after the arrival in Milwaukee the plaintiff examined the 500 tons American iron to which solely the controversy in this case referred, and refused to accept it on the ground that it was not of the grade called for by the contract, and at once gave the defendants notice of the fact, and that he held the iron subject to their order, and brought this suit to recover the price of the iron and the freight thereon.

The defences relied on to defeat the action were (1) that the iron delivered by the defendants to the plaintiff was No. 1 extra American iron, and was of the kind and quality required by the contract: and (2) that the title having passed to the plaintiff when the iron was shipped to him at Elizabethport, he could not afterwards rescind the contract and sue for the price of the iron and the freight which he had paid, but must sue for a breach of the warranty.

It was conceded upon the trial that, if the plaintiff was entitled to recover at all, his recovery should be for $22,315.40. The defendants pleaded a counter-claim for $5,311, which was admitted by the plaintiff. The jury returned a verdict for the plaintiff for $16,513.11, for which sum and costs the court rendered a judgment against the defendants. This writ of error brought that judgment under review.

Mr. George P. Miller, for plaintiffs in error (*Mr. William P. Lynde* also filed a brief for same).

Mr. Eppa Hunton (*Mr. J. G. Jenkins* also filed a brief), for defendant in error.

Mr. Justice Woods delivered the opinion of the court.

4. The assignment of error mainly relied on by the plaintiffs in error is that the court refused to instruct the jury to return a verdict for the defendants. The legal proposition upon which their counsel based this request was, that the purchaser of personal property, upon breach of warranty of quality, cannot, in the absence of fraud, rescind the contract of purchase and sale and sue for the recovery of the price. And they contended that, as the iron was delivered to defendant in error either at Coplay or Elizabethport, and the sale was completed thereby, the only remedy of the defendant in error was by a suit upon the warranty.

It did not appear that at the date of the contract the iron had been manufactured, and it was shown by the record that no particular iron was segregated and appropriated to the contract by the plaintiffs in error until a short time before its shipment, in the latter part of April and the early part of May. The defendant in error had no opportunity to inspect it until it arrived in Milwaukee, and consequently never accepted the particular iron appropriated to fill the contract. It was established by the verdict of the jury that the iron shipped was not of the quality required by the contract. Under these circumstances the contention of the plaintiffs in error is, that the defendant in error, although the iron shipped to him was not what he bought, and could not be used in his business, was bound to keep it, and could only recover the difference in value between the iron for which he contracted and the iron which was delivered to him.

We do not think that such is the law. When the subject-matter of a sale is not in existence, or not ascertained at the time of the contract, an undertaking that it shall, when existing or ascertained, possess certain qualities, is not a mere warranty, but a condition, the performance of which is precedent to any obligation upon the vendee under the contract; because the existence of those qualities being part of the description of the thing sold becomes essential to its identity, and the vendee cannot be obliged to receive and pay for a thing different from that for which he contracted. Chanter *v.* Hopkins, 4 M. & W. 399, 404; Barr *v.* Gibson, 3 M. & W. 390; Gompertz *v.* Bartlett, 2 El. & Bl. 849; Okell *v.* Smith, 1 Stark. N. P. 86; Notes to Cutter *v.* Powell, 2 Smith's Leading Cases, 37, 7th Am ed.; Woodle *v.* Whitney, 23 Wisc. 55; Boothby *v.* Scales, 27 Wisc. 626; Fairfield *v.* Madison Man. Co., 38 Wisc. 346. See also Nichol *v.* Godts, 10 Exch. 191.

So, in a recent case decided by this court, it was said by Mr. Justice Gray: "A statement" in a mercantile contract "descriptive of the subject-matter or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent upon the failure or non-performance of which the party aggrieved may repudiate the whole contract." Norrington *v.* Wright, 115 U. S. 188. See also Filley *v.* Pope, 115 U. S. 213.

And so, when a contract for the sale of goods is made by sample, it amounts to an undertaking on the part of the seller with the buyer that all the goods are similar, both in nature and quality, to those exhibited, and if they do not correspond the buyer may refuse to receive them, or if received, he may return them in a reasonable time allowed for examination, and thus rescind the contract. Lorymer *v.* Smith, 1 B. & C. 1; Magee *v.* Billingsley, 3 Ala. 679.

The authorities cited sustain this proposition, that when a vendor sells goods of a specified quality, but not in existence or ascertained, and undertakes to ship them to a distant buyer when made or ascertained, and delivers them to the carrier for the purchaser, the latter is not bound to accept them without examination. The mere delivery of the goods by the vendor to the carrier does not necessarily bind the vendee to accept them. On their arrival he has the right to inspect them to ascertain whether they conform to the contract, and the right to inspect implies the right to reject them if they are not of the quality required by the contract. The rulings of the Circuit Court were in accordance with these views.

We have been referred by the plaintiffs in error to the cases of

Thornton *v.* Wynn, 12 Wheat. 183, and Lyon *v.* Bertram, 20 How. 149, to sustain the proposition that the defendant in error in this case could not rescind the contract and sue to recover back the price of the iron. But the cases are not in point. In the first there was an absolute sale with warranty and delivery to the vendee of a specific chattel, namely, a race-horse; in the second, the sale was of a specified and designated lot of flour which the vendee had accepted, and part of which he had used, with ample means to ascertain whether or not it conformed to the contract.

The cases we have cited are conclusive against the contention of the plaintiffs in error. The jury has found that the iron was not of the quality which the contract required, and, on that ground, the defendant in error, at the first opportunity, rejected it, as he had a right to do. His suit to recover the price was, therefore, well brought.

Other errors are assigned, but, in our opinion, they present no ground for the reversal of the judgment, and do not require discussion. *Judgment affirmed.*[1]

OK

BRYANT *v.* ISBURGH.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, SEPTEMBER TERM, 1859.

[*Reported in* 13 *Gray*, 607]

METCALF, J. The precise question in this case is, whether a purchaser of personal property, sold to him with an express warranty, and taken into possession by him, can rescind the contract and return the property, for breach of the warranty, when there is no fraud, and no express agreement that he may do so. It appears from the cases cited for the plaintiff that in the English courts, and in some of the courts in this country, he cannot; and that his only remedy is on the warranty. See also 2 Steph. N. P. 1296; Addison on Con. (2d Amer. ed.) 272; Oliphant's Law of Horses, 88; Cripps *v.* Smith, 3 Irish Law R. 277.

But we are of opinion (notwithstanding a *dictum* of Parsons, C. J., in Kimball *v.* Cunningham, 4 Mass 505) that, by the law of this commonwealth, as understood and practised upon for more than forty years, there is no such difference between the effect of an implied and an express warranty as deprives a purchaser of any legal right of rescission under the latter, which he has under the former; and that he to whom property is sold with express warranty, as well as he to whom it is sold with an implied warranty, may rescind the contract for breach of warranty, by a seasonable return of the property, and thus entitle himself to a full defence to a suit brought against him for the price of the property, or to an action against the seller to recover back the price, if it have been paid to him. In Bradford *v.* Manly, 13 Mass. 139, where it was decided that a sale by sample was tantamount to an express warranty that the sample was a true representative of the kind of thing sold (and in which case there was no fraud), Chief Justice Parker said: "If a different thing is delivered, he [the seller] does not perform his contract, and must pay the difference, or receive the thing back and rescind the bargain, if it is offered him." This, it is true, was only a *dictum*, and not to be regarded as a decisive authority. But in Perley *v.* Balch, 23 Pick. 283, which was an action on a promissory note given for the price of an ox sold to the defendant, it was adjudged that the jury were rightly instructed that if, on the sale of the ox, there was fraud, or an express warranty and a breach of it, the defendant might avoid the contract by returning the ox within a reasonable time, and that this would be a defence to the action. In Dorr *v.* Fisher, 1 Cush. 274, it was said by Shaw, C. J., that, "to avoid circuity of action, a warranty may be treated as a condition subsequent, at the election of the vendee, who may, upon a breach thereof, rescind the contract and recover back the amount of his purchase money, as in case of fraud. But if he does this, he must first return the property sold, or do everything in his power requisite to a complete restoration of the property to the vendor; and without this he cannot recover." The chief justice took no distinction between an express warranty and an implied one, but referred, in support of what he had said (with other cases), to Perley *v.* Balch, cited above.

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[1] Only so much of the opinion as relates to the subject of warranty is printed

In 1816, when the case of Bradford *v.* Manly was before this court, and afterwards, until 1831, the law of England, on the point raised in the present case, was supposed to be as we now hold it to be here. Lord Eldon had said, in Curtis *v.* Hannay, 3 Esp. R. 82, that he took it to be "clear law;" and so it was laid down in 2 Selw. N. P. (1st ed.) 586, in 1807, and in Long on Sales, 125, 126, in 1821, and in 2 Stark. Ev. (1st ed.) 645, in 1825. In 1831, in Street *v.* Blay, 2 B. & Ad. 461, Lord Eldon's opinion was first denied, and a contrary opinion expressed by the Court of King's Bench. Yet our court subsequently (in 1839) decided the case of Perley *v.* Balch. The doctrine of that decision prevents circuity of action and multiplicity of suits, and, at the same time, accomplishes all the ends of justice.

Exceptions sustained.[1]

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[1] The doctrine of this case has been continuously followed in Massachusetts. In Smith *v.* Hale, 158 Mass. 178, it was held that a buggy the springs of which were warranted strong might be returned though one of the springs had been broken while in the vendee's possession, because "the breaking of the spring was just what the plaintiff had warranted against."

A number of other States also allow a rescission of the contract as a remedy for breach of an express warranty. The authorities are collected and discussed in 16 Harv. L. Rev. 465; 4 Col. L. Rev. 1, 195, 265; 17 Harv. L. Rev. 500.

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Sales Act § 69
finis.

EDMUND DAY *v.* HIRAM POOL.

NEW YORK COURT OF APPEALS, FEBRUARY 25 — APRIL 1, 1873.

[*Reported in* 52 *New York*, 416.]

PECKHAM, J. Action for damages for alleged breach of warranty upon a contract to sell and deliver to plaintiffs, at a future day, eighty barrels of rock-candy syrup. The contract of sale with warranty was proved, or sufficiently so for the jury, and the breach; but it also appeared in proof that the plaintiffs, after receiving the syrup and discovering its failure to comply with the warranty, proceeded to use it in their business of wine manufacture, and neither returned nor offered to return it. Upon this ground the plaintiffs, on defendants' motion, were nonsuited at the circuit. It appeared that the plaintiffs required and desired to purchase for their business, in a western county, an article of rock-candy syrup "that would not crystallize, or the sugar fall down," in its use.

This the defendants, merchants in the city of New York, undertook to sell to them, and to warrant in these respects. The syrup was manufactured in Boston; but samples of the syrup were shown at the time of the contract to the plaintiffs. It was to be ordered by defendants from Boston. It was all to be sent to plaintiffs by the fifteenth of October then next, in two car loads.

It was in fact delivered in small parcels, at different times, up to the last of November.

The plaintiffs complained of the deficiency of the syrup at various times to the defendants while they were delivering it; at one time sent a sample of that already received, complaining of its deficiency; and the defendants promised to correct it (though they insisted it was then sound). If not, they could "do it at the end." The plaintiffs paid for the syrup in full before suit.

The question presented is, did the plaintiffs' claim for damages survive their acceptance and use of the syrup, or were they bound to return or offer to return the defective syrup as soon as its deficiency was discovered? In other words, were they bound to rescind the contract, or could they use the syrup and rely upon their warranty?

There seems very little authority upon this precise point in this State, viz., as to an executory sale, with warranty as to the quality of the article contracted for.

It is well settled that, upon a sale and delivery *in præsenti* of goods with express warranty, if the goods upon trial or full examination turn out to be defective, and there is a breach of the warranty, the vendee may retain and use the property, and may have his remedy upon the warranty without returning or offering to return. In fact, it seems to be regarded as settled in this State, though perhaps not necessarily determined in any case, that he has no right to return the goods in such case, unless there was fraud in the sale. It is not necessary to decide that point in this case. Voorhees *v.* Earl, 2 Hill, 288; Muller *v.* Eno, 14 N. Y. 597; Best *v.* Eckle, 41 *id.* 488; Foot *v.* Bentley, 44 *id.* 166; see, also, Story on Sales, § 421, and cases cited; Thornton *v.* Wynn, 12 Wheat. 183.

In Massachusetts and in Maryland the vendee has his option to retain and use the property, and recoup, or sue on his warranty; or he may return it, rescind, and sue for the consideration. Dorr *v.* Fisher, 1 Cush. 271; Bryant *v.* Isburgh, 13 Gray, 607; Hyatt *v.* Bayle, 5 Gill & J. 121; Franklin *v.* Long, 7 *id.* 407; Butler *v.* Blake, 2 Har. & J. 350.

In addition to the mere contract of sale in an executory as well as on a sale *in præsenti*, a vendor may warrant that the article shall have certain qualities. This agreement to warrant in an executory contract of sale is just as obligatory as a warranty on a present sale and delivery of goods. Is there any reason why the vendee in such executory contract of sale, may not rely upon that warranty to the same extent as upon a warranty in a present sale and delivery of property?

Had this syrup been all present when purchased, and the plaintiffs (the purchasers) given it all reasonable examination, without any actual trial, there could have been no legal objection to the defendants' warranty, that it would "not crystallize, or the sugar fall down," in its use.

Upon such a warranty the plaintiffs might have used the syrup without returning it, though found to be defective, and relied upon their warranty. This is well settled law.

Why might they not likewise rely upon a like warranty in this executory contract?

I confess myself unable to see any controlling reason for a legal difference.

In a present sale with warranty it is expected, of course, that the vendor incurs the peril of defects being developed, in the property warranted, after its delivery to the purchaser. He warrants against that. He does precisely the same upon a warranty in an executory contract.

If it be dangerous to allow this defect to be discovered by the purchaser in the one case, without any return of the property, it is no more so in the other.

I see no reason why the same rights and remedies should not attach to a warranty in an executory as in a present sale, and no greater. The purchaser in an executory sale could not rely upon a warranty as to open, plainly apparent defects any more than he could in a sale *in præsenti*.

The appellant greatly relies upon the *nisi prius* case of Hopkins *v.* Appleby, 1 Stark. 388, tried before Lord Ellenborough, which was an action for goods sold and delivered, warranted to be of the best quality Spanish barilla and salt barilla. The defendant had consumed the article purchased in eight successive boilings, without giving notice of its defect or offering to return it; and he attempted to show that the quality could not be ascertained by mere inspection without actual experiment. Proof to the reverse of this was also given. The court held that he ought to have given notice of the defect in an early stage, so that the vendor might have sent there and ascertained the cause of the failure; and he disallowed the claim.

That case has not been followed in the English courts. It is distinctly overruled in Poulton *v.* Lattimore, 9 Bar. & Cr. 259. There the buyer neither returned the seed bought nor gave any notice of its defect; but as there was an express warranty, the defects, by the breach thereof, were allowed to defeat the action for the price. This in 1829.

Nor does it seem to have been the law of England prior to that decision. Filder *v.* Starkin, 1 H. Bl. 17; and see Story on Sales, § 405, and cases there cited; also § 422, and note 2, and cases cited.

The counsel also insists that the cases of Reed *v.* Randall, 29 N. Y. 358; McCormick *v.* Dawkins, 45 *id.* 265, and cases there referred to, sustain this nonsuit. Neither was a case of warranty; and each one that speaks upon the subject expressly excepts the rule there laid down from a case of warranty as inapplicable.

In Neaffie *v.* Hart, 4 Lans. 4, there was claimed to have been an implied warranty. The court held that it was not taken out of the rule of the above cases.

In my opinion, where there is an express warranty the purchaser, whether in an executed or an executory sale, is not bound to return the property upon discovering the breach, even if he have the right to do so.

See the cases as to the right to return property purchased upon warranty, before cited; also those from Massachusetts and from Maryland; also Messenger *v.* Pratt, 3 Lans. 234. All agree that he is not bound to return property warranted upon discovering the breach. Reed *v.* Randall, *supra*, would have been decided the other way had there been an express warranty as to the quality of the tobacco. The court held there was no warranty, and that was the ground of the judgment.

Foot *v.* Bentley, *supra*, substantially decides this case. The action in respect to the warranty was held to lie, though the tea was not returned when its defects were discovered; but the judgment was reversed upon another ground. Muller *v.* Eno, *supra*.

The maintenance of this action does not at all conflict with Hopkins *v.* Appleby, *supra*.

Here notice was given of the defects in the syrup at an early stage, and the defendants promised to attend to it. They also apparently acquiesced in the plaintiff's use of it, virtually promising to make it right if it did not prove to be sound rock-candy syrup. It would scarcely be just now to allow the defendants to take advantage of the non-return of the syrup under such circumstances.

Of course, there is danger of fraud and false claims, even where there is an express warranty, when notice is not early given of the defect. It leads the buyer into temptation. Hence, juries should listen to such claims (never presented when their falsity could have been ascertained) with great caution. The proof thereof should be more clear than if the buyer had acted with the frankness of an honest man, willing to allow his claims to be tested. This is so declared by courts, while the rule is maintained as to an express warranty as above stated.

The order of the General Term granting a new trial is, therefore, affirmed, and judgment absolute given for the plaintiffs.

GROVER, FOLGER, and RAPALLO, JJ., concur.

CHURCH, C. J., ALLEN and ANDREWS, JJ., dissent.

Order affirmed and judgment accordingly.

GAYLORD MANUFACTURING CO. v. SARAH O. ALLEN.

NEW YORK COURT OF APPEALS, SEPTEMBER 24 — OCTOBER 7, 1873.

[*Reported in* 53 *New York*, 515.]

APPEAL from judgment of the General Term of the Superior Court of the city of New York, affirming a judgment in favor of plaintiff, entered upon the report of a referee.

This action was brought by plaintiff, as assignee of the Chicopee Malleable Iron Works, to recover a balance claimed to be due upon sale to Richard L. Allen, defendant's intestate, of a quantity of malleable iron castings. The answer set up as a counter-claim a breach of contract as to time of delivery, and a warranty of quality and breach thereof. The reply denied the warranty, alleged acceptance, and that all delays were occasioned by the neglect of defendant to furnish patterns as agreed. The facts sufficiently appear in the opinion.

John L. Cadwalader, for the appellant.

John L. Hill, for the respondent.

ALLEN, J. Whether the contract was made before, or on or after the 7th of January, 1865, is not material; or whether it rested partly in parol and partly in writing, or otherwise. It would seem from the evidence that the principal negotiation was verbal, at a personal interview between the agents of the contracting parties at the works of the plaintiff at Chicopee and at Northampton, the parties visiting the latter place to inspect one of the machines for which castings were wanted, at which interview the referee was authorized to infer from the evidence that the character, description, and quality of the castings, and the purposes for which they would be wanted, were understood by the parties; and that they parted, leaving nothing but the terms or prices at which the plaintiff would contract to furnish them undetermined. The evidence is that, at parting, the representative of the Chicopee Malleable Iron Works, the contracting party, and to whose obligations and rights the plaintiff has succeeded, was requested by the representative of defendant's intestate to inform him by letter the terms on which the company would take the contract or do the work. The letter was written on the 7th of January, stating the price per pound at which the castings would be made, and promising, if an order should be given, to put the patterns in the works as soon as they were received, and stating that the writer had no doubt that the first delivery would be made as required, and that monthly deliveries would be continued, and promising to make every exertion to complete the order as desired, concluding with a statement that, in all probability, the company would be able to meet every requirement, and expressing a hope to receive the order, and promising prompt attention. The reply to this was an order, under date of 10th of January, for a large number of castings of different descriptions and weights, with a specification of the date and times at which they would be wanted, and promising to send most of the patterns the next morning, and the balance in a few days, except those for a pony machine, which would not be ready until spring, the order concluding with the expression of a hope that the company would be able to furnish the castings ordered in quantities according to the date specified, and of suitable quality. But following the signature to the order, the following note is added: "The above to be at sixteen cents (16c.) per lb., as agreeable to your letter of January 7, 1864, and to be of the best quality and suitable to the purpose designed." No answer was made to this order, in writing or verbally, so far as appears; but the contracting company — hereafter called the plaintiff, as the plaintiff has taken its place, under the contract — proceeded on receipt of the patterns to manufacture and furnish the castings. Whether the agreement was consummated by the letter of the 7th of January, fixing the price as found by the referee, or by that of the 10th of January, acceding to the terms and ordering the castings, is not material. There is no dispute that the contract was made substantially as found by the referee. Whether the addendum to the letter of the defendant's intestate is or is not a part of the contract, the legal effect is the same. The referee has not found that there was any warranty, express or implied, of the quality of the castings, or that they should be suitable to the purpose for which they were designed, and, so far as appears, was not requested to find such fact. There is no ground for complaint that the castings were not of the best of iron, and of the best quality as castings, after they were finished. The only objection to them was, that they were not well or sufficiently annealed, and were not for that reason suitable for the purpose for which they were required, or could not as readily or profitably be wrought and applied to such purposes as if they had been more perfectly or thoroughly annealed. The law would imply precisely that which the defendant's claim made a part of the express contract. This was an executory contract for the manufacture and sale of goods, and is distinguished from a sale of goods in existence, defined and specifically sold. A contract to manufacture and deliver an article at a future day, carries with it an obligation that the article shall be merchantable, or, if sold for a particular purpose, that it shall be suitable and proper for such purpose. Hargous *v.* Stone, 1 Seld. 73, and cases cited by Judge Paige, at page 86; Reed *v.* Randall, 29 N. Y. 358; Dutchess Co. *v.* Harding, 49 *id.* 321. Incorporating into the agreement the obligation which the law implies would superadd nothing to the contract, or vary its nature or affect the remedy upon it. Sprague *v.* Blake, 20 W. R. 64. Whatever agreement there was, whether expressed or implied, was a part of the contract, and was not a special warranty or agreement collateral to it, and, in the absence of fraud or artifice in inducing an acceptance of the article, did not survive the execution and performance of the contract.

It is not intended to express an opinion as to the rule in case there were latent defects, or those which could not be discerned at the time of the delivery or acceptance of the articles. But in the absence of fraud or latent defects, an acceptance of the article sold upon an executory contract, after an opportunity to examine it, is a consent and agreement that the quality is satisfactory and as conforming to the contract, and bars all claim for compensation for any defects that may exist in the article. The party cannot, under such circumstances, retain the property, and afterwards sue or counter-claim for damages, under pretence that it was not of the character and quality or description called for by the agreement. Dutchess Co. *v.* Harding, and Reed *v.* Randall, *supra,* and cases cited; McCormick *v.* Sarson, 45 N. Y. 265. The dissents in the latter case were not to the principle decided, but to its application under the facts and circumstances of that case.

Although the referee has not found, in terms, that the quality of the castings was patent and easily to be discerned upon inspection and attempt to use them, and that the defendant had full opportunity to and did examine them and know their quality, the evidence clearly shows this to have been so, and the fact is clearly to be implied from the findings of the referee. It was the duty of the intestate, therefore, to return the defective castings at once, and, having omitted to do so, he must be deemed in law to have waived all objections to them. And the result is the same, whether the agreement as to the quality of the articles is implied or express. But the report of the referee is, that the intestate did object to some of the castings, and they were reannealed by the plaintiff, and returned to and accepted by the intestate; and that the residue of the castings were accepted and used without objection or complaint. This was a waiver of all objection to the quality of the articles, and an assent to accept them in performance of the contract. The report might have gone much further. The evidence would have warranted the referee in finding that the intestate voluntarily, after a delivery of some of the castings, and without claiming that they were not of the quality called for by the contract, employed the plaintiff to reanneal them, and agreed upon the price to be paid, and had others reannealed elsewhere, without making claim upon the plaintiff. The whole case shows that the castings were regarded at the time of the delivery and acceptance, and when their quality and condition was well known, as well by the intestate as by the plaintiff, as answering the description and call of the contract; and that the claim that they did not do so was an after-thought, when the plaintiff had declined to accept the note of the intestate instead of the money for the balance due. There was no agreement to furnish the castings at any particular time, and the referee has so found.

As there were no breaches of the contract by the plaintiff established upon the trial, entitling the plaintiff to counter-claim for damages, it is unnecessary to examine the questions made as to the other and hypothetical findings of the referee, to the effect that if there was any failure of the plaintiff to perform the contract, either as to time or the quality of the articles, such failure was caused by the acts of the intestate, and was therefore excused. There were several objections and exceptions to evidence upon the trial, but no point is made upon them here, and no error seems to have been committed to the prejudice of the defendant in that respect. Upon the merits the facts found, as well as upon the law of the case, the plaintiff was entitled to a judgment. The offer of the plaintiff to deduct a specified sum from the claim as made for the "sake of peaceful settlement," at the same time insisting upon a legal right to demand the whole, not having been accepted by the intestate, is not binding upon the plaintiff, and cannot operate as an admission that any deduction should be made, and the defendant has failed to show that any particular sum should be deducted for castings returned or furnished in excess of orders. The judgment must be affirmed. All concur; GROVER and FOLGER, JJ., concurring in result. *Judgment affirmed.*[1]

[1] In Brigg *v.* Hilton, 99 N. Y. 517, 529, the court said: "If the sale is of existing and specific goods, with or without warranty of quality, the title at once passes to the purchaser, and where there is an express warranty, it is, if untrue, at once broken, and the vendor becomes liable in damages, but the purchaser cannot for that reason either refuse to accept the goods or return them. If the contract is executory, and the goods yet to be manufactured, no title can pass until delivery or some equivalent act to which both parties assent, and when offered, the vendee may reject the goods as not answering the bargain, but if the sale was with warranty, he may receive the goods, and then the same consequences attach as in the former case, and among others, the right to compensation if the warranty is broken."

In Studer *v.* Bleistein, 115 N. Y. 316, 325, the court said: "An acceptance by the vendee of personal property manufactured under an executory contract of sale, after a full and fair opportunity of inspection, in the absence of fraud, estops him from thereafter raising any objection as to visible defects and imperfections, whether discovered or not, unless such delivery and acceptance is accompanied by some warranty of quality manifestly intended to survive acceptance."

See, also, Carleton *v.* Jenks, 80 Fed. Rep. 937 (C. C. A.); Oakland Mill Co. *v.* Fred W. Wolf Co., 118 Fed. Rep. 239 (C. C. A.); Jones *v.* McEwan, 91 Ky. 373; Day *v.* Mapes Reeve Co., 174 Mass. 412; Williams *v.* Robb, 104 Mich. 242; W. K. Henderson Co. *v.* Stilwell, 130 Mich. 124; Rosenfield *v.* Swenson, 45 Minn. 190; Hazen *v.* Wilhelmie, 93 N. W. Rep. 920 (Neb.); Gentilli *v.* Starace, 133 N. Y. 140; Nash *v.* Weidenfeld, 41 N. Y. App. Div. 511, aff'd, without opinion, 166 N. Y. 612; Waeber *v.* Talbot, 167 N. Y. 48; Russell *v.* Corning Mfg. Co., 49 N. Y. App. Div. 610; Bull *v.* Bath Iron Works, 75 N. Y. App. Div. 380; Bell *v.* Mills, 78 N. Y. App. Div. 42; Lifshitz *v.* McConnell, 80 N. Y. App. Div. 289; McClure *v.* Jefferson, 85 Wis. 208; Northern Supply Co. *v.* Wangard, 117 Wis. 624.

FAIRBANK CANNING COMPANY *v.* SETH X. METZGER.

New York Court of Appeals, Second Division. December 11, 1889, — January 14, 1890.

[*Reported in* 118 *N. Y.* 260.]

Appeal from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made January 11, 1887, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

This action was brought to recover the contract price of a car-load of dressed beef.

The answer averred, by way of counter-claim, a warranty, that the meat should be clean, well dressed, and in first-class condition, not heated before being killed, and a breach thereof by reason of which defendant sustained damage.

The following facts appeared.

The plaintiff is a corporation engaged in buying and slaughtering cattle and selling fresh dressed beef in Chicago. The defendants are copartners engaged in wholesaling and retailing meat. In February, 1883, the plaintiff by letter solicited the defendants to purchase from it what dressed beef they required. It resulted in a contract, made entirely by correspondence, for meat to be wholesaled from the car by defendant's agent from Dunkirk to Elmira, the portion remaining unsold when the car should reach Elmira to be retailed by the defendants. The defendants ordered at different times four car-loads of fresh beef and, pursuant to their agreement, on receipt of the bill for the second and third car-loads, and before the arrival of the goods, paid the plaintiff therefor by a draft on New York.

The referee found as facts: That the plaintiff was to deliver the beef on board the cars at Chicago, which was a delivery to the defendants, and the same then and there became the property of the defendants; that by the agreement made between the parties the plaintiff represented and agreed to furnish the defendants beef that had not been heated before being killed; that should be thoroughly chilled before being loaded on the cars; that it should be in first-class condition in every respect and merchantable; that a portion of the meat furnished, including all of the fourth car-load, had been heated before being killed, and was not in first-class condition or merchantable when shipped at Chicago; that as to the fourth car-load, the "defendants did all they could to dispose of it, and save what they could from it, after the car had been opened several times on different days between Dunkirk and Elmira, and finding they could not use it, they shipped back to the plaintiff 12,991 pounds, and notified plaintiff by wire of the same, and plaintiff immediately wired back that they would not receive it, whereupon the defendants ordered the same back to Elmira."

The referee found, as a matter of law, that there was no warranty, and directed a judgment to be entered in favor of the plaintiff for the contract price.

Further facts appear in the opinion.

Gabriel L. Smith, for appellant.

Henry S. Redfield, for respondent.

PARKER, J. In the absence of a warranty as to quality and a breach, the defendant's claim for damages could not have survived the use of the property. For in such case vendees are bound to rescind the contract and return, or offer to return the goods. If they omit to do so, they will be conclusively presumed to have acquiesced in their quality. Coplay Iron Company *v.* Pope, 108 N. Y. 232. Therefore, if the referee was right in holding that there was no warranty as to quality, collateral to the contract of sale, we need not inquire further, as the judgment must be affirmed. The referee has found the facts, and this court may properly review his legal conclusion as to whether they amounted to a warranty.

"A warranty is an express or implied statement of something which a party undertakes shall be a part of a contract, and, though part of the contract, collateral to the express object of it." 2 Schouler on Personal Property, 327. All contracts of sale with warranty, therefore, must contain two independent stipulations: —

First. An agreement for the transfer of title and possession from the vendor to the vendee.

Second. A further agreement that the subject of the sale has certain qualities and conditions.

It is not necessary that in the collateral agreement the word warranty should be used. No particular phraseology is requisite to constitute a warranty. "It must be a representation which the vendee relies on, and which is understood by the parties as an absolute assertion, and not the expression of an opinion." Oneida Manufacturing Society *v.* Lawrence, 4 Cow. 440. It is not necessary that the vendor should have intended the representation to constitute a warranty. If the writing contains that which amounts to a warranty, the vendor will not be permitted to say that he did not intend what his language clearly and explicitly declares. Hawkins *v.* Pemberton, 51 N. Y. 198. In that case the defendants purchased at auction an article, relying upon the representation of the auctioneer that it was "blue vitriol." It was in fact "Salzburger vitriol," an article much less valuable. In an action brought against the purchaser the trial court directed a verdict for the plaintiff. This was held to be error, because the representation at the sale amounted to a warranty.

Judge Earl, in delivering the opinion of the court, after collating and discussing the authorities upon the subject of warranty, said: "The more recent cases hold that a positive affirmation, understood and relied upon as such by the vendee, is an express warranty."

In Kent *v.* Friedman, 17 Wkly. Dig. 484, Judge Learned in his opinion says: "There can be no difference between an executory contract to sell and deliver goods of such and such a quality, and an executory contract to sell and deliver goods which the vendor warrants to be of such and such a quality. The former is as much a warranty as the latter." The Court of Appeals subsequently affirmed the judgment of the General Term without an opinion. 101 N. Y. 616.

In White *v.* Miller, 71 N. Y. 118, frequently referred to as the "Bristol cabbage seed case," the Court says: "The case of Hawkins *v.* Pemberton, *supra*, adopts as the law in this State the doctrine upon this subject now prevailing elsewhere, that a sale of a chattel by a particular description is a warranty that the article sold is of the kind specified."

So, too, a sale by sample imports a warranty that the quality of the goods shall be equal in every respect to the sample. Brigg *v.* Hilton, 99 N. Y. 517, and cases cited.

Now, in the case before us, the defendants undertook to purchase of the plaintiff fresh dressed beef to be wholesaled in part and the residue retailed to their customers. They endeavored to procure good beef. Not only did they contract for beef that was clean, well dressed, in first-class condition in every respect, and merchantable, and that was thoroughly chilled before being loaded on the cars; but further, that they should not be given beef that had been heated before being killed.

When, therefore, the plaintiff placed in a suitable car beef well-dressed and clean, and of the general description given in defendants' order, it had made a delivery of the merchandise sold, and by the terms of the contract was entitled to be paid as soon as the bill should reach defendants, and before the arrival of the beef made an examination by defendants possible.

But there was another collateral engagement, and yet forming a part of the contract, which the plaintiff had not performed, — an engagement of much consequence to the defendants and their customers, because it affected the quality of the meat. Upon its performance or non-performance depended whether it should be wholesome as an article of food. It was of such a character that defendants were obliged to rely solely upon the representation of the plaintiff in respect thereto. The plaintiff or its agents selected from their stock the cattle to be slaughtered. No one else knew or could know whether they were heated and feverish. Inspection immediately after placing the beef in the car would not determine it. That collateral engagement consisted of a representation and agreement that plaintiff would deliver to the defendants beef from cattle that had not been heated before being slaughtered. Such representation and agreement amounted to an express warranty.

The referee found as a fact, "that the meat had been heated before being killed," therefore there was a breach of the warranty, and the defendants are entitled to recover their damages, by way of counter-claim, unless such right must be deemed to have been subsequently waived.

It is not necessary for the disposition of this case to decide, and therefore it is not decided, whether a warranty is implied in all cases of a sale of fresh dressed meat, by the party slaughtering the animals, that they were not heated before being killed, and, as some of my associates are averse to any expression whatever upon that question at this time, what is said must be regarded as an individual view rather than that of the court. My attention has not been called to a decision in this State covering that precise question.

It was determined in Divine *v.* McCormick, 50 Barb. 116, that in the sale of a heifer for immediate consumption, a warranty that she is not diseased and unfit for food is implied. That decision is well founded in principle, and is in accordance with a sound public policy, which demands that the doctrine of *caveat emptor* shall be still further encroached upon, rather than that the public health shall be endangered. I see no reason for applying the rule to one who slaughters and sells to his customers for immediate consumption, and denying its application to one who slaughters and sells to another to be retailed by him. In each case it is fresh meat intended for immediate consumption.

The rule is well settled by the courts of last resort in many of the States that a vendor of an article manufactured by him for a particular use impliedly warrants it against all such defects as arise from his unskilfulness, either in selecting the materials, or in putting them together and adapting them to the required purpose. See cases cited in Albany Law Journal, vol. 18, p. 324.

One who prepares meat for the wholesale market may be said to come within that rule, — because he purchases the cattle; determines whether they are healthy and in proper condition for food; and upon his skill in dressing and preparing the meat for transportation a long distance, its quality and condition as an article of diet for the consumer largely depends.

In two of the States, at least, it is held that where perishable goods are sold to be shipped to a distant market, a warranty is implied that they are properly packed and fit for shipment, but not that they will continue sound for any particular or definite period. Mann *v.* Everston, 32 Ind. 355; Leopold *v.* Van Kirk, 27 Wis. 152.

The respondent insists that the act of defendants' agent in selling some sixty quarters of the beef before the car reached Elmira, when the defendants, after making a personal examination, immediately shipped that which remained unsold to the plaintiff, constituted a waiver of their claim for damages. It is undoubtedly the rule that in cases of executory contracts for the sale and delivery of personal property, if the article furnished fails to conform to the agreement, the vendee's right to recover damages does not survive an acceptance of the property, after opportunity to ascertain the defect, unless notice has been given to the vendor, or the vendee offers to return the property. Reed *v.* Randall, 29 N. Y. 358; Beck *v.* Sheldon, 48 N. Y. 365; Coplay Iron Company *v.* Pope, 108 N. Y. 232.

But when there is an express warranty it is unimportant whether the sale be regarded as executory or *in præsenti*, for it is now well settled that the same rights and remedies attach to an express warranty in an executory as in a present sale. Day *v.* Pool, 52 N. Y. 416; Parks *v.* Morris Ax & Tool Company, 54 N. Y. 586; Dounce *v.* Dow, 57 N. Y. 16; Brigg *v.* Hilton, 99 N. Y. 517.

In such cases the right to recover damages for the breach of the warranty survives an acceptance, the vendee being under no obligation to return the goods.

Indeed, his right to return them upon discovery of the breach is questioned in Day *v.* Pool, *supra.* And Judge Danforth, in Brigg *v.* Hilton, *supra,* after a careful review of the leading authorities upon the question, states the rule as follows: "Where there is an express warranty, it is, if untrue, at once broken, and the vendor becomes liable in damages; but the purchaser cannot for that reason either refuse to accept the goods or return them."

It follows, from the views expressed, that the judgment should be reversed.

All concur, except FOLLETT, C. J., not sitting.

Judgment reversed.

ZABRISKIE *v.* CENTRAL VERMONT RAILROAD CO.

NEW YORK COURT OF APPEALS, DECEMBER 2, 1891 — FEBRUARY 2, 1892.

[*Reported in* 131 *New York*, 72.]

RUGER, C. J. This action was brought by the plaintiff to recover the contract price of a certain quantity of coal sold and delivered by Robert Hare Powell & Co. and their assignee, the Guarantee Trust and Safe Deposit Company, to the defendant, after June, 1887, and which claim was assigned by the vendors to the plaintiff.

This coal was furnished by the vendors to the defendant under a written contract made June 8, 1887, between Powell & Co. and the defendant, whereby the said vendors agreed to sell and deliver to the defendant, during the year ending June 1, 1888, at Norwood, N. Y., 30,000 tons of "Powelton coal, of same quality and kind as furnished you during the past year," at $3 per net ton.

The same vendors had furnished the defendant a quantity of Powelton coal the previous year, which had been approved as satisfactory by the defendant. Under the contract of 1887, Powell & Co. had, previous to August 29, 1887, delivered to the defendant on its contract, upwards of four thousand tons of coal, and on that day they assigned their contract to the Guarantee Trust and Safe Deposit Company, who continued delivering coal until they were stopped by the absolute refusal of the defendant to receive any more coal from them of the kind already delivered. The assignee of the contract had, up to this time, delivered about five hundred tons, leaving some twenty-five thousand tons yet undelivered to complete the performance of the contract.

Immediately after the defendant had had an opportunity to test the first delivery of coal, and until it ceased altogether, it uniformly and constantly complained of the quality of the coal delivered to it, and objected that it did not correspond, either in quality or kind, with the coal delivered to the company in the year 1886. The defendant, however, was induced to continue to receive and to test the coal actually delivered, by the representations and promises made by the plaintiff's assignors that the quality of the coal thereafter delivered should be improved, and that upon trial it would be found to work more satisfactorily. Various interviews took place between the agents of the defendant and the plaintiff's assignors, and several examinations were made by them after the coal was delivered and in possession of defendant, and the vendors uniformly promised to improve the quality of the coal delivered, and predicted that the future deliveries would, upon actual experiment, prove to conform to the quality of the coal described in the contract, and that compensation for the damages caused by the inferior quality of the coal already delivered, should be adjusted.

It was found by the referee that practically all of the coal delivered under the contract was greatly inferior to that furnished in the year 1886. It is clearly inferable from the findings of the referee, as well as the evidence, that the great bulk of the coal was received by the defendant at the earnest solicitation of the vendors, and for the purpose of testing its quality and determining whether the vendors would be able to make its quality conform to the obligations of their contract. It is also evident from the findings that this effort was an unqualified failure.

It is contended by the plaintiff that there was no warranty of the quality of the coal sold, and that, by its acceptance, the defendant has precluded itself from claiming damages for a breach of contract.

A satisfactory answer to this claim appears in the fact that it is not found or shown that the defects in the coal were visible on inspection; but, on the contrary, it negatively appears from the conduct of both the vendors and vendee that they were not discernible on inspection. A further answer to this point is found in the proposition that the evidence authorized the finding that there was a warranty as to the quality of the coal sold.

The contract in this case calls for Powelton coal of the "same quality and kind as furnished" by the vendors to the defendant the preceding year. It calls for coal of a particular quality and kind, determinable by a standard which was equally well known and understood, both by the vendors and the purchaser. While the term "Powelton coal" may be said to be a descriptive term, merely; when it is said that the coal was to be Powelton coal of the same quality and kind as that delivered in the previous year, it goes beyond mere words of description, and refers to the intrinsic value of the goods sold in language which cannot be misunderstood, and can be satisfied only by a consideration of its fitness to perform the work required of it in the defendant's business. That this was the theory of the vendors while the coal was being delivered, is quite evident from their request that it should not be prematurely judged by its appearance alone, but should be determined by positive trial and the results shown by actual use and experiment. It comes, therefore, with ill grace from the vendors now to insist that the defects in the coal were so perceptible on inspection that the defendant should be barred by its acceptance, when they themselves had induced that acceptance only by the assurance that the working quality of the coal would show that the defects visible on inspection were apparent and not real.

We are, however, of the opinion that, upon the evidence, the contract contained a warranty of quality which survived the acceptance of the goods. The principle is well established that, upon an executory sale of goods by sample, with warranty that the goods shall correspond with the sample, the vendee is not precluded from claiming and recovering damages for breach of warranty, although he has accepted the goods after an opportunity for inspection. Kent *v.* Friedman, 101 N. Y. 616; Brigg *v.* Hilton, 99 *id.* 517; Gurney *v.* Atlantic & Great Western R. Co., 58 *id.* 358.

We are, also, of the opinion that the sale in question was, practically, a sale by sample. Although the standard selected for comparison was not present, or in existence even, at the time of the sale, its qualities had been observed and demonstrated, and were capable of exact ascertainment by the evidence of those who had witnessed the results produced by the consumption of the coal. It was unnecessary for the purpose of effecting a comparison of the respective qualities of the two specimens of coal that they should be present and compared side by side, or tested at the same time. The capacity of coal for generating heat and steam determines its value, and it is only by the destruction of the subject that a standard can be created for comparison. The comparison does not depend upon considerations of external correspondence and appearance, and this was obviously the view which these parties took of the question while negotiating as to the continuance of the deliveries of coal under this contract.

The standard selected for testing the quality of the goods sold was considered sufficiently definite and precise by the parties to the contract, and it does not appear that there was any difficulty in practice in applying it to the subject.

A contract of sale which points out a known and ascertainable standard by which to judge the quality of goods sold, is, for all practical purposes, a sale by sample, and renders the vendor liable for damages upon a breach of warranty, although there has been an acceptance afte opportunity to inspect the goods. The cases of Coplay Iron Co. *v.* Pope, 108 N. Y. 232; Studer *v.* Bleistein, 115 *id.* 316; Pierson *v.* Crooks, *id.* 539, and other cases of like character are clearly distinguishable, inasmuch as one is a contract concerning a sale by sample and the others were executory contracts for the manufacture and sale or delivery of goods of a particular description. In cases of the latter character, where the quality of goods is capable of discovery upon inspection, and where, after full opportunity for such inspection, the goods are accepted and no warranty attends the sale, the vendee is precluded from recovering damages for any variation between the goods delivered and those described in the contract. *Judgment affirmed.*[1]

UNDERWOOD *v.* WOLF.

SUPREME COURT OF ILLINOIS, JANUARY 21, 1890.

[*Reported in* 131 *Illinois*, 425.]

MR. JUSTICE MAGRUDER delivered the opinion of the court: —

The contract bears date Feb. 8, 1886. By its terms the appellee was to furnish and erect the refrigerating machinery with engine, pump, pipes, etc., in the packing-house of the appellants, and have the same in complete working order by the 8th day of May, 1886. The evidence tends to show that the whole plant was not ready for use until the 1st day of July, 1886.

The evidence further tends to show that the appellants were carrying on their packing business while the appellee was putting in the machinery. The appellee claims that the conduct of the business under such circumstances necessarily interfered with his work and delayed its progress. He also claims that delay was caused by the failure of the appellants to prepare in proper time the room in which the machinery was to be erected.

Whether the delay in the completion of the plant was due to the fault of the appellee or to that of the appellants was a question of fact to be determined by the jury under proper instructions from the court. We see no objection to the tenth instruction given for the defendants below, as modified by the court. It told the jury that "under the contract in evidence the plaintiff was bound to complete the whole plant in complete working order and condition within ninety days from the 8th day of February, A. D. 1886, *unless prevented by the acts or fault of the defendants;* and if the evidence shows that he did not do it, then he is liable in this action to the defendants for any damages the evidence may show they have sustained by reason of such delay." This instruction was given as asked by the defendants except that the words in italics were added by the court. It was proper to add the words in question because the contract required the defendants to furnish a room, foundations, masonry, carpenter work, and all steam and feed and discharge water connections, and to properly insulate the rooms according to plans, etc., and if delay resulted from their failure to meet these requirements, the plaintiff certainly could not be held responsible. The jury found in his favor upon this question, and the judgment of the Appellate Court forbids us to disturb the finding.

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[1] A portion of the opinion irrelevant to the subject of warranty is omitted.

But the main controversy between the parties arises upon the following provision in the contract: "And it is further agreed . . . that if the machines have fulfilled the guaranties made for them in this agreement by 1st of September, 1886, then said party of the second part [appellants] shall accept the same; and all payments to be made after the payment to be made on July 1, 1886, shall be promissory notes, dated on the day of acceptance of the plant with interest after maturity." The defendants refused to give and have never given the notes thus provided for.

What are the guaranties which were to be fulfilled? The plaintiff, Wolf, agreed and guaranteed, that the machine would maintain certain degrees of cooling temperature in certain rooms in the packing-house and would cool the rooms within a certain specified time; that it would cool a certain number of hogs of a specified weight within a specified time; that the power required to drive the machinery should not exceed a certain limit; that the fuel required to produce the steam to do the work of the engines should not exceed a certain amount; that the loss of ammonia in doing the work should not exceed a certain number of pounds; that the refrigerating machines should be of the best material and workmanship; that the engine should be capable of running the packing-house machinery in addition to the compressors; that the iron piping to be furnished should be such as would be necessary to carry and convey the brine required for the proper cooling of the rooms.

In considering the nature of these guaranties, it is unnecessary to discuss any nice distinctions between warranties on the one side, and conditions precedent or descriptions of the property on the other. It is sufficient that the guaranties are treated as warranties, and their nonfulfilment, if they were not fulfilled, will be regarded as a breach of warranty.

Inasmuch as the plant was to be completed by May 8, 1886, and was to be accepted if the guaranties were fulfilled by September 1, 1886, it is manifest that the period between these two dates was to be made use of for the purpose of testing the machines, in order to ascertain whether or not they were such as they were guaranteed to be. It is also sufficiently manifest that, if the machines failed in any of the particulars named in the guaranties, the defects which would thus be shown to exist must be regarded as patent defects as contradistinguished from latent defects.

Where there is a sale and delivery of personal property *in præsenti* with express warranty, and the property turns out to be defective, the vendee may receive and use the property and sue for damages on a breach of the warranty, or, when sued for the purchase price, he may recoup such damages under the general issue, or set them up in a special plea of set-off. This is a well-settled rule. In the present case the contract is executory; the title to the property did not vest in the purchaser until the period for making the test had passed. It has been held in some States that, where the contract is thus executory and a time is fixed for making a test, the acceptance and use of the property, after such time has passed, amount to a waiver of the right to claim damages for a breach of the warranty. But such is not the law in this State. In the present case, the evidence tends to show that the defendants took possession about July 1, 1886, of the machines, placed in their packing-house by the plaintiff, and had been using the same up to the time of the trial of the cause in the court below. The chief complaint of the appellants is that, under the instructions given by the trial court, the jury were led to regard the acceptance and use of the machinery by the defendants as an abandonment of all right to damages for breach of the warranties. We are unable to regard this complaint as well founded.

We agree with the counsel for appellants, in the main, in their view of the law. We think that, even where the contract is executory, the claim for damages on account of a breach of the warranty will survive the acceptance of the property. Chitty on Contracts (11th ed.) at page 652 says: "Where, therefore, the vendor of a warranted article, whether it be a specific chattel or not, sues for the price or value, it is competent to the purchaser, in all cases, to prove the breach of the warranty in reduction of damages, and the sum to be recovered for the price of the article will be reduced by so much as the article was diminished in value by non-compliance with the warranty." The previous discussion of the authorities by the author, before arriving at the conclusion thus announced, shows his meaning to be, that the breach of the warranty may be proven in reduction of damages, not only in the case of the sale of a specific chattel, but also in the case of an executory contract, as, for example, "where an article is ordered from a manufacturer who contracts that it shall be of a certain quality, or fit for a certain purpose." *Idem*, pages 647 to 652.

In Benjamin on Sales, Vol. 2, § 1356 (4th Am. ed.), it is said: "The buyer will also lose his right of returning goods delivered to him under a warranty of quality, if he has shown by his conduct an acceptance of them, or if he has retained them a longer time than was reasonable for a trial, or has consumed more than was necessary for testing them, or has exercised acts of ownership as by offering to resell them; all of which acts show an agreement to accept the goods, but do not constitute an abandonment of his remedy by cross-action or by counterclaim in the vendor's action for the price." If the retention of the property by the buyer for a longer time than is reasonable for a trial does not waive his right to damages in an action by the vendor for the purchase price, then there is no reason why his retention of the property for a longer time than that fixed in the contract for a trial should amount to such waiver.

The rule, as announced by these text writers, has been held to be the law in this State.

In Babcock *v.* Trice, 18 Ill. 420, there was an executory contract for the sale and delivery of corn with an implied warranty that it should be of a fair and merchantable quality; it was there said: "It is true that the acceptance of corn under an executory contract, with opportunity of inspection at the time of delivery, *without complaint*, may raise a presumption that it was of the quality contemplated by the parties, but it will not preclude the party from showing and setting up the actual defect in quality and condition. . . . He could, . . . under the general issue prove the facts out of which the warranty arose, the breach and his damages by way of recoupment," etc. Crabtree *v.* Kile, 21 Ill. 184.

In Strawn *v.* Cogswell, 28 Ill. 457, which was a petition for a mechanic's lien founded upon a contract to furnish iron castings for a grist mill, and where the defence was that the work was not done in a workmanlike manner, and the materials were not of the quality required by the contract, we said, "Improvements of this description being permanent and fixed, and requiring skill to test their sufficiency, their being received and put to use is not such an acceptance as estops the party from claiming damages for their being defective."

In the case at bar, the refrigerating machines were so built into the packing-house and so much a part thereof, that their removal could only have been accomplished with difficulty, and perhaps with injury to the house itself. The mere use of them by the defendants after September 1, 1886, might not of itself amount to such an acceptance as would preclude them from claiming damages for defects. Mears *v.* Nichols, 41 Ill. 207; Peck *v.* Brewer, 48 Ill. 54.

In Doane *v.* Dunham, 65 Ill. 512, and same case, 79 *id.* 131, the distinction between executory and executed contracts was recognized, and it was held that, in the former, the law gives the buyer a reasonable time for making an examination of the chattels sold; that it is for the jury to determine under all the circumstances what is such reasonable time; that a failure to make the examination within a reasonable time may preclude the buyer from offering the property back, rescinding the contract and avoiding payment on that ground, but will not deprive him of the right to rely upon the breach of the warranty for damages. The only difference between that case and the one at bar is, that there the *law* gives time for examination or test, while here the *contract* fixes the time. The same rule, however, will apply to both cases. Estep *v.* Fenton, 66 Ill. 467.

In Owens *v.* Sturges, 67 Ill. 366, it was held that where the contract is unexecuted, the buyer may retain the property and show the warranty and breach to reduce the recovery, even though he neglected to return the property upon discovery of the breach.

In Prairie Farmer Co. *v.* Taylor, 69 Ill. 440, the contract was to set up a printing-press in complete running order in the defendant's press-room within seventy days from the acceptance of the plaintiff's proposition, with warranty that the press should give complete satisfaction, and granting to the defendant thirty days' time from the setting up of the press to decide whether the warranty was good; the defendant gave no notice of its intention after the thirty days had passed, but kept the press; it was held, that the continued use of the press indicated the vesting of the title in the buyer, and that the defendant could recoup his damages from the contract price if there had been a breach of the warranty.

We are, therefore, of the opinion that the defendants had a right, in the case at bar, to offset, against plaintiff's claim for the contract price of the machines, such damages as they were able to show that they had sustained from a failure to fulfil the guaranties, if there was such failure.

The subject presents itself under two aspects: first, were the machines such as they were warranted to be in the contract? second, if they were not such as they were warranted to be, was there such an acceptance of them as would preclude the defendants from insisting upon damages for the breach?

The case seems to have been tried mainly upon the theory suggested by the first question. The plaintiff introduced proof to show that the machines did fulfil the guaranties, while the defendants produced evidence to show that they did not fulfil the guaranties. In other words, the question most prominently presented to the minds of the jury was, not whether there had been a waiver of existing defects, but whether or not any defects actually existed. Upon the latter subject they were most fully and elaborately instructed by the court. The court gave nine or ten instructions asked by the defendants, authorizing the jury to give them damages for the breach of the warranties if the jury should find from the evidence that the machines did not fulfil the guaranties. These instructions all adopt and express the theory of the law contended for by the counsel for appellants. They announce over and over again, that the defendants were entitled to damages if the machines were not what they were warranted to be as to cooling capacity for rooms and hogs, as to amount of power and fuel and piping, etc., and as to every other particular specified in the contract. The jury by their verdict and the Appellate Court by their judgment of affirmance have found the fact to be that the defendants had not suffered the damages claimed by them. Hence, such fact is settled beyond our power to change it.

But counsel say, that the instructions given for the defendants, although announcing a correct rule of law, were contradicted by the instructions given for the plaintiff, and that the jury were left at liberty to follow either of two sets of contradictory instructions, unenlightened as to what the law really was. We do not think that the instructions taken as a whole can be regarded as laying down contradictory principles. Certainly no instruction given for the plaintiff states that the defendants were not entitled to damages for breach of the warranties. On the contrary, several of them expressly recognize the right of the defendants to claim damages.

The fourth instruction given for the plaintiff told the jury, that, so far as the defendants relied upon a breach of warranty as a defence, or by way of set-off, the burden of proof was upon them "as to such breach and as to any damages, if any, arising therefrom, and unless they prove such breach and damages as alleged by them by a preponderance of the evidence, then they will not be entitled to any benefit therefrom in this suit." This language most clearly conveys the idea that if the defendants did prove the breach and damages by a preponderance of the evidence, they would be entitled to the benefit thereof.

The fifth of plaintiff's instructions told the jury that damages for breach of warranty of machinery did not include probable profits or prospective gains, thereby implying that such damages as did not include probable profits or prospective gains might be recovered.

The first instruction given for the plaintiff, in reciting the conditions upon which the plaintiff would be entitled to recover interest upon the notes, uses these words: "The court instructs the jury, that, if they believe from the evidence that the plaintiff has made out his case as by him alleged in his declaration," etc. The plaintiff in his declaration alleges that he has furnished machines, tanks, engine, piping, etc., of such description, quality, and capacity as the contract calls for, and that he has kept the contract in all things on his part, and performed all the covenants therein within the time and in the manner therein provided. In other words, the first instruction requires the jury to find, as a condition of recovery, that the plaintiff has fulfilled all the guaranties above specified. This requirement negatives the idea that the defendants, by acceptance or other acts, had waived their right to claim damages for a non-fulfilment of the guaranties.

The obscurity which seems to exist in one or two of the instructions given for the plaintiff, will disappear upon considering the true meaning of some of the terms therein used.

Where the contract for the sale of the goods is an executory one, and the time for examination, whether fixed by the contract or allowed by the law, has passed, the buyer may refuse to accept the goods and may return them, or he may accept them and sue for breach of warranty, or rely upon the damages for such breach in reduction of the contract price. Benjamin on Sales, 4th Am. ed., vol. 2, §§ 1346, 1347, 1348, etc.; Doane *v.* Dunham, *supra;* Owens *v.* Sturges, *supra;* Mears *v.* Nichols, *supra.* If he desires to rescind the contract and return the goods, he must offer them back as soon as he discovers the breach, or after he has had a reasonable time for examination; such right to rescind and return is waived by retaining and continuing to use the goods longer than is necessary for a trial of them.

There is some evidence tending to show that Viles, one of the defendants, requested the plaintiff to remove the machine. Such request if made would indicate an intention on the part of the defendants not to accept the machine, but to rescind the contract. Hence, no harm was done by giving the plaintiff's eighth instruction. That instruction merely told the jury that the right of the buyer to reject the article sold to him, or, in other words, his right to return it and rescind the contract, might be waived or lost by acts inconsistent with the ownership of the vendor or by the continued use of the article after knowledge of the defects. But the impression was in no way conveyed to the minds of the jury that, if defendants elected to accept the machine and not to return it, their right to offset damages for breach of warranty against the contract price would be waived by such acts and such continued use as are specified in the instruction. Waiver of the right to return the machine is one thing; waiver of the right to claim damages is another and entirely different thing. The third instruction given for the defendants expressly told the jury that "the defendants were not bound to return the said machines and apparatus, if found not to be according to the warranty, but might keep the same, and, when sued for the price, set up such warranty and the breach thereof as a defence, and, if proven, be allowed the amount of damages they have sustained by reason of the breach of the warranty."

It is also to be observed that the word "acceptance," as used in reference to the subject-matter of this controversy, has two significations. Where goods are sold under an executory contract, there may be an acceptance of them in full discharge of the contract, or there may be an acceptance of them in such sense that the buyer retains and uses them and becomes vested with the title and ownership of them, but reserves the right to claim damages for their defects. This distinction is recognized in Estep *v.* Fenton, *supra*, and in Mears *v.* Nichols, *supra.* It is also recognized in the fourth instruction given for the defendants in this case, which told the jury that "the defendants are not prevented from setting off the damages they may have sustained by reason of the performance of the contract in a manner different from the agreement merely because they may have done acts amounting to an acceptance of the machine. They could only be prevented from setting off such damages so sustained in case they had accepted the machine in full discharge of the contract." So, also, the seventh instruction given for the plaintiff contains these words: "If the jury shall believe from the evidence that, prior to the bringing of this suit, defendants did accept said machine *in full discharge of the contract*, then the jury are instructed that defendants are not entitled to set off or recover in this action any damages resulting to them, if any, by reason of plaintiff's failing to meet the guaranties made by him in said contract." Under these and other instructions that were given, the jury could not have been led to believe, that the right of the defendants to claim damages for breach of the warranties was cut off or waived by any other kind of acceptance than an acceptance in full discharge of the contract.

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The sixth instruction and the first sentence of the seventh intended to call the attention of the jury to the time allowed to the defendants for the purpose of testing the machine. Therein the jury were told that, if the time for making the test, which by the terms of the contract expired on Sept. 1, 1886, was extended beyond that date by arrangement between the parties, then whatever the defendants were required to do by Sept. 1, 1886, either in the matter of rejecting the machine, or of accepting it — whether such acceptance should be in full discharge of the contract, or with a reservation of the right to offset damages for breach of the warranties — they might do at the expiration of the period as thus extended. There was nothing in the language used that could by any possibility have been construed as a denial of the right to claim damages for a failure to fulfil the guaranties.

We perceive no such error in the record as will justify us in reversing the judgment.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.[1]

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[1] In English *v.* Spokane Commission Co., 57 Fed. Rep. 451, 456, Hawley, J., delivering the judgment of the Circuit Court of Appeals for the ninth circuit, said: "There has been some controversy in the courts as to the right of the purchaser to accept the goods and rely upon the warranty, some of the authorities holding that where the sale is executory, and the goods, upon arrival at the place of delivery, are found upon examination to be unsound, the purchaser must immediately return them to the vendor, or give him notice to take them back, and thereby rescind the contract, or he will be presumed to have acquiesced in the quality of the goods. But the great weight of authority, as well as reason, is now, we think, well settled that, in cases of this kind and character, if the goods upon arrival at the place of delivery are found to be unmerchantable in whole or in part, the vendee has the option either to reject them or receive them and rely upon the warranty; and, if there has been no waiver of the right, he may bring an action against the vendor to recover the damages for a breach of the warranty, or set up a counterclaim for such damages in an action brought by the vendor for the purchase price of the goods. 2 Schouler, Pers. Prop. §§ 581-583; 2 Benj. Sales, § 977, note 29 *et seq.*; *Id.* §§ 1353, 1354, 1356, note 11; Babcock *v.* Trice, 18 Ill. 420; Best *v.* Flint, 58 Vt. 543, 5 Atl. Rep. 192; Polhemus *v.* Heiman, 45 Cal. 573; Hege *v.* Newsom, 96 Ind. 431; Lewis *v.* Rountree, 78 N. C. 323; English *v.* Commission Co., 48 Fed. Rep. 197, and other authorities there cited."

See, also, Sale of Goods Act, sec. 11 (1) (*a*); Clydebank Engineering Co. *v.* Yzquierdo y Castaneda, [1905] A. C. 6; Hodge *v.* Tufts, 115 Ala. 366; Iroquois Furnace Co. *v.* Wilkin Mfg. Co., 181 Ill. 582; Graff *v.* Osborne, 56 Kan. 162; Morse *v.* Morse, 83 Me. 471; Crook *v.* Baltimore, &c. R. Co., 80 Md. 338; Gould *v.* Stein, 149 Mass. 570; Stillwell Co. *v.* Biloxi Co., 78 Miss. 779; Redlands Assoc. *v.* Gorman, 161 Mo. 203; Miles *v.* Withers, 76 Mo. App. 87; St. Louis Brewing Assoc. *v.* McEnroe, 80 Mo. App. 429; Edwards *v.* Noel, 88 Mo. App. 434; Kester *v.* Miller, 119 N. C. 475; Northwestern Cordage Co. *v.* Rice, 5 N. Dak. 432; Dayton *v.* Hooglund, 39 Ohio St. 671; Morse *v.* Union Stock Yards, 21 Oreg. 289; Holloway *v.* Jacoby, 120 Pa. 583; Tacoma Coal Co. *v.* Bradley, 2 Wash. 600; 54 L. R. A. 718 *n.*

CHAPTER VI.

STATUTE OF FRAUDS.

[29 *Car. II. c.* 3, § 17.]

"AND be it further enacted by the authority aforesaid, That from and after the said four and twentieth day of June [A. D. 1677] no contract for the sale of any goods, wares, and merchandises, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

SECTION I.

"CONTRACT FOR THE SALE OF."

CLAYTON THE YOUNGER *v.* ANDREWS.

IN THE KING'S BENCH, JUNE 23, 1767.

[*Reported in* 4 *Burrow,* 2101.]

ASSUMPSIT, for non-performance of a contract for sale of corn. *Non assumpsit* pleaded. On a trial at Sussex assizes a verdict was found for the plaintiff, subject to the opinion of this court upon the following case and question: —

The defendant, on 13th October, 1776, agreed to deliver one load and a half of wheat to the plaintiff, within three weeks or a month from the said agreement, at the rate of twelve guineas a load, to be paid on delivery: which wheat was understood by both parties to be at that time unthrashed. No part of the said wheat so sold was delivered, nor any money paid by way of earnest for the same, nor any memorandum thereof made in writing. And "Whether this agreement be within the Statute of Frauds," is the question.

Mr. Harvey, for the plaintiff.

Mr. Burrell, for the defendant.

MR. JUSTICE YATES. That clause of the statute relates only to executed contracts. Here, wheat was sold, to be delivered at a future time. It was unthrashed at the time when the contract was made: therefore it could not be delivered at that time. The case mentioned out of Sir John Strange is in point.

Mr. Justice Aston concurred, and added that the case in 1 Str. 506 has always been considered as an authority in point upon questions of this kind.

Per Curiam, unanimously, ordered that the postea be delivered to the plaintiff or his attorney.

RONDEAU *v.* WYATT.

In the Common Pleas, June 27, 1792.

[*Reported in* 2 *Henry Blackstone*, 63.]

This was an action on the case for the non-performance of a special agreement.

At the trial, which came on before Lord Loughborough at Guildhall, at the sittings after last Michaelmas term, it appeared that the defendant, who was one of the proprietors of the Albion Mill, had entered into a verbal agreement to sell and deliver three thousand sacks of flour to the plaintiff, to be put in sacks which the plaintiff was to send to the mill, and shipped on board vessels to be provided by him in the river Thames.

The defendant having refused to perform the contract, the plaintiff filed a bill in chancery for a discovery in aid of an action at law. In his answer to the bill the defendant admitted the agreement, but pleaded the Statute of Frauds. That plea being overruled, the present action was brought, in which the plaintiff obtained a verdict contrary to the opinion of Lord Loughborough, who thought, because the contract seemed to him to be within the Statute of Frauds, the plaintiff was not entitled to recover. And now, a rule having been granted to show cause why the verdict should not be set aside and a nonsuit entered, —

Adair and *Bond*, Serjts., showed cause.

Lawrence and *Marshall*, Serjts., in support of the rule.

Cur. adv. vult.

On this day Lord Loughborough, after stating the facts of the case, pronounced the judgment of the court[1] to the following effect:

The only point to be decided is that which arises on the Statute of Frauds; and we who are now in court think that the objection made on that statute is well grounded, and therefore that the plaintiff ought to be nonsuited. It was said in the argument that the statute does not extend to cases of executory contracts. To try the validity of this objection, it will be necessary to advert to that clause[1] of the statute on which the question arises, and which directs [quoting it]. Now, it is singular that an idea could ever prevail that this section of the statute was only applicable to cases where the bargain was immediate; for it seems plain from the words made use of that it was meant to regulate executory as well as other contracts. The words are, "No contract for the sale of any goods," &c. And indeed it seems that this provision of the statute would not be of much use unless it were to extend to executory contracts; for it is from bargains to be completed at a future period that the uncertainty and confusion will probably arise which the statute was designed to prevent. The case of Simon *v.* Metivier, 3 Burr. 1921, was decided on the ground that the auctioneer was the agent as well for the defendant as the plaintiff, and therefore that the contract was sufficiently reduced into writing. The case of Towers *v.* Sir John Osborne, 1 Strange, 506, was plainly out of the statute, not because it was an executory contract, as it has been said, but because it was for work and labor to be done, and materials and other necessary things to be found, which is different from a mere contract of sale, to which species of contract alone the statute is applicable. In Clayton *v.* Andrews, which was on an agreement to deliver corn at a future period, there was also some work to be performed, for it was necessary that the corn should be thrashed before the delivery. This perhaps may seem to be a very nice distinction, but still the work to be performed in thrashing made, though in a small degree, a part of the contract. *Rule absolute to enter a nonsuit.*[2]

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[1] In which his Lordship, Mr. Justice Gould, and Mr. Justice Heath were unanimous But his Lordship mentioned a few days before that Mr. Justice Wilson, who was now sitting in chancery as one of the lords commissioners of the great seal, had declared himself to be of a different opinion.

GARBUTT AND ANOTHER *v.* WATSON.

IN THE KING'S BENCH, APRIL 26, 1822.

[*Reported in* 5 *Barnewall & Alderson*, 613.]

ASSUMPSIT for the non-performance by the defendant of a special agreement relating to the sale of 100 sacks of flour. Plea, general issue. At the trial at the last assizes for the county of York, before

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[1] Sect. 17.

[2] In Blackburn on Sale, p. 7, after citing Towers *v.* Osborne, Clayton *v.* Andrews, and Groves *v.* Buck, 3 M. & S. 178, the author says. "The principle of these cases, decided by great judges, including Pratt, C. J., Lord Mansfield, and Lord Ellenborough, seems to have been either that the word 'bargain' in the statute must be taken in the strict technical sense, so as to exclude all executory contracts not amounting to a bargain and sale, or else that, as the statute said the contract was to be good if the buyer 'accepted and actually received' part of the goods, it could only be meant to apply to contracts where it was possible to accept and receive part of the goods. It is clear that the buyer could neither accept nor receive the chariot before it was built, the corn before it was thrashed, or the oak pins before they were cut out."

Bayley, J., it appeared that the plaintiffs, who were millers near Hull, on the 22d of October, 1821, made an agreement with the defendant, a corn merchant, for the sale of 100 sacks of flour at 50*s.* per sack, to be got ready by the plaintiffs to ship to the defendant's order free on board at Hull within three weeks, to be paid for by a bill on London at two months' date on receipt of invoice. There was no memorandum in writing of the contract, nor any earnest paid. The flour at the time of the bargain was not prepared, so as to be capable of being immediately delivered to the defendant. The learned judge at the trial was of opinion that the case fell within the 17th section of the Statute of Frauds, and the plaintiffs were accordingly nonsuited. And now

Scarlett, by leave, moved to enter a verdict for the plaintiff.

Abbott, C. J. In Towers *v.* Osborne the chariot which was ordered to be made would never but for that order have had any existence. But here the plaintiffs were proceeding to grind the flour for the purposes of general sale, and sold this quantity to the defendant as part of their general stock. The distinction is indeed somewhat nice, but the case of Towers *v.* Osborne is an extreme case, and ought not to be carried further. I think this case was rightly decided, the contract being one for the sale of goods, and falling within the 17th section of the Statute of Frauds.

Bayley, J. The nearest case to this is Clayton *v.* Andrews. But that decision was, as it seems to me, corrected by Rondeau *v.* Wyatt. This was substantially a contract for the sale of flour, and it seems to me immaterial whether the flour was at the time ground or not. The question is, whether this was a contract for goods, or for work and labor and materials found. I think it was the former; and if so, it falls within the Statute of Frauds.

Holroyd, J. I am of the same opinion. I cannot agree with the judgment of the court in Clayton *v.* Andrews. This was a contract for the sale of goods, and therefore the verdict is right.

Best, J., concurred. *Rule refused.*

CLAY *v.* YATES.

In the Exchequer, May 3, 1856.

[*Reported in* 1 *Hurlstone & Norman*, 73.]

Declaration for goods sold and delivered, and work and labor and materials. Plea, never indebted.

At the trial before Pollock, C. B., at the London sittings, after last Hilary term, it appeared that the defendant applied to the plaintiff, a printer, to print a second edition of a treatise called "Military Tactics." This edition was to contain a dedication to Sir William Napier. The plaintiff verbally agreed to find the paper and print 500 copies for

£4 10*s.* a sheet. At the time the plaintiff commenced printing the treatise the dedication was not written, but it was afterwards sent to him, and the type set up without his having any knowledge of its contents. After the proof-sheets of the dedication had been revised by the defendant and returned to the plaintiff, he for the first time discovered that the dedication contained libellous matter, and he refused to complete the printing of it. The defendant would not pay for the treatise without the dedication, whereupon the present action was brought to recover for printing the treatise.

It was objected, on behalf of the defendant: first, that this was a contract for the sale of goods within the 17th section of the Statute of Frauds, 29 Car. 2, c. 3, as extended by 9 Geo. 4, c. 14, § 7;[1] secondly, that the contract was an entire one, viz, to print the treatise and the dedication, and that the plaintiff having refused to print the dedication was not entitled to recover in respect of the treatise. The learned Judge left it to the jury to say: first, whether work and labor was the essence of the contract, and the materials merely ancillary; secondly, whether the dedication was libellous. The jury found both questions in the affirmative, whereupon a verdict was entered for the plaintiff, leave being reserved to the defendant [to move] to enter a verdict for him.

Montague Smith, and *Hannen* now showed cause.

Quain, in support of the rule.

POLLOCK, C. B. The rule must be discharged. The first question is, whether this is a contract for the sale of goods within the 17th section of the Statute of Frauds, and I am of opinion that it is properly a contract for work, labor, and materials. It appears from Chitty on Pleading (vol. i. p. 359; vol. ii. pp. 61, 62, 7th ed.), that a count for work, labor, and materials may be resorted to by farriers, medical men, and surveyors, and that such is the form in which they are in the habit of suing. Against the opinion of Bayley, J., in Atkinson *v.* Bell, we may set off the opinions of Maule, J., and Erle, J., in the case of Grafton *v.* Armitage, and then we have to decide the point as if it were quite new and without authority. It may happen that part of the materials is found by the person for whom the work is done, and part by the person who does the work; for instance, the paper for printing may be found by the one party, while the ink is found by the printer. In such cases it seems to me that the true criterion is, whether work is the essence of the contract, or whether it is the materials supplied. My impression is, that in the case of a work of art, whether in gold, silver, marble, or plaster, where the application of skill and labor is of the highest description, and the material is of no importance as compared with the labor, the price may be recovered as work, labor, and materials. No doubt it is a chattel that was bargained for, and, if delivered, might be recovered as goods sold and delivered; still it may also be recovered as work, labor, and materials. Therefore it appears to me that this is properly a contract for work, labor, and materials. I am inclined to think that it is only where the bargain is for goods thereafter to be made, and not where it is a mixed contract for work and materials to be found, that Lord Tenterden's Act, 9 Geo. 4, c. 14, applies; and the reason why no cases on this subject are found in the books is, that before Lord Tenterden's Act passed the Statute of Frauds did not apply to the case of goods not actually made, or fit for delivery. I think therefore that the objection does not arise.

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[1] "And whereas by an act passed in England in the twenty-ninth year of the reign of King Charles the Second, intituled An Act for the Prevention of Frauds and Perjuries, it is, among other things, enacted, that from and after the twenty-fourth day of June, one thousand six hundred and seventy-seven, no contract for the sale of any goods, wares, and merchandises, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized: And whereas a similar enactment is contained in an act passed in Ireland, in the seventh year of the reign of King William the Third: And whereas it has been held that the said recited enactments do not extend to certain executory contracts for the sale of goods, which nevertheless are within the mischief thereby intended to be remedied; and it is expedient to extend the said enactments 'to such executory contracts:' — Be it enacted that the said enactments shall extend to all contracts for the sale of goods of the value of ten pounds sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery." — Lord Tenterden's Act, 9 Geo. IV. c. 14, § 7.

Then with respect to the other point, I entertain no doubt. I told the jury that if the plaintiff agreed to print the dedication and the treatise, and so undertook to print that which he knew to be libellous, and afterwards said that he would not print both; in such case he could not recover. I think his right to recover rests entirely on this ground, that he had been furnished with the treatise without the dedication. The dedication was afterwards sent, but he had no opportunity of reading it until after it was printed; he then discovered that it was libellous, and refused to permit the defendant to have it. I think that if a contract is *bona fide* entered into by a printer to print a work consisting of two parts, and at the time he enters into the contract he has no means of knowing that one part is unlawful, and he executes both, but afterwards suppresses that which is unlawful, there is an implied undertaking on the part of the person employing him to pay for so much of the work as is lawful. For these reasons I think that the rule ought to be discharged.

MARTIN, B. I am of the same opinion. There are three matters of charge well known to the law, viz., for labor simply, for labor and materials, and for goods sold and delivered. Now every case must be judged of by itself; and what is the present case? The defendant, having a manuscript, takes it to a printer to print for him. Then what does he intend shall be done? He intends that the printer shall use his type, shall set it up in a frame and impress it on paper, that the paper shall be submitted to the author, that the author having corrected it shall send it back to the printer, who shall again exercise labor and make it into a complete thing in the shape of a book. That being so, I think that the plaintiff was employed to do work and labor, and supply materials, and for that he is entitled to be paid. It seems to me that the true criterion is this: Suppose there was no contract as to payment, and the printer brought an action to recover what he was by law entitled to receive, would that be the value of the book as a book? I apprehend not; for the book might not be worth half the value of the paper on which it was printed, but he would be entitled to recover for his work, labor, and materials supplied; therefore this is in strictness work, labor, and materials done and provided by the plaintiff for the defendant. In the case of Bensley *v.* Bignold, where the defence was that the printer had not affixed his name to the book as required by the 39 Geo. 3, c. 79, § 27, it was treated by Abbott, C. J., Bayley, J., and Holroyd, J., as a contract for work, labor, and materials; and concurring in opinion with them, I do not think it profitable to go into an examination of the other cases.

With respect to the other point, I agree that as soon as a printer discovers the objectionable nature of the work which he is employed to print, he ought to stop, and that he would not be entitled to recover for work done after he made the discovery. But I cannot doubt that in this case, although the contract has never been performed, yet as the work was commenced on the retainer of the defendant, and in ignorance that part of it was unlawful, a duty arises to pay the plaintiff for that part which he has performed. It is like one of those transactions where a person accepts goods not made according to contract, in which case the law implies a promise to pay for them; though perhaps the better expression would be, "a duty arises to pay for them," for the true ground of the right to recover is, that such a state of circumstances has arisen that in point of law there is a duty to pay.

Rule discharged.[1]

LEE *v.* GRIFFIN.

IN THE QUEEN'S BENCH, MAY 9, 1861.

[*Reported in* 1 *Best & Smith*, 272.]

DECLARATION against the defendant, as the executor of one Frances P., for goods bargained and sold, goods sold and delivered, and for work and labor done and materials provided by the plaintiff as a surgeon-dentist for the said Frances P.

Plea, that the said Frances P. never was indebted as alleged.

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[1] BRAMWELL, B., delivered a concurring opinion. ALDERSON, B., also concurred.

The action was brought to recover the sum of £21 for two sets of artificial teeth ordered by the deceased.

At the trial, before Crompton, J., at the sittings for Middlesex after Michaelmas term, 1860, it was proved by the plaintiff that he had, in pursuance of an order from the deceased, prepared a model of her mouth, and made two sets of artificial teeth; as soon as they were ready he wrote a letter to the deceased, requesting her to appoint a day when he could see her for the purpose of fitting them. To this communication the deceased replied as follows: —

My dear Sir, — I regret, after your kind effort to oblige me, my health will prevent my taking advantage of the early day. I fear I may not be able for some days.

Yours, &c., Frances P.

Shortly after writing the above letter Frances P. died. On these facts the defendant's counsel contended that the plaintiff ought to be nonsuited, on the ground that there was no evidence of a delivery and acceptance of the goods by the deceased, nor any memorandum in writing of a contract within the meaning of the 17th section of the Statute of Frauds, 29 Car. 2, c. 3, and the learned judge was of that opinion. The plaintiff's counsel then contended that, on the authority of Clay *v.* Yates, 1 H. & N. 73, the plaintiff could recover in the action on the count for work and labor done, and materials provided. The learned judge declined to nonsuit, and directed a verdict for the amount claimed to be entered for the plaintiff, with leave to the defendant to move to enter a nonsuit or verdict.

Patchett now showed cause.

Griffits, in support of the rule.

Crompton, J. I think that this rule ought to be made absolute. On the second point I am of the same opinion as I was at the trial. There is not any sufficient memorandum in writing of a contract to satisfy the Statute of Frauds. The case decided in the House of Lords, to which reference has been made during the argument, is clearly distinguishable. That case only decided that if a document, which is silent as to the particulars of a contract, refers to another document which contains such particulars, parol evidence is admissible for the purpose of showing what document is referred to. Assuming, in this case, that the two documents were sufficiently connected, still there would not be any sufficient evidence of the contract. The contract in question was to deliver some particular teeth to be made in a particular way, but these letters do not refer to any particular bargain, nor in any manner disclose its terms.

The main question which arose at the trial was, whether the contract in the second count could be treated as one for work and labor, or whether it was a contract for goods sold and delivered. The distinction between these two causes of action is sometimes very fine; but where the contract is for a chattel to be made and delivered, it clearly is a contract for the sale of goods. There are some cases in which the supply of the materials is ancillary to the contract, as in the case of a printer supplying the paper on which a book is printed. In such a case an action might perhaps be brought for work and labor done and materials provided, as it could hardly be said that the subject-matter of the contract was the sale of a chattel: perhaps it is more in the nature of a contract merely to exercise skill and labor. Clay *v.* Yates turned on its own peculiar circumstances. I entertain some doubt as to the correctness of that decision; but I certainly do not agree to the proposition that the value of the skill and labor, as compared to that of the material supplied, is a criterion by which to decide whether the contract be for work and labor, or for the sale of the chattel. Here, however, the subject-matter of the contract was the supply of goods. The case bears a strong resemblance to that of a tailor supplying a coat, the measurement of the mouth and fitting of the teeth being analogous to the measurement and fitting of the garment.

HILL, J. I am of the same opinion. I think that the decision in Clay *v.* Yates is perfectly right. That was not a case in which a party ordered a chattel of another which was afterwards to be made and delivered, but a case in which the subject-matter of the contract was the exercise of skill and labor. Wherever a contract is entered into for the manufacture of a chattel, there the subject-matter of the contract is the sale and delivery of the chattel, and the party supplying it cannot recover for work and labor. Atkinson *v.* Bell, 8 B. & C. 277, is, in my opinion, good law, with the exception of the *dictum* of Bayley, J., which is repudiated by Maule, J., in Grafton *v.* Armitage, 2 C. B. 336, where he says: "In order to sustain a count for work and labor, it is not necessary that the work and labor should be performed upon materials that are the property of the plaintiff [defendant?]." And Tindal, C. J., in his judgment in the same case, page 340, points out that in the application of the observations of Bayley, J., regard must be had to the particular facts of the case. In every other respect, therefore, the case of Atkinson *v.* Bell is law. I think that these authorities are a complete answer to the point taken at the trial on behalf of the plaintiff.

When, however, the facts of this case are looked at, I cannot see how, wholly irrespective of the question arising under the Statute of Frauds, this action can be maintained. The contract entered into by the plaintiff with the deceased was to supply two sets of teeth, which were to be made for her and fitted to her mouth, and then to be paid for. Through no default on her part, she having died, they never were fitted; no action can therefore be brought by the plaintiff.

BLACKBURN, J. On the second point, I am of opinion that the letter is not a sufficient memorandum in writing to take the case out of the Statute of Frauds.

On the other point, the question is whether the contract was one for the sale of goods or for work and labor. I think that in all cases, in order to ascertain whether the action ought to be brought for goods sold and delivered, or for work and labor done and materials provided, we must look at the particular contract entered into between the parties. If the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labor; but if the result of the contract is that the party has done work and labor which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered. The case of an attorney employed to prepare a deed is an illustration of this latter proposition. It cannot be said that the paper and ink he uses in the preparation of the deed are goods sold and delivered. The case of a printer printing a book would most probably fall within the same category. In Atkinson *v.* Bell the contract, if carried out, would have resulted in the sale of a chattel. In Grafton *v.* Armitage, Tindal, C. J., lays down this very principle. He draws a distinction between the case of Atkinson *v.* Bell and that before him. The reason he gives is that, in the former case "the substance of the contract was goods to be sold and delivered by the one party to the other;" in the latter, "there never was any intention to make anything that could properly become the subject of an action for goods sold and delivered." I think that distinction reconciles those two cases, and the decision of Clay *v.* Yates is not inconsistent with them. In the present case the contract was to deliver a thing which, when completed, would have resulted in the sale of a chattel; in other words, the substance of the contract was goods sold and delivered. I do not think that the test to apply to these cases is whether the value of the work exceeds that of the materials used in its execution; for, if a sculptor were employed to execute a work of art, greatly as his skill and labor, supposing it to be of the highest description, might exceed the value of the marble on which he worked, the contract would, in my opinion, nevertheless be a contract for the sale of a chattel.

Rule absolute.[1]

JOHN MIXER *v.* JOHN HOWARTH.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY 24 — FEBRUARY 1, 1839.

[*Reported in* 21 *Pickering,* 205.]

ASSUMPSIT. Trial before Wilde, J. The writ contained the common counts for work and labor, and materials found, &c. In the Common Pleas the plaintiff filed a specification, claiming to recover $250, the price of a buggy sold and delivered to the defendant. In this court he filed an additional specification, claiming for work and labor, and materials furnished the defendant, at his request, upon the same article, $250; likewise a count setting forth a special contract. To this last count the defendant objected, because it was not for the same cause of action and not consistent with the original declaration; but the amendment was allowed without terms.

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[1] Isaacs *v.* Hardy, 1 Cab. & E. 287; Pratt *v.* Miller, 109 Mo. 78; Burrell *v.* Highleyman, 33 Mo. App. 183; Pike Co. *v.* Richardson Co., 42 Mo. App. 272, *acc.*

The testimony of witnesses produced by the plaintiff had a tendency to prove that in September, 1836, the defendant came into the plaintiff's shop and selected a piece of cloth for the lining of a buggy; that the plaintiff then had on hand the body of a buggy, nearly finished, but not lined; that by a conversation between the parties it was understood that the plaintiff was to finish a buggy for the defendant in a fortnight from that time; and that the unfinished buggy was completed accordingly, and the defendant had notice thereof and was requested to take it away, but he declined so to do. The witnesses were allowed to testify as to the estimated value of the trimmings and other materials used in finishing the buggy, and of the plaintiff's work and labor thereon. A witness named Scadding testified that, at the time when the defendant went to the plaintiff's shop, the plaintiff had but one carriage-body on hand not lined; that the plaintiff had on hand several buggies partly finished; that the witness did not know of anything done in consequence of any application made by the defendant, except that the plaintiff had before that time told him that he should not complete any more buggies that fall unless ordered, and after this a buggy was finished; that no account was kept of any labor or materials; and that the witness knew nothing of any work done except upon the body.

The defendant moved for a nonsuit, because the contract, if any, was void by the Revised Stat., c. 74, § 4 (of frauds); but the judge intimating a different opinion, a verdict was taken for the plaintiff, subject to the opinion of the whole court.

Hazen and *Cummins*, for the defendant.

L. Williams, for the plaintiff.

SHAW, C. J., delivered the opinion of the court. The first question is, whether the amendment was rightly allowed. The original count was for a carriage sold and delivered, with counts for labor and materials, &c. And in the specification the plaintiff claimed the price of the carriage. The new count was upon an agreement by the defendant to take and pay for a carriage to be built by his order and request.

The court are of opinion that these were for the same substantive cause of action, and that the amendment was admissible and rightly allowed. And in a similar case recently decided in England, Bayley, J., stated that in his opinion the plaintiff could not recover as for goods sold, because the property had not passed; but he also expressed his opinion that, on payment of costs, the nonsuit ought to be set aside, and the plaintiff allowed to amend by adding counts on the agreement and for not accepting the goods. Atkinson *v.* Bell, 8 Barn. & Cressw. 277.

But the main question is, whether this contract for the sale of the carriage was within the Statute of Frauds, and so void if not proved by a note or memorandum in writing. Revised Stat., c. 74, § 4.

It is very clear, we think, that by this contract no property passed to the defendant. The carriage contemplated to be sold by the plaintiff to the defendant did not then exist. It was to be constructed from materials, partly wrought indeed, but not put together. It was therefore essentially an agreement by the defendant with the plaintiff to build a carriage for him, and on his part to take it when finished and pay for it at an agreed or at the reasonable value. This is a valid contract and made on a good consideration, and therefore binding on the defendant. But it was not a contract of sale, within the meaning of the Statute of Frauds, and therefore need not be proved by a note in writing.

When the contract is a contract of sale, either of an article then existing, or of articles which the vendor usually has for sale in the course of his business, the statute applies to the contract, as well where it is to be executed at a future time, as where it is to be executed immediately. Cooper *v.* Elston, 7 T. R. 14; Sewall *v.* Fitch, 8 Cowen, 215. But where it is an agreement with a workman to put materials together and construct an article for the employer, whether at an agreed price or not, though in common parlance it may be called a purchase and sale of the article, to be completed *in futuro*, it is not a sale until an actual or constructive delivery and acceptance; and the remedy for not accepting is on the agreement. *Judgment on the verdict.*

GODDARD *v.* BINNEY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH 14 — SEPTEMBER 4, 1874.

[*Reported in* 115 *Massachusetts,* 450.]

CONTRACT to recover the price of a buggy built by the plaintiff for the defendant.

Trial in the Superior Court, before Dewey, J., who reported the case for the consideration of this court in substance as follows: —

The plaintiff, a carriage manufacturer in Boston, testified that the defendant came to his place of business in April, 1872, and directed the plaintiff to make for him a buggy, and the plaintiff entered the order in his order-book; the defendant gave directions that the color of the lining should be drab, and the outside seat of cane, and as to the painting, and also that the buggy was to have on it his monogram and initials. The sum of $675 was agreed as the price. It was to be done in or about four months. The plaintiff immediately began work upon the buggy and made every part, it being painted, lined, and with the initials, as ordered.

The last of August, when the buggy was nearly completed, wanting only the last coat of varnish, and the hanging of it on the wheels, the defendant came to the plaintiff's place of business and asked when it would be done. The plaintiff replied in about ten days, and asked the defendant if he might sell the buggy, or if he wished it, as he, the plaintiff, had opportunities of selling it to others. The defendant then inquired if the plaintiff could furnish him another if he sold that, to which he replied he could not, as he was going to give up the business of manufacturing, and that unless he took this he could not have any. The defendant then said he would keep this one.

The defendant did not at this, nor at any other time, see the buggy. The buggy was finished September 15, in accordance with the original order. It is usual to keep carriages some time after they are finished to let the paint and varnish harden.

October 14, 1872, the plaintiff sent to the defendant the following bill: "Boston, October 14, 1872. Mr. H. P. Binney. Bo't of Thos. Goddard, one new cane seat buggy, $675. Rec'd Pay't. (Buggy was finished Sept. 15.)"

The bill was presented by a clerk of the plaintiff. The defendant, after looking at it, said he would see the plaintiff soon. The bill was in the plaintiff's handwriting and was kept by the defendant. The same clerk called again soon after and asked the defendant for a check, to which he replied that he would pay it soon, and would see the plaintiff. Calling a third time, before the fire of November 9th, the defendant said, "Tell Mr. Goddard I will come and see him right away." By the fire of November 9, 1872, this buggy and all the property on the plaintiff's premises were destroyed. After the fire the plaintiff again called on the defendant for payment. He wanted to know if it was insured, and said he would see the plaintiff about it.

After the buggy was finished, it was kept with the completed work on the plaintiff's premises; and it was at all times after it was finished till burned worth and could have been sold by the plaintiff for upwards of $700, the value of buggies of the plaintiff's manufacture having advanced after the contract was made in April.

The defendant put in no evidence, and contended that this action could not be maintained, that it came within the provisions of the Gen. Stats. c. 105, § 5, and that there had never been any delivery of the said buggy to the defendant, nor any acceptance thereof by him, and that the property belonged to and was at the sole risk of the plaintiff at the time of the fire, and that if any cause of action arose against the defendant for not taking away the said buggy, it arose prior to the fire, and no damage was caused to the plaintiff thereupon. The plaintiff contended that the contract did not come within the provision of the statute referred to, and that it was the duty of the defendant, upon being notified that the buggy was completed, to take the same away within a reasonable time, and that not having done so the buggy was at the risk of the defendant when burned.

The plaintiff further contended that upon the evidence the jury would be authorized to find that there had been a delivery of the buggy to the defendant, and an acceptance by him, and without submitting that question to the jury it was agreed by the parties, that if there was any evidence which could have properly been submitted to the jury as showing a delivery, and an acceptance of the buggy by the defendant, then it shall be taken that the jury would have found said delivery and acceptance.

Upon the evidence hereinbefore stated, the presiding judge directed a verdict for the defendant; and it was agreed that if the jury would have been authorized to find a delivery and an acceptance by the defendant, or if upon the facts above stated the court is of opinion that at the time of the fire the said buggy was on the premises of the plaintiff, at the risk of the defendant, the verdict is to be set aside, and judgment entered for $675, and interest, from October 15, 1872; otherwise, judgment on the verdict.

C. A. Welch, for the plaintiff.

G. Putnam, Jr., for the defendant.

AMES, J. Whether an agreement like that described in this report should be considered as a contract for the sale of goods, within the meaning of the Statute of Frauds, or a contract for labor, services, and materials, and therefore not within that statute, is a question upon which there is a conflict of authority. According to a long course of decisions in New York, and in some other States of the Union, an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered (such as flour from wheat not yet ground, or nails to be made from iron in the vendor's hands), is not a contract of sale within the meaning of the statute. Crookshank *v.* Burrell, 18 Johns. 58; Sewall *v.* Fitch, 8 Cow. 215; Robertson *v.* Vaughn, 5 Sandf. 1; Downs *v.* Ross, 23 Wend. 270; Eichelberger *v.* M'Cauley, 5 Har. & J. 213. In England, on the other hand, the tendency of the recent decisions is to treat all contracts of such a kind intended to result in a sale, as substantially contracts for the sale of chattels; and the decision in Lee *v.* Griffin, 1 B. & S. 272, goes so far as to hold that a contract to make and fit a set of artificial teeth for a patient is essentially a contract for the sale of goods, and therefore is subject to the provisions of the statute. See Maberley *v.* Sheppard, 10 Bing. 99; Howe *v.* Palmer, 3 B. & Ald. 321; Baldey *v.* Parker, 2 B. & C. 37; Atkinson *v.* Bell, 8 B. & C. 277.

In this Commonwealth, a rule avoiding both of these extremes was established in Mixer *v.* Howarth, 21 Pick. 205, and has been recognized and affirmed in repeated decisions of more recent date. The effect of these decisions we understand to be this, namely, that a contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But, on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute. Spencer *v.* Cone, 1 Met. 283. "The distinction," says Chief Justice

Shaw, in Lamb *v.* Crafts, 12 Met. 353, "we believe is now well understood. When a person stipulates for the future sale of articles, which he is habitually making, and which, at the time, are not made or finished, it is essentially a contract of sale, and not a contract for labor; otherwise, when the article is made pursuant to the agreement." In Gardner *v.* Joy, 9 Met. 177, a contract to buy a certain number of boxes of candles at a fixed rate per pound, which the vendor said he would manufacture and deliver in about three months, was held to be a contract of sale and within the statute. To the same general effect are Waterman *v.* Meigs, 4 Cush. 497, and Clark *v.* Nichols, 107 Mass. 547. It is true that in "the infinitely various shades of different contracts," there is some practical difficulty in disposing of the questions that arise under that section of the statute. Gen. Sts. c. 105, § 5. But we see no ground for holding that there is any uncertainty in the rule itself. On the contrary, its correctness and justice are clearly implied or expressly affirmed in all of our decisions upon the subject-matter. It is proper to say also that the present case is a much stronger one than Mixer *v.* Howarth. In this case, the carriage was not only built for the defendant, but in conformity in some respects with his directions, and at his request, was marked with his initials. It was neither intended nor adapted for the general market. As we are by no means prepared to overrule the decision in that case, we must therefore hold that the Statute of Frauds does not apply to the contract which the plaintiff is seeking to enforce in this action.

Independently of that statute, and in cases to which it does not apply, it is well settled that as between the immediate parties, property in personal chattels may pass by bargain and sale without actual delivery. If the parties have agreed upon the specific thing that is sold and the price that the buyer is to pay for it, and nothing remains to be done but that the buyer should pay the price and take the same thing, the property passes to the buyer, and with it the risk of loss by fire or any other accident. The appropriation of the chattel to the buyer is equivalent, for that purpose, to delivery by the seller. The assent of the buyer to take the specific chattel is equivalent for the same purpose to his acceptance of possession. Dixon *v.* Yates, 5 B. & Ad. 313, 340. The property may well be in the buyer, though the right of possession, or lien for the price, is in the seller. There could in fact be no such lien without a change of ownership. No man can be said to have a lien, in the proper sense of the term, upon his own property, and the seller's lien can only be upon the buyer's property. It has often been decided that assumpsit for the price of goods bargained and sold can be maintained where the goods have been selected by the buyer, and set apart for him by the seller, though not actually delivered to him, and where nothing remains to be done except that the buyer should pay the agreed price. In such a state of things the property vests in him, and with it the risk of any accident that may happen to the goods in the mean time. Noy's Maxims, 89; 2 Kent Com. (12th ed.) 492; Bloxam *v.* Sanders, 4 B. &

C. 941; Tarling *v.* Baxter, 6 B. & C. 360; Hinde *v.* Whitehouse, 7 East. 571; Macomber *v.* Parker, 13 Pick. 175, 183; Morse *v.* Sherman, 106 Mass. 430.

In the present case, nothing remained to be done on the part of the plaintiff. The price had been agreed upon; the specific chattel had been finished according to order, set apart and appropriated for the defendant, and marked with his initials. The plaintiff had not undertaken to deliver it elsewhere than on his own premises. He gave notice that it was finished, and presented his bill to the defendant, who promised to pay it soon. He had previously requested that the carriage should not be sold, a request which substantially is equivalent to asking the plaintiff to keep it for him when finished. Without contending that these circumstances amount to a delivery and acceptance within the Statute of Frauds, the plaintiff may well claim that enough has been done, in a case not within that statute, to vest the general ownership in the defendant, and to cast upon him the risk of loss by fire, while the chattel remained in the plaintiff's possession.

According to the terms of the reservation, the verdict must be set aside, and *Judgment entered for the plaintiff.*[1]

PARSONS *v.* LOUCKS.

NEW YORK COURT OF APPEALS, MAY 11 — SEPTEMBER, 1871.

[*Reported in* 48 *New York*, 17.]

APPEAL from judgment of the Superior Court, affirming a judgment in favor of plaintiffs, entered upon the report of a referee, who found:

1st. That about the 30th day of October, 1862, it was agreed between the plaintiffs and the defendants that the defendants should manufacture and deliver to the plaintiffs 20,000 pounds of book paper, similar to other paper which the defendants had previously made for the plaintiffs; and that the plaintiffs on such delivery should pay the defendants therefor thirteen cents a pound, less a discount of five per cent.

2d. That in January, 1863, the defendants stated to the plaintiffs that they would not perform the said agreement, or manufacture or deliver said paper, and refused to perform the said agreement, although thereto requested by the plaintiffs, and that the plaintiffs were at all times ready and willing to receive said paper and pay for the same, pursuant to the terms of the said agreement, and that said defendants have never delivered to said plaintiffs said ten tons of paper, or any part thereof, but have refused so to do.

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[1] Flynn *v.* Dougherty, 91 Cal. 669; Atwater *v.* Hough, 29 Conn. 508; Cason *v.* Cheely, 6 Ga. 554; Edwards *v.* Grand Trunk R. Co., 48 Me. 379; Crockett *v.* Scribner, 64 Me. 447; Turner v. Mason, 65 Mich. 662; Russell *v.* Wisconsin Ry. Co., 39 Minn. 145; Brown & Haywood Co. *v.* Wunder, 64 Minn. 450; Pitkin *v.* Noyes, 48 N. H. 294; Prescott *v.* Locke, 51 N. H. 94; Pawelski *v.* Hargreaves, 47 N. J. L. 334; Mechanical Boiler Co. *v.* Kellner, 62 N. J. L. 544; Orman *v.* Hager, 3 N. Mex. 331; Puget Sound Depot *v.* Rigby, 13 Wash. 264; Meincke *v.* Folk, 55 Wis. 427; Hanson *v.* Roter, 64 Wis. 622; Gross *v.* Heckert, 97 N. W. Rep. 952 (Wis.); Williams-Hayward Co. *v.* Brooks, 9 Wyo. 424, *acc.* See, also, Sawyer *v.* Ware, 36 Ala. 675; Scales *v.* Wiley, 68 Vt. 39. *Conf.* Smalley *v.* Hamblin, 170 Mass. 380.

3d. That by reason of the breach of the said agreement the plaintiffs have sustained damage to the amount of $1,930, as of the time when such breach occurred, the difference between the contract price (thirteen cents, less five per cent discount) per pound, and the market price of such paper (twenty-two cents per pound) at the time of such breach, on 20,000 pounds, amount, to said sum of $1,930.

As matter of law: That the plaintiffs are entitled to recover of the defendants said sum of $1,930, with interest thereon since the 1st day of January, 1863, that is to say, the sum of $2,301.51, with costs.

Augustus F. Smith, for the appellants.

John E. Parsons, for the respondents.

HUNT, C. The paper to be delivered was not in existence at the time of the making of the contract in October, 1862. It was yet to be brought into existence by the labor and the science of the defendants. Of the 20,000 pounds to be delivered, not an ounce had then been manufactured. It was all of it to be created by the defendants, and at their mill. In such a case it is well settled, that the Statute of Frauds does not apply to the contract. The distinction is between the sale of goods in existence, at the time of making the contract, and an agreement to manufacture goods. The former is within the prohibition of the statute, and void unless it is in writing, or there has been a delivery of a portion of the goods sold or a payment of the purchase-price. The latter is not. The statute reads, "Every contract for the sale of any goods, chattels, or things in action, for the price of fifty dollars or more, shall be void unless," etc. 2 R. S. 136, § 3. The statute alludes to a *sale* of goods, assuming that the articles are already in existence. This distinction was settled in this State in 1820, by the case of Crookshank *v.* Burrell, 18 John. R. 58, and has been followed and recognized in many others. Sewall *v.* Fitch, 8 Cowen, 215; Robertson *v.* Vaughn, 5 Sand. S. C. R. 1; Bronson *v.* Wiman, 10 Barb. 406; Donovan *v.* Willson, 26 Barb. 138; Parker *v.* Schenck, 28 *id.* 38; Mead *v.* Case, 33 *id.* 202; Smith *v.* N. Y. Central R. R. 4 Keyes, 194.

The present is not one of the border cases, in which an embarrassing or doubtful question is presented, as where wheat is sold, but the labor of threshing remains to be done, Downs *v.* Ross, 23 Wend. 270; or a sale of flour which has yet to be ground from the wheat, Garbutt *v.* Watson, 5 B. & Ald. 613; or the sale of wood or timber which requires to be cut and corded, Smith *v.* N. Y. Central R. R., *supra;* nor where the defendants might procure other parties to manufacture the paper. 3 Pars. on Contracts, 52. It was a simple naked agreement to manufacture at their own mills, and deliver at a specified price, 20,000 pounds of paper of specified sizes, no part of which was in existence at the time of making the contract. Indeed, there is no evidence that the rags and other materials from which it was to be manufactured were owned by the defendants, or were in existence, except so far as it may be argued that matter is indestructible, and that in some form they must necessarily have then existed. As to cases of this character, the course of decisions in this State has been uniform. If we desired to do otherwise, we have no choice; we must follow them.

The judgment must be affirmed with costs.

All concur for affirmance, except Gray, C., dissenting.[1]

Judgment affirmed with costs.[2]

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[1] The dissenting opinion of GRAY, C., is omitted.

[2] In Cooke v. Millard, 65 N. Y. 352, the defendants, desiring to purchase lumber, went to the plaintiffs' yard and were shown lumber of the desired quality, but which needed to be dressed and cut into the different sizes desired. An order was given orally for certain quantities. The order was complied with, and the lumber was placed as ordered on the plaintiffs' dock. While there it was burned. The plaintiffs sued for the price. Dwight, Commissioner, in giving judgment for the defendant said:

"The New York rule is still different. It is held here by a long course of decisions, that an agreement for the sale of any commodity not in existence at the time, but which the vendor is to manufacture or put in a condition to be delivered, such as flour from wheat not yet ground, or nails to be made from iron belonging to the manufacturer, is not a contract of sale. The New York rule lays stress on the word 'sale.' There must be a sale at the time the contract is made. The latest and most authoritative expression of the rule is found in a recent case in this court. Parsons v. Loucks, 48 N. Y. 17, 19. The contrast between Parsons v. Loucks, in this State, on the one hand, and Lee v. Griffin, 1 Best & Smith, 272, in England, on the other is, that in the former case, the word 'sale' refers to the time of entering into the contract, while in the latter, reference is had to the time of delivery, as contemplated by the parties. If at that time it is a chattel it is enough, according to the English rule. Other cases in this State agreeing with Parsons v. Loucks, are Crookshank v. Burrell, 18 J. R. 58; Sewall v. Fitch, 8 Cow. 215; Robertson v. Vaughn, 5 Sandf. S. C. 1; Parker v. Schenck, 28 Barb. 38. These cases are based on certain old decisions in England, such as Towers v. Osborne, 1 Strange, 506, and Clayton v. Andrews, 4 Burrow, 2101, which have been wholly discarded in that country.

"The case at bar does not fall within the rule in Parsons v. Loucks, *supra*. The facts of that case were, that a manufacturer agreed to make for the other party to the contract two tons of book paper. The paper was not in existence, and, so far as appears, not even the rags, 'except so far as such existence may be argued from the fact that matter is indestructible.' So in Sewall v. Fitch, *supra*, the nails which were the subject of the contract were not then wrought out, but were to be made and delivered at a future day.

"Nothing of this kind is found in the present case. The lumber, with the possible exception of the clapboards, was all in existence when the contract was made. It only needed to be prepared for the purchaser, — dressed and put in a condition to fill his order. The court, accordingly, is not hampered in the disposition of this cause by authority, but may proceed upon principle. . . .

"In the view of these principles the defendants had the right to set up the Statute of Frauds. I think that this was so even as to the clapboards. Although not strictly in existence as clapboards, they fall within the rule in Smith v. Central Railroad Company, 4 Keyes, 180. They were no more new products than was the wood in that case. There was simply to be gone through with a process of dividing and adapting existing materials to the plaintiffs' use. It would be difficult to distinguish between splitting

SECTION II.

"GOODS, WARES, AND MERCHANDISES."

PARKER *v.* STANILAND.

IN THE KING'S BENCH, JUNE 13, 1809.

[*Reported in* 11 *East*, 362.]

THE plaintiff declared that the defendant was, on the 1st of January, 1809, indebted to him in £500 for a certain crop of potatoes of the plaintiff before that time bargained and sold by the plaintiff to the defendant at his request, and by the defendant under that bargain and sale before that time accepted, gathered, dug up, taken, and carried away; and being so indebted the defendant promised to pay, &c. There was another similar count on a *quantum meruit,* and other general counts for goods sold and delivered, &c. The defendant pleaded the general issue, and paid £22 1*s.* 9*d.* into court. It appeared at the trial before Bayley, J., at Nottingham, that the plaintiff, being the owner of a close of about two acres, which was cropped with potatoes, agreed with the defendant on the 21st of November to sell him the potatoes at 4*s.* 6*d.* a sack. The defendant was to get them himself, and to get them immediately. The defendant employed men to dig the potatoes, and got part of them, the value of which was covered by the money paid into court. But there remained about three roods of potatoes which were not dug up, and which were spoiled by the frost; and the action was brought to recover the value of these. The objection taken at the trial was, that this was an agreement for an interest in land, which was void by the Statute of Frauds. But the learned judge overruled the objection; reserving leave to the defendant to move to enter a nonsuit, if the court should think the objection well founded.

Clarke and *Hemming* now showed cause against the rule.

Balguy and *Balguy, Jr.*, in support of the rule.

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planks into clapboards, and trees into wood. No especial skill is required, as all the work is done by machinery in general use, and readily managed by any producers of ordinary intelligence. The case bears no resemblance to that of Parsons *v.* Loucks, where the product was to be created from materials in no respect existing in the form of paper. The cases would have been more analogous had the contract in that case been to divide large sheets of paper into small ones, or to make packages of envelopes from existing paper."

Bennett *v.* Nye, 4 Greene (Ia.), 410 (*conf.* Mighell *v.* Dougherty, 86 Ia. 480; Lewis *v.* Evans, 108 Ia. 296; Dierson *v.* Petersmeyer, 109 Ia. 233); Eichelberger *v.* McCauley, 5 H. & J. 213; Bagby *v.* Walker, 78 Md. 239; Deal *v.* Maxwell, 51 N. Y. 652; Higgins *v.* Murray, 4 Hun, 565, 73 N. Y. 252; Rutty *v.* Consolidated Fruit Jar Co., 58 Hun, 611; Winship *v.* Buzzard, 9 Rich. 103; Suber *v.* Pullin, 1 S. C. 273; Mattison *v.* Wescott, 13 Vt. 258; Ellison *v.* Brigham, 38 Vt. 64; Forsyth *v.* Mann, 68 Vt. 116, *acc.* See, also, Hientz *v.* Burkhard, 29 Oreg. 55.

Lord Ellenborough, C. J. It does not follow that because the potatoes were not at the time of the contract in the shape of personal chattels, as not being severed from the land, so that larceny might be committed of them, therefore the contract for the purchase of them passed an interest in the land within the 4th section of the Statute of Frauds. The contract here was confined to the sale of the potatoes, and nothing else was in the contemplation of the parties. It is probable that in the course of nature the vegetation was at an end; but be that as it may, they were to be taken by the defendant immediately, and it was quite accidental if they derived any further advantage from being in the land. This differs the present case from those which have been cited. The lessee *primæ vesturæ* may maintain trespass *quare clausum fregit*, or ejectment for injuries to his possessory right; but this defendant could not have maintained either; for he had no right to the possession of the close; he had only an easement, a right to come upon the land for the purpose of taking up and carrying away the potatoes; but that gave him no interest in the soil. I am not disposed to extend the case of Crosby *v.* Wadsworth further, so as to bring such a contract as this within the Statute of Frauds as passing an interest in land.

Grose and Le Blanc, JJ., agreed.

Bayley, J. I do not think that this contract passed an interest in the land within the meaning of the 4th section of the Statute of Frauds. In the cases of Crosby *v.* Wadsworth and Waddington *v.* Bristow the contracts were made for the growing crops of grass and hops, and therefore the purchasers of the crops had an intermediate interest in the land while the crops were growing to maturity before they were gathered: but here the land was considered as a mere warehouse for the potatoes till the defendant could remove them, which he was to do immediately; and therefore I do not think that the case is within the statute. *Rule discharged.*

EVANS *v.* ROBERTS.

In the King's Bench, Trinity Term, 1826.

[*Reported in* 5 *Barnewall & Cresswell*, 829]

Indebitatus assumpsit, for crops of potatoes bargained and sold. Plea, the general issue. At the trial before Garrow, B., at the Spring Assizes for the county of Monmouth, 1826, it appeared that on the 25th of September a verbal agreement was made between the plaintiff and defendant, by which the defendant agreed to purchase of the plaintiff a cover of potatoes then in the ground, to be turned up by the plaintiff, at the price of £5, and the defendant paid one shilling earnest. It was objected that this was a contract or sale of an interest in or concerning land, within the meaning of the 4th section of the Statute of

Frauds. The learned judge was of opinion that, as the seller was to turn up the potatoes, the contract did not give the buyer any interest in the land; and he directed a verdict to be found for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit. A rule *nisi* having been obtained accordingly,

Justice now showed cause.

Ludlow, contra.

BAYLEY, J. I am of opinion that in this case there was not a contract for the sale of any lands, tenements, or hereditaments, or any interest in or concerning them, but a contract only for the sale and delivery of things which, at the time of the delivery, should be goods and chattels. It appears that the contract was for a cover of potatoes; the vendor was to raise the potatoes from the ground at the request of the vendee. The effect of the contract therefore was to give to the buyer a right to all the potatoes which a given quantity of land should produce, but not to give him any right to the possession of the land; he was merely to have the potatoes delivered to him when their growth was complete. Most of the authorities cited in the course of the argument, to show that this contract gave the vendee an interest in the land within the meaning of the 4th section of the Statute of Frauds, are distinguishable from the present case. In Crosby *v.* Wadsworth, 6 East, 602, the buyer did acquire an interest in the land; for by the terms of the contract, he was to mow the grass, and must therefore have had the possession of the land for that purpose. Besides, in that case the contract was for the growing grass, which is the natural and permanent produce of the land, renewed from time to time without cultivation. Now, growing grass does not come within the description of goods and chattels, and cannot be seized as such under a *fi. fa.*; it goes to the heir and not to the executor; but growing potatoes come within the description of emblements, and are deemed chattels, by reason of their being raised by labor and manurance. They go to the executor of tenant in fee-simple, although they are fixed to the freehold, and may be taken in execution under a *fi. fa.*, by which the sheriff is commanded to levy the debt of the goods and chattels of the defendant; and if a growing crop of potatoes be chattels, then they are not within the provisions of the 4th section of the Statute of Frauds, which relate to lands, tenements, or hereditaments, or any interest in or concerning them. In Parker *v.* Staniland, 11 East, 362, the owner of a close cropped with potatoes made a contract on the 21st of November to sell them at so much per sack, and the purchaser was to raise them from the ground immediately; and that was held not to be a contract for any interest in or concerning land. In that case, as well as in Warwick *v.* Bruce, 2 M. & S. 205, the potatoes had ceased to grow; and therefore they are distinguishable from the present; but the reasoning of Lord Ellenborough in the latter case may assist us in coming to a right conclusion in the present; he there says: "If this had been a contract conferring an exclusive right to the land for a time, for the purpose of making a profit of the growing surface, it would be a contract for the sale of an interest in or concerning lands, and would then fall unquestionably within the range of Crosby *v.* Wadsworth, *supra.* But here is a contract for the sale of potatoes at so much per acre: the potatoes are the subject-matter of sale; and whether at the time of sale they were covered with earth in the field, or in a box, still it was a sale of a mere chattel." It does not appear that the other judges gave any opinion upon that point; but it is clear that Lord Ellenborough's judgment proceeded upon the ground that if the contract gave to the vendee no right to the land so as to enable him to make a profit of the growing surface, then it was not to be considered as giving an interest in the land, but merely in a chattel. The opinion delivered by Mansfield, C. J., in Emmerson *v.* Heelis, 2 Taunt. 38, is certainly at variance with our judgment in the present case. But it is first to be observed that it was not necessary in that case for the court to decide the question upon the 4th section of the Statute of Frauds, for the contract was signed by the auctioneer as the agent of the buyer, and was equally binding whether it was for a sale of goods and chattels or of an interest in land. The plaintiff there put up to sale on the 25th of September, by public auction, a crop of turnips then growing on his land, in separate lots, and under certain conditions of sale. The defendant, by his agent, attended at the sale, and being the highest bidder for twenty-seven different lots, was declared to be the purchaser; and the name of the defendant was written in the sale-bill opposite to each particular lot for which he had been declared the highest bidder. Mansfield, C. J., there says: "As to this being an interest in the land, we do not see how it can be distinguished from the case of hops decided in this court; and if the auctioneer is an agent for the purchaser, then the Statute of Frauds is satisfied, because the memorandum in writing is signed by an agent for the party to be charged therewith." The ground of the Lord Chief Justice's opinion, as to the contract giving the purchaser an interest in land, was that the case could not be distinguished from that of Waddington *v.* Bristow, 2 Bos. & Pul. 452. It becomes necessary therefore to consider whether the two cases be similar. In the latter case the contract was made in November for all the hops which should be grown in the ensuing year upon a given number of acres of land. At that time the hops which were the subject of the contract were not in existence; there was nothing but the root of the plant, and the purchaser was not to have that. The question in that case was, not whether the agreement, which was in writing, was for an interest in the land, but whether it ought to have been stamped. It was contended that it was, within the exception in the stamp act, an agreement made for and relating to the sale of goods, wares, and merchandise. All the judges concurred in the judgment that the contract in that case was not an agreement for the sale of goods, wares, and merchandise; but their opinions were founded upon different reasons. Lord Alvanley thought that it was an agreement for the sale of goods, wares, and merchandise, and something more, viz., for the produce of the land in a certain state at the time of delivery. The opinions of Heath and Rooke, JJ., proceeded on the ground that the hops at the time of the contract did not exist as goods, wares, and merchandise. Chambre, J., was the only judge who intimated an opinion that the contract gave the vendee an interest in the land. He certainly stated that the contract gave the vendee an interest in the produce of the whole of that part of the vendor's farm which consisted of hop-grounds. I concur in opinion with the three learned judges who thought in that case that the hops were not goods, wares, and merchandise, at the time of the contract; but I do not agree with Lord Chief Justice Mansfield that there was no distinction between the hops in that case and the growing turnips in the case of Emmerson *v.* Heelis, because I think that in the latter case the growing turnips at the time of the contract were chattels. It has been insisted that the right to have the potatoes remain in the ground is an interest in the land; but a party entitled to emblements has the same right, and yet he is not by virtue of that right considered to have any interest in the land. For the land goes to the heir, but the emblements go to the executor. In Tidd's Practice, 1039, it is laid down that under a *fieri facias* the sheriff may sell *fructus industriales,* as corn growing, which goes to the executor, or fixtures which may be removed by the tenant; but not furnaces, or apples upon trees, which belong to the freehold and go to the heir. The distinction is between those things which go to the executor and those which go to the heir. The former may be seized and sold under the *fi. fa.;* the latter cannot. The former must therefore, in contemplation of law, be considered chattels. It appears therefore that, when it was necessary at common law to distinguish between what was land and what was not, a growing crop produced by the labor and expense of the occupier of lands was, as the representative of that labor and expense, considered an independent chattel, not going as the land goes, but in a different direction. Upon the same principle the purchaser of a growing crop, who by his contract acquired a right to have the crop continue in the land of the seller until it arrived at maturity, must, before the passing of the Statute of Frauds, have been considered to have had an interest not in the land, but in a chattel independent of the land; and that being so, I cannot suppose that by the 4th section of that statute, which enacts that, unless certain provisions be complied with, no action shall be brought upon any contract or sale of any interest in or concerning lands, tenements, or hereditaments, the Legislature contemplated, as the subject-matter of such contract or sale, that interest which passes from a vendor to a vendee by a sale of a growing crop of potatoes. The statute 56 G. 3, c. 50, indeed, is a legislative declaration that growing crops may be seized and taken in execution under *fi. fa.* It prevents their being so seized in cases where the tenant is restrained by covenant in his lease from removing them off the premises. The case of Mayfield *v.* Wadsley, 3 B. & C. 357, also shows that where there is a sale of growing crops, distinct from any assignment or letting of the land, the crops do not constitute part of the inheritance or any interest in land, but are mere chattels, and may be recovered under a count for goods bargained and sold. Upon these grounds, I am of opinion that there was not in this case any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them within the 4th section of the Statute of Frauds; but that there was a contract for the sale of goods, wares, and merchandise within the meaning of the 17th section, though not to the amount which makes a written note or memorandum of the bargain necessary. The rule for entering a nonsuit must therefore be discharged.

Rule discharged.[1]

SMITH *v.* SURMAN.

In the King's Bench, Easter Term, 1829.

[*Reported in* 9 *Barnewall & Cresswell,* 561.]

Declaration stated that the plaintiff on, &c., at, &c., at the request of the defendant bargained with the defendant to sell to him, and the defendant agreed to buy of the plaintiff, a large quantity of timber, to wit, 230 feet of timber, lying and being in and upon certain lands of the plaintiff, at a certain rate or price, to wit, at the rate or price of eighteen pence for each and every foot thereof, to be fetched, taken, and carried away by the defendant from the said lands of the plaintiff; and to be paid for by the defendant at the rate or price aforesaid within a reasonable time then next following; and in consideration thereof, and also in consideration that the plaintiff at the like request of the defendant had undertaken and faithfully promised the defendant to permit and suffer the defendant to fetch, take, and carry away the said timber from the lands of the plaintiff, the defendant undertook and faithfully promised the plaintiff to fetch, take, and carry away the timber from the lands of the plaintiff, and to pay the plaintiff for the same at the rate aforesaid within a reasonable time. Breach, that the defendant refused to fetch and carry away the timber, or to pay for the same. There were counts for goods bargained and sold, and goods sold and delivered. Plea, the general issue. At the trial before Vaughan, B., at the summer assizes for the county of Worcester, 1828, it appeared that this action was brought to recover £17 3*s.* 6*d.*, the value of 229 feet of ash timber at 1*s.* 6*d.* per foot, which the plaintiff had agreed to sell to the defendant under the following circumstances: The plaintiff, the proprietor of a coppice, had given orders to have some ash-trees cut down; and the defendant on the 7th of April, while the trees were in the course of being cut, and after two of them had been actually felled, came to the coppice, and the plaintiff pointed out to him the trees, which were numbered. The defendant, after he had looked at them, said to one of the bystanders that he had made a good bargain, and told one of the persons who was cutting them, to tell the other men to cross cut them fair, and they were cut accordingly. The defendant afterwards said he had bought ten trees only, and that the reason he did not have them was that they were unsound. After the trees were cut they measured 229 feet 7 inches. The person who measured them afterwards met the defendant, who asked him if he had measured the timber at Mr. Smith's, and receiving an answer in the affirmative, the defendant offered to sell him the butts (which he alleged he had bought of Mr. Smith); but this not being acceded to, the defendant asked him if he knew any person who wanted any butts, and then said he would go to Mr. Smith's and convert the tops into building stuff. The defendant not having taken the timber away, the attorney of the plaintiff, by his direction, wrote the following letter to the defendant upon the subject: —

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[1] Holroyd and Littledale, JJ., delivered concurring opinions.

SIR, — I am directed by Mr. Smith, of Norton Hall, to request you will forthwith pay for the ash timber which you purchased of him. The trees are numbered from one to fourteen, and contain, upon a very fair admeasurement, 229 feet 7 inches. The value at 1*s.* 6*d.* per foot amounts to the sum of £17 3*s.* 6*d.* I understand your objection to complete your contract is on the ground that the timber is faulty and unsound; but there is sufficient evidence to show that the same timber is very kind and superior, and a superior marketable article. I understand you object to the manner in which the trees were cross-cut, but there is also evidence to prove they were so cut by your direction. Unless the debt is immediately discharged, I have instructions to commence an action against you.

In answer to this letter the defendant wrote to the plaintiff's attorney as follows: —

SIR, — I have this moment received a letter from you respecting Mr. Smith's timber, which I bought of him at 1*s.* 6*d.* per foot, to be sound and good, which I have some doubts whether it is or not, but he promised to make it so, and now denies it. When I saw him, he told me I should not have any without all, so we agreed on these terms, and I expected him to sell it to somebody else.

Upon this evidence it was objected by the defendant's counsel that the contract was one for the sale of growing trees, and therefore for the sale of an interest in land, and he cited Scorell *v.* Boxall, 1 Younge & Jervis, 396; or assuming that it was a contract for the sale of goods, wares, and merchandises, the price being £10 and upwards, and there being no note or memorandum of the contract in writing, the action was not maintainable. The learned judge directed the jury to find a verdict for the plaintiff for £17 3*s.* 6*d.*, but reserved liberty to the defendant to move to enter a nonsuit. A rule *nisi* having been obtained for this purpose,

Russell, Serjt., and *Shutt*, now showed cause.

Jervis, contra, was stopped by the court.

LITTLEDALE, J. The intention of the Legislature in making the statute in question appears by the preamble to have been to prevent fraudulent practices, commonly endeavored to be upheld by perjury and subornation of perjury; and for that purpose, in order to prevent them, it requires that the terms of contract shall be reduced to writing, or that some other requisite should be complied with to show manifestly that the contract was completed. I infer from the preamble that the Legislature intended to embrace within some of its sections the subject-matter of all contracts. The various contracts enumerated in the several sections of the statute seem also to warrant that inference. The first section enacts that parol leases shall have the effect of leases at will only. The second section excepts out of the first leases not exceeding three years, where the rent reserved during the term is two-thirds of the improved value. The third section enacts that no leases, either of freehold or terms for years, shall be assigned, granted, or surrendered, except by deed or note in writing. The first three sections apply to contracts which, before the statute, were usually, though not necessarily, under seal. The 4th section applies to those parol promises or agreements which, before the statute, were probably in most instances reduced into writing, but which need not have been so. That section enacts that no action shall be brought in such cases, unless the agreement, or some note or memorandum thereof, shall be reduced into writing. The agreements therein described are a special promise by an executor to answer damages out of his own estate; or a special promise to answer for the debt of another person; or an agreement made in consideration of marriage; or any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or any agreement not to be performed within the space of one year from the making thereof. Such contracts, from their very special nature and subject-matter, would probably have been reduced into writing. The statute requires that they shall be so. The 5th and 6th sections apply to devises of land. The 7th, 8th, 9th, 10th, and 11th, apply to declarations of trusts, and they are also required to be in writing. The 12th section makes estates *per auter vie* devisable. The 13th, 14th, 15th, and 16th sections apply to judgments and executions. The 17th section enacts that no contract for the sale of goods, wares, and merchandises, for the price of £10 or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain or in part payment, or that some note or memorandum of the bargain, in writing, be made and signed by the parties to be charged by such contract, or their agents thereunto properly authorized. Now, looking to the object of the statute as recited in the preamble, I collect it was the intention of the Legislature to comprehend within the 4th and 17th sections the subject-matter of every parol contract, the uncertainty in the terms of which was likely to produce perjury or subornation of perjury. A contract for mere work and labor is not specifically mentioned in those clauses; such a contract therefore may not be within the statute.

But where the contracting parties contemplate a sale of goods, although the subject-matter at the time of making the contract does not exist in goods, but is to be converted into that state by the seller's bestowing work and labor on his own raw materials: that is a case within the statute. It is sufficient if, at the time of the completion of the contract the subject-matter be goods, wares, and merchandise. I cannot assent to any case which has decided that such a contract is not within the statute.

I think that the contract in this case was not a contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning the same, within the meaning of the 4th section. Those words in that section relate to contracts (for the sale of the fee-simple, or of some less interest than the fee), which give the vendee a right to the use of the land for a specific period. If in this case the contract had been for the sale of the trees, with a specific liberty to the vendee to enter the land to cut them, I think it would not have given him an interest in the land within the meaning of the statute. The object of a party who sells timber is, not to give the vendee any interest in his land, but to pass to him an interest in the trees when they become goods and chattels. Here the vendor was to cut the trees himself. His intention clearly was, not to give the vendee any property in the trees until they were cut and ceased to be part of the freehold. I think therefore that there was not in this case any contract or sale of any interest in lands.

Then assuming the contract not to be within the 4th section, the question arises, Whether it is within the 17th section? It was formerly held that where the goods, which were the subject-matter of the sale, were not to be delivered till a future day, as one of the three things required by that section of the statute, viz., a part acceptance, could not be complied with at the time of the contract, it was not a case within that section of the statute; but later authorities[1] have established that such a contract, whether the goods are or are not to be delivered immediately, is within the statute. Those cases therefore have established that if two of the things required by the 17th section can at the time of the contract be carried into effect, the case is within it, although one cannot be complied with. There is another class of cases,[2] where the article contracted for has not existed at the time of the contract, but is to be produced by work and labor to be bestowed by the vendor; as where the contract was for a quantity of oak pins which had not been made, but were to be cut out of slabs, or for a chariot to be built. In those cases the contract has been considered rather as a contract for work and labor than for the sale of goods, wares, and merchandise, and not within the statute. The impression on my mind however is, that wherever the subject-matter at the time of the completion of the contract is goods, wares, and merchandise, this section of the statute attaches upon it, although it has become goods, wares, and merchandise, between the time of making and completing the contract, either by one of the parties having bestowed his work and labor upon his own materials, or by his having converted a portion of his freehold into goods and chattels. The provisions of the statute are more necessary in cases where the contract is to be executed at a future period, than where it is to be executed immediately. From the uncertainty in the terms of bargains to be completed at a future period, disputes are more likely to arise, and the consequent perjury which it was the object of the statute to prevent. In the case of the chariot, for instance, a dispute might at any time before its completion have arisen respecting the quality of the materials of which it was to be composed, or the color which it was to be painted, and in those respects it would have been necessary to have recourse to verbal testimony to prove the terms of the contract, which it was the very object of the statute to prevent. I am therefore of opinion that the contract in this case was a contract for the sale of goods, wares, and merchandise, within the 17th section. I think also that there is no sufficient note in writing of the contract. The plaintiff's attorney in his letter speaks of it as a contract for the sale of so much timber, at so much per foot, without reference to quality. The defendant in his letter states that it was a contract, with a condition that the timber should be sound and good, though the plaintiff had subsequently denied that that was one of the terms of the contract. I think also, for the reasons stated by my brother Bayley, that there was no part-acceptance of the goods to satisfy the statute.[1]

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[1] Rondeau *v.* Wyatt, 2 H. Bl. 67; Cooper *v.* Elston, 7 T. R. 14; Alexander *v* Comber, 1 H. Bl. 21.

[2] Towers *v.* Osborne, 1 Stra 506; Groves *v.* Buck, 3 M. & S. 179.

Rule absolute.[2]

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[1] BAYLEY and PARK, JJ., delivered concurring opinions.

[2] In Rodwell *v.* Phillips, 9 M. & W. 501, 505, Lord Abinger, C. B., referring to the foregoing case, said: "Undoubtedly there is a case in which it appears that a contract to sell timber growing was not held to convey any interest in the land, but that was where the parties contracted to sell the timber at so much per foot, and from the nature of that contract it must be taken to have been the same as if the parties had contracted for the sale of timber already felled."

SAINSBURY *v.* MATTHEWS.

In the Exchequer, Michaelmas Term, 1838.

[*Reported in* 4 *Meeson & Welsby*, 343.]

This was an action of assumpsit to recover damages for the breach of a contract by the defendant to sell and deliver to the plaintiff a certain quantity of potatoes.[1]

At the trial before Coltman, J., at the last Wiltshire assizes, it was proved that the plaintiff and defendant being together at an inn at Erlstoke, in June, 1836, the defendant said he had got 100 lugs of potatoes, and he would sell them at two shillings a sack. The plaintiff said he would have them; and it was agreed that the plaintiff was to have them at that price at digging-up time, and that he should find diggers. When the potatoes were ripe, the plaintiff accordingly sent diggers to take them up; but the defendant refused to permit them to do so.

The jury having found for the plaintiff, damages £5 10*s.*,

Crowder now moved, pursuant to leave reserved by the learned judge, to enter a nonsuit.

Lord Abinger, C. B. I think this was not a contract giving an interest in the land; it is only a contract to sell potatoes at so much a sack on a future day, to be taken up at the expense of the vendee. He must give notice to the defendant for that purpose, and cannot come upon the land when he pleases.

Parke, B. This is a contract for the sale of goods and chattels at a future day, the produce of certain land, and to be taken away at a certain time. It gives no right to the land: if a tempest had destroyed the crop in the mean time, and there had been none to deliver, the loss would clearly have fallen upon the defendant. The case is stronger than that of Evans *v.* Roberts, because here there is only a stipulation to pay so much per sack for the potatoes when delivered; it is only a contract for goods to be sold and delivered. In that case all the authorities were reviewed, and the result of them clearly laid down.

Gurney, B., concurred. *Rule refused.*

MARSHALL *v.* GREEN.

In the Common Pleas, November 6, 1875

[*Reported in Law Reports,* 1 *Common Pleas Division*, 35.]

Lord Coleridge, C. J. This is an action[2] in respect of the entry by the defendant upon certain land in the occupation of the plaintiff's tenant, and the cutting down of certain trees. The facts were these. The plaintiff was the owner in fee of a copyhold tenement on which certain timber trees were growing. The tenement was under lease, but the custom of the manor reserved the trees upon the tenement leased to the owner in fee of the copyhold tenement. The plaintiff had communicated with the defendant, a timber merchant, on the subject of his wish to sell the trees; but some question had arisen as to the number of the trees, and it was agreed that the plaintiff and defendant should go over the land together to inspect the trees. On the 27th of February they went over the land for that purpose, and there was then a parol sale of twenty-two trees, at the price of £26, and it was arranged that the trees should be "got away as soon as possible." The defendant's servants entered, and on the 2d, 3d, and 4th of March, they cut down the trees. On the 2d of March, after six trees had been cut down, the plaintiff wrote countermanding the sale. The defendant had sold the tops and stumps before receipt of the letter of countermand; but, though sold before, they were not taken away until after such letter was received. If there was a valid contract for the sale of the trees, the plaintiff must fail; the trees had been sold, and the property had passed; the land was not in the plaintiff's possession, but his tenant's, and the defendant had a perfect right to do what he did. It is not denied that there was a verbal contract, and the question therefore is whether this was a contract which required to be in writing under the Statute of Frauds. If so, the defendant was in the wrong, because there was no such contract. The first question is whether this was a contract within the 4th section, as being a "contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them." These words have given rise to a great deal of discussion, and very high authorities have said that it is impossible to reconcile all the decisions on the subject. If the matter were *res integra*, I should be inclined to think that there was much to be said for Littledale, J.'s view, that the words of the statute were never meant to apply to such a matter as this at all, but only referred to such interests as are known to conveyancers. It is, however, too late now to maintain this view, inasmuch as there are a great number of decisions which proceed on the opposite view. It is clear on the decisions that there are certain natural growths which, under certain circumstances, have been held to be within the words of the section, and a contract with respect to which must, therefore, be in writing. The question then is, what the rule is to be. The matter has been much discussed, and for my part I despair of laying down any rule which can stand the test of every conceivable case. If it is said that there is an interest in land within the section when the sale is of something which, before it is taken away, is to derive benefit from the land, and to become altered by virtue of what it draws from the soil, the rule is an intelligible one, but one which it is almost impossible to apply with absolute strictness. The effect of such a rule, if strictly applied, would vary at different times of the year. If the sale were in the spring, and the removal of the thing sold were to be postponed but for two or three days, it would not, at its severance, in strictness, be in the same state as it was at the time of the sale. On the other hand, in winter, when the sap is out of the tree, and it is standing, as it were, dead for the time being, there would be no appreciable change. It is almost impossible to say that the rule can be that, wherever anything, however small, is to pass into that which grows on the land, out of the land, between the sale and the reduction into possession, the contract is within the section.

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[1] Only so much of this case is given as relates to the question whether the subject of the sale was goods, wares, or merchandise, within the meaning of the Statute of Frauds.

[2] The declaration contained: 1st count for trespass to land and cutting down certain trees of the plaintiff; 2nd, trover; 3rd, for an injury to the plaintiff's reversion.

I find the following statement of the law with regard to this subject, which must be taken to have received the sanction of that learned judge, Sir Edward Vaughan Williams, in the notes in the last edition of Williams' Saunders, upon the case of Duppa *v.* Mayo, p. 395 : "The principle of these decisions appears to be this, that wherever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold from further vegetation and from the nutriment to be afforded by the land, the contract is to be considered as for an interest in land ; but where the process of vegetation is over, or the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold, and the contract is for goods. This doctrine has been materially qualified by later decisions, and it appears to be now settled that, with respect to emblements or *fructus industriales*, &c., the corn and other growth of the earth which are produced not spontaneously, but by labor and industry, a contract for the sale of them while growing, whether they are in a state of maturity or whether they have still to derive nutriment from the land in order to bring them to that state, is not a contract for the sale of any interest in land, but merely for the sale of goods." The propositions so laid down, as applied to the present case, seem to afford a very clear and intelligible rule. Planted trees cannot in strictness be said to be produced spontaneously, yet the labor employed in their planting bears so small a proportion to their natural growth, that they cannot be considered as *fructus industriales* ; but treating them as not being *fructus industriales*, the proposition is, that where the thing sold is to derive no benefit from the land, and is to be taken away immediately, the contract is not for an interest in land. Here the contract was that the trees should be got away as soon as possible, and they were almost immediately cut down. Apart from any decisions on the subject, and as a matter of common-sense, it would seem obvious that a sale of twenty-two trees, to be taken away immediately, was not a sale of an interest in land, but merely of so much timber.

There do not seem to be any decisions which prevent our deciding in conformity with the common-sense of the matter. On the contrary, there is a case of Smith *v.* Surman, 9 B. & C. 561, in which the Court of Queen's Bench held, under circumstances very like those of the present case, that there was no contract for an interest in land. The only distinction that I can see between that and the present case is, that there the trees were to be cut by the vendor; but Littledale, J., held that, "if in that case the contract had been for the sale of the trees, with a specific liberty to the vendee to enter the land to cut them, it would not have given him an interest in land, within the meaning of the statute." This decision has never been questioned, and has been adopted in subsequent decisions. It seems to me, therefore, that both common-sense and authority combine to show that this was not a contract for an interest in land, within the section.

The remaining question is, whether this contract was within the 17th section. This depends on whether there was here an acceptance and actual receipt of part of the goods. There have been many decisions on the question, what amounts to such an acceptance and receipt; it was very early determined that an actual manual receipt of the article sold was not necessary, but that a constructive receipt would do. Here six of the trees were cut down before the sale was countermanded, and at a time when it must be taken that that was done with the assent of the seller, and portions were sold. What more could have been done short of actually removing the trees? These were bulky trees, that a man could not carry away like a small article. If anything short of actual manual possession could be sufficient, all was done that could be done. The defendant immediately cuts down the trees, and converts them into chattels, and deals with them as owner by selling the tops and stumps. In the absence of any decision on the subject, I should have said that, if it be once admitted that anything short of actual manual possession could be a sufficient acceptance and receipt, there was amply sufficient to show such an acceptance and receipt here. But we are not without authority on the subject. There have been repeated decisions that, where anything has been done on the part of the vendee, under such a contract as this, to the whole or part of the goods, indicating an intention to deal with the subject-matter as owner in possession, and he is allowed by the vendor so to deal with it, that amounts to an acceptance and receipt within the statute. It has been held, with regard to bulky things, that the delivery of the *indicia* of title was sufficient. When the purchaser had marked the goods, and left them so marked on the vendor's premises, it was held that there was a sufficient acceptance and receipt. The case of Chaplin *v.* Rogers, 1 East, 192, seems to me to be a distinct authority for the view that there was an acceptance and receipt here, the words of the section having received all the fulfilment the subject-matter was capable of. I do not rely on the circumstance that the land was in the possession of the plaintiff's tenant. It seems to me that, apart from that circumstance, and treating the land as being the vendor's, the case is clear. The result is, that the plaintiff fails on both points, and the rule must be discharged. *Rule discharged.*[1]

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[1] BRETT and GROVE, JJ., delivered concurring opinions.

NOTE. — In Lavery *v.* Pursell, 39 Ch. D. 508, Chitty, J., held that a contract to sell building materials in a standing building to be removed by the purchaser within two months, was a contract for the sale of an interest in or concerning land within section 4 of the Statute of Frauds. In the course of his opinion, he said: —

"Now the authority upon which the plaintiff relied is Marshall *v.* Green, 1 C. P. D. 35. In that case the subject-matter of the contract was standing trees, fit to be cut as timber. The intention of the parties unquestionably was to sell and buy as timber. There was no stipulation there in regard to possession, but it was a part of the terms of the contract that the purchaser should cut, and of course part of the terms of the contract that he should enter for that purpose. On the facts it appeared that six trees had been cut down by the defendant, who was sued for the wrongful acts of cutting down the trees. The substantial question was whether the defendant was a trespasser and wrongdoer in cutting the trees, and that depended upon whether he had an enforceable contract to cut the trees. He had cut six trees, and then a notice was given to him by the owner of the trees to cut no more. After that he entered and still cut, and the question was as to his liability in respect of those trees. Sir Arthur Watson, in arguing this case, spoke of a revocable license, but the Common Pleas Division appeared to consider that this was not a revocable license, because they held that he was justified in cutting the trees, notwithstanding the notice. Then the trees being standing trees, to be cut by the purchaser, the court held that it was not within the 4th section. Of course I am bound by the decision itself, and I am bound by any principle of law that is necessary to the decision, but I am not bound by the decision beyond that. Now the court appears to have considered that there was no interest in the land. I agree that it was a point, if I may say so with great respect, that required a good deal of attention, whether a standing tree is a chattel, or can be made, by any acts of the parties, a chattel. It is a hereditament at the time when the contract is made. It is just as much a hereditament, in point of law, as a house which is standing on the land, and just as much so as the mines which are underneath. I only speak now as a real property lawyer I am bound, of course, by the English law, to say that a tree is not a chattel. Indeed, if a man were indicted for larceny of a tree, the indictment would be quashed. I feel a little difficulty in following that reasoning, which, for the purposes of sect. 4, through the intention of the parties, changes the nature of the property from realty to personalty, but I make these observations merely for the purpose of endeavoring to get at the principle on which the decision turns, and not for the purpose of making any unnecessary comments on what was said. The Lord Chief Justice says, and I thoroughly agree with him, that it is difficult, if not impossible, to reconcile all the authorities in these matters. He mentions the cases which referred to the *fructus naturales* and the *fructus industriales*, which have no doubt given rise to a considerable difference of opinion, and he quotes the well-known passage in Williams' Saunders, Vol. I. p 395 (Duppa *v.* Mayo), where it was said that where the parties agree that the thing sold shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold, the contract is for goods. I pause for one moment to say that I am always myself afraid, in dealing with propositions of law, to use metaphors. They are very often very convenient, but if pressed too far they often lead to erroneous conclusions. Taking this statement, could the land in the case before me be considered as the warehouse for the building? Why, certainly not. Such a contention as that, on the mere statement of it, would be one which could not be permitted in a court of justice. I say that merely to follow the reasoning, but when the case is examined as a whole, it will be seen that the judgment turned upon this, that they considered that, as the trees were to be cut down as soon as possible, and were almost immediately cut down, the thing sold was a chattel. A point was taken with reference to the statement by Lord Justice Brett, 1 C. P. D. 42: 'With respect to the first point, when the subject-matter of the contract is something affixed to land, the question is whether the contract is intended to be for the purchase of the thing affixed only, or of an interest in the land as well as the thing affixed.' I think upon that, that the Lord Justice did not intend to draw any such distinction as to the word commented on — that the tree was affixed, or was a fixture

I can see nothing in the argument founded on that proposition. The true basis of his judgment is, I think, to be found in the same page, where he says, 'the contract is not for an interest in the land, but relates solely to the thing sold itself.'

"Though that case may be open hereafter to further consideration, of course I can not reconsider it, nor can I differ from it. It is evident that if that view is right, which I will assume it to be, a line must be drawn somewhere, because, if this principle were carried to the full extent, there being no distinction between the timber on the land, in point of law, and the mines, then it would have to be said, following out what the plaintiff says was the principle of this decision, that a contract for all the coal or minerals under a man's land, with a license to enter and get it, is not within sect. 4. Some explanation why that should be was attempted to be given by plaintiff's counsel, but without success. The answer perhaps is, that courts of justice ought not to be puzzled by such old scholastic questions as to where a horse's tail begins and where it ceases. You are obliged to say, 'This is a horse's tail,' at some time. What I say is, that I must draw the line at this case, because on the facts it is quite different, or materially different, from Marshall *v.* Green, 1 C. P. D. 35, and I leave that case as it stands on its own footing, and must hold that this case comes within the 4th section."

Compare Hallen *v.* Runder, 1 C. M. & R. 267, and Lee *v.* Gaskell, 1 Q. B. D. 700, in which it was held that a sale of fixtures by the tenant's trustee in bankruptcy to the landlord was not within either the 4th or the 17th section of the statute.

SAMUEL WHITMARSH *v.* HEZEKIAH WALKER, JR.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, SEPTEMBER TERM, 1840.

[*Reported in* 1 *Metcalf*, 313.]

WILDE, J. This action is founded on a parol agreement, whereby the defendant agreed to sell to the plaintiff two thousand mulberry-trees at a stipulated price; the trees at the time of the agreement being growing in the close of the defendant. It was proved at the trial that the plaintiff paid the defendant in hand the sum of ten dollars in part payment of the price thereof, and promised to pay the residue of the price on the delivery of the trees, which the defendant promised to deliver on demand, but which promise on his part he afterwards refused to perform. And the defence is that the contract was for the sale of an interest in land, and therefore void by the Rev. Sts. c. 74. § 1.

In support of the defence it has been argued that trees growing and rooted in the soil appertain to the realty, and that the contract in question was for the sale of trees rooted and growing in the soil of the defendant at the time of the sale. On the part of the plaintiff it was contended that the trees contracted for were raised for sale and transplantation; and like fruit-trees, shrubs, and plants, rooted in the soil of a nursery garden, are not within the general rule, but are to be considered as personal chattels. This question was discussed and considered in Miller *v.* Baker, 1 Met. 27, and we do not deem it necessary to reconsider it in reference to the present case. We do not consider the agreement set forth in the declaration and proved at the trial as a contract of sale consummated at the time of the agreement; for the delivery was postponed to a future time, and the defendant was not bound to complete the contract on his part, unless the plaintiff should be ready and willing to complete the payment of the stipulated price. Sainsbury *v.* Matthews, 4 Mees. & Welsb. 347. Independently of the Statute of Frauds, and considering the agreement as valid and binding, no property in the trees vested thereby in the plaintiff. The delivery of them and the payment of the price were to be simultaneous acts. The plaintiff cannot maintain an action for the non-delivery without proving that he offered and was ready to complete the payment of the price; nor could the defendant maintain an action for the price without proving that he was ready and offered to deliver the trees. According to the true construction of the contract, as we understand it, the defendant undertook to sell the trees at a stipulated price, to sever them from the soil, or to permit the plaintiff to sever them, and to deliver them to him on demand; he at the same time paying the defendant the residue of the price. And it is immaterial whether the severance was to be made by the plaintiff or the defendant. For a license for the plaintiff to enter and remove the trees would pass no interest in the land, and would, without writing, be valid, notwithstanding the Statute of Frauds.

This subject was fully considered in the case of Tayler *v.* Waters, 7 Taunt. 374; and it was held that a beneficial license, to be exercised upon land, may be granted without deed and without writing; and that such a license, granted for a valuable consideration and acted upon, cannot be countermanded. The subject has also been ably and elaborately discussed by Chief Justice Savage in the case of Mumford *v.* Whitney, 15 Wend. 380, in which all the authorities are reviewed; and we concur in the doctrine as therein laid down, namely, that a permanent interest in land can be transferred only by writing, but that a license to enter upon the land of another and do a particular act or a series of acts, without transferring any interest in the land, is valid, though not in writing. And such is the license on which the plaintiff relies in the present case.

Chancellor Kent in his Commentaries, vol. iii. p. 452, 3d ed., very justly remarks that "the distinction between a privilege or easement carrying an interest in the land, and requiring a writing within the Statute of Frauds to support it, and a license which may be by parol, is quite subtile, and it becomes difficult in some of the cases to discern a substantial difference between them." But no such difficulty occurs in the present case. The plaintiff claims no right to enter on the defendant's land by virtue of the license. It is admitted that he had a legal right to revoke his license. But if he exercised his legal right in violation of his agreement, to the plaintiff's prejudice, he is responsible in damages. We think it therefore clear that, giving to the contract the construction already stated, the plaintiff is entitled to recover. If for a valuable consideration the defendant contracted to sell the trees and to deliver them at a future time, he was bound to sever them from the soil himself, or to permit the plaintiff to do it; and if he refused to comply with his agreement, he is responsible in damages.

Judgment on the verdict.

GREEN *v.* ARMSTRONG.

New York Supreme Court, October, 1845.

[*Reported in* 1 *Denio*, 552.]

Beardsley, J. A verbal contract was made between these parties, by which the defendant agreed to sell certain trees then standing and growing on his land, to the plaintiff, with liberty to cut and remove the same at any time within twenty years from the making of the contract. A part of the trees were cut and removed under this agreement, but the defendant then refused to permit any more to be taken, and for this the plaintiff brought his action in the justice's court, where a judgment was rendered in his favor. On the trial of the cause the defendant objected to proof of such parol contract, but the objection was overruled. The judgment was removed by *certiorari* to the Court of Common Pleas of Oneida county, and was reversed by that court, on the ground, as the record states, that the contract, not being in writing, was void by the Statute of Frauds.

As the declaration stated that the contract was by parol and not in writing, and the defendant pleaded instead of demurring, it is now urged on behalf of the plaintiff in error, that the defendant was precluded from objecting, on the trial of the cause before the justice, or in the Court of Common Pleas, to proof of a parol contract, or that such contract was void. It is insisted the defendant should have demurred, if a verbal contract like this was invalid, and that by pleading to the declaration, its sufficiency, and consequently the validity of the contract as stated, were admitted; and if, in truth, the contract was for this reason void, the defendant, having failed to make the objection at the proper time and in an appropriate manner, is now remediless.

If the action had been pending in this court, or in a Court of Common Pleas, the principles stated would, to a certain extent, have been applicable; for the objection that the contract was by parol and not in writing, could not have been made on the trial of the issue joined. But a verdict on the issue would not have concluded the defendant, for he might still move in arrest of judgment, and thus raise the question as to the validity of the contract declared on. A motion in arrest, however, cannot be made in the justice's court, and where issue has been joined, as in this case, if the defendant cannot, on the trial or on *certiorari*, object that the contract is void, he is without any redress whatever. But pleading to a declaration, when the party might have demurred, cannot be allowed to have any such conclusive effect upon the rights of the party: it cannot make a void contract valid, or at all change the real rights of the litigant parties. The orderly and formal mode of making the objection would be by demurrer or motion in arrest; but this is only a matter of form. And as it was too late to demur, and a motion in arrest could not be made, I have no difficulty in saying the objection was properly made on the trial, and in the Common Pleas, and it must now be determined by this court.

The Revised Statutes declare that no "interest in lands" shall be created, unless by deed or conveyance in writing; and that every contract for the sale of "any interest in lands" shall be void unless in writing. 2 R. S. 134, §§ 6, 8. Certain exceptions and qualifications to these enactments are contained in the sections referred to, but none which touch the question now before the court: and so far as respects this question the former statute of New York, and the English statute of 29 Charles 2, ch. 3, contain similar provisions. 1 R. L. of 1813, p. 78; Chit. on Cont. 299.

The precise question in this case is, whether an agreement for the sale of growing trees, with a right to enter on the land at a future time and remove them, is a contract for the sale of an interest in land. If it is, it must follow that the one declared on in this case, not being in writing, was invalid, and the judgment of the Common Pleas, reversing that of the justice, was correct and must be affirmed.

And in the outset I must observe, that this question has not, to my knowledge, been decided in this State. It has, however, arisen in the English courts, and in some of those of our sister States; but their decisions are contradictory, and the views of individual judges wholly irreconcilable with each other. Greenleaf's Ev. 2d ed. § 271, and notes; Chit. on Cont. 299 to 302; 4 Kent's Com. 5th ed. 450, 1. We are, therefore, as it seems to me, at full liberty to adopt a broad principle, if one can be found, which will determine this precise question in a manner which our judgments shall approve, and especially if it be equally applicable to other and analogous cases.

By the statute, a contract for the sale of "any interest in lands" is void unless in writing. The word "land" is comprehensive in its import, and includes many things besides the earth we tread on, as waters, grass, stones, buildings, fences, trees, and the like; for all these may be conveyed by the general designation of land. 1 Shep. Touch. by Preston, 91; 1 Inst. 4; 1 Preston on Estates, 8; 2 Black. Com. 17, 18; 1 R. S. 387, § 2; 2 *id.* 137, § 6. Standing trees are therefore part and parcel of the land in which they are rooted, and as such are real property. They pass to the heir by descent as part of the inheritance, and not, as personal chattels do, to the executor or administrator. Toller's Law of Executors, 193, 4, 5; 2 Black. Com. by Chitty, 122 note; Rob. on Frauds, 365, 6; Richard Liford's case, 11 Rep. 46; Com. Dig. Biens, (H). And being strictly real property, they cannot be sold on an execution against chattels only. Scorell *v.* Boxall, 1 Younge & Jer. 396. Evans *v.* Roberts, 5 Barn. & Cress. 829.

It is otherwise with growing crops, as wheat and corn, the annual produce of labor and cultivation of the earth; for these are personal chattels, and pass to those entitled to the personal estate, and not to the heir. Toller, 150, 194; 2 Black. Com. 404. They may also be sold on execution like other personal chattels. Whipple *v.* Foot, 2 John. 418; Jones *v.* Flint, 10 Adol. & Ellis, 753; Peacock *v.* Purvis, 2 Brod. & Bing. 362; Hartwell *v.* Bissell, 17 John. 128.

These principles suggest the proper distinction. An interest in personal chattels may be created without a deed or conveyance in writing, and a contract for their sale may be valid although by parol. But an interest in that which is land, can only be created by deed or written conveyance: and no contract for the sale of such an interest is valid unless in writing. It is not material and does not affect the principle, that the subject of the sale will be personal property when transferred to the purchaser. If, when sold, it is, in the hands of the seller, a part of the land itself, the contract is within the statute. These trees were part of the defendant's land and not his personal chattels. The contract for their sale and transfer, being by parol, was therefore void.

The opinion of the court in the case of Dunne *v.* Ferguson, 1 Hayes (Irish) R. 542, contains one of the best illustrations of this question. That case is thus stated in Stephens' N. P. (1971.) "The facts of the case were, that in October, 1830, the defendant sold to the plaintiff a crop of turnips, which he had sown a short time previously, for a sum less than ten pounds. In February, 1831, and previously, while the turnips were still in the ground, the defendant severed and carried away considerable quantities of them, which he converted to his own use. No note in writing was made of the bargain. It was contended for the defendant, that the action of trover did not lie for things annexed to the freehold, and that the contract was of no validity for want of a note or memorandum in writing pursuant to the Statute of Frauds. Upon the foregoing facts Chief Baron Joy observed (Barons Smith, Pennefather and Foster, concurring), "The general question for our decision is, whether there has been a contract for an interest concerning lands, within the second section of the Statute of Frauds? or whether it merely concerned goods and chattels? And that question resolves itself into another, whether or not a growing crop is goods and chattels? In one case it has been held, that a contract for potatoes did not require a note in writing, because the potatoes were ripe; and in another case, the distinction turned upon the hand that was to dig them, so that if dug by A. B. they were potatoes, and if by C. D. they were an interest in lands. Such a course always involves the judge in perplexity, and the case in obscurity. Another criterion must, therefore, be had recourse to; and, fortunately, the later cases have rested the matter on a more rational and solid foundation. At common law, growing crops were uniformly held to be goods; and they were subject to all the leading consequences of being goods, as seizure in execution, etc. The Statute of Frauds takes things as it finds them, and provides for lands and goods according as they were so esteemed before its enactment. In this way the question may be satisfactorily decided. If, before the statute, a growing crop has been held to be an interest in lands, it would come within the second section of the act, but if it were only goods and chattels, then it came within the thirteenth section. On this, the only rational ground, the cases of Evans *v.* Roberts, 5 Barn. & Cress. 829; Smith *v.* Surman, 9 *id.* 561; and Scorell *v.* Boxall, 1 Younge & Jer. 396, have been decided. And as we think that growing crops have all the consequences of chattels, and are like them liable to be taken in execution, we must rule the points saved for the plaintiff."

Various other decisions have proceeded on the same principle, although it has nowhere been stated and illustrated with the same clearness and force as in the opinion of Chief Baron Joy.

The following cases may be cited to show that growing crops of grain and vegetables, *fructus industriales*, being goods and chattels, and not real estate, may be conveyed by a verbal contract, as they may also be sold on execution as personal chattels. Carrington *v.* Roots, 2 Mees. & Wels. 248; Sainsbury *v.* Matthews, 4 *id.* 343; Randall *v.* Ramer, 2 John. 421, note; Mumford *v.* Whitney, 15 Wend. 387; Austin *v.* Sawyer, 9 Cowen, 39; Jones *v.* Flint, 10 Adol. & Ellis, 753; Warwick *v.* Bruce, 2 Maule & Selw. 205; Graves *v.* Weld, 5 Barn. & Adol. 105.

But where the subject-matter of a contract of sale is growing trees, fruit, or grass, the natural produce of the earth, and not annual productions raised by manurance and the industry of man, as they are parcel of the land itself, and not chattels, the contract, in order to be valid, must be in writing. Teal *v.* Auty, 2 Brod. & Bing. 99; Putney *v.* Day, 6 N. Hamp. R. 430; Olmstead *v.* Niles, 7 *id.* 522; Crosby *v.* Wadsworth, 6 East, 602; Rodwell *v.* Phillips, 9 Mees. & Wels. 501; Jones *v.* Flint, 10 Adol. & Ellis, 753.

The contract in this case was within the statute, and being by parol was void. The judgment of the Common Pleas must be affirmed.

Judgment affirmed.

HIRTH *v.* GRAHAM.

OHIO SUPREME COURT, JANUARY 24, 1893.

[*Reported in* 50 *Ohio State*, 57.]

BRADBURY, J. The plaintiff in error brought an action before a justice of the peace to recover of the defendant in error damages alleged to have been sustained on account of the refusal of the latter to perform a contract by which he had sold to the plaintiff in error certain growing timber. The defendant attempted to secure the dismissal of the action, on the ground that the justice had no jurisdiction of an action for the breach of such a contract. Failing in this, and the action being tried to a jury, he requested the justice to instruct the jury "that if they find from the evidence that the trees about which this action is brought were at the time of said alleged contract then growing upon the land of defendant, and that no note or contract or memorandum of the contract of sale was at the time made in writing, the plaintiff cannot maintain this action, and your verdict should be for the defendant;" which instruction the justice refused to give, but on the contrary gave to them the following instructions on the subject: "This is an action for damage, not on the contract, nor to enforce the same; and if you find that a contract was made, verbal or otherwise, and the defendant refused or failed to comply with its terms, the plaintiff is entitled to any damage you may find him to have sustained by way of such non-compliance." The defendant in error, who was also the defendant in the justice's court, excepted, both to the charge as given and to the refusal to charge as requested; the verdict and judgment being against him, he embodied the charge as given, as well as that refused, in separate bills of exceptions, and brought the cause to the Court of Common Pleas on error, where the judgment of the justice of the peace was affirmed. He thereupon brought error to the Circuit Court, where the judgments of the Court of Common Pleas and that of the justice were both reversed; and it is to reverse this judgment of the Circuit Court, and reinstate and affirm those of the Court of Common Pleas and justice of the peace, that this proceeding is pending.

Counsel for plaintiff in error contends that the record contains nothing to show that the trees which were the subject of the contract were standing or growing, and that therefore it does not appear that the defendant was injured by the instructions given and refused. The record does not support this contention. During the trial three separate bills of exceptions were taken; and, when all of them are considered together, it clearly appears that evidence was given tending to prove that the trees, the subject of the contract, were growing on the land at the time it was made, and that the contract was not evidenced by any note or memorandum in writing. The instruction refused was, therefore, pertinent; and if it contained a sound legal proposition, the refusal to give it in charge to the jury was prejudicial to the defendant. The court, however, not only refused to give the instructions requested by the defendant, but told the jury in substance that no written memorandum was necessary.

Whether a sale of growing trees is the sale of an interest in or concerning land has long been a much controverted subject in the courts of England, as well as in the courts of the several States of the Union. The question has been differently decided in different jurisdictions, and by different courts, or at different times by the same court within the same jurisdiction. The courts of England, particularly, have varied widely in their holdings on the subject. Lord Mansfield held that the sale of a crop of growing turnips was within this clause of the statute. Emmerson *v.* Heelis, 2 Taunt. 38, following the case of Waddington *v.* Bristow, 2 Bos. & P. 452, where the sale of a crop of growing hops was adjudged not to have been a sale of goods and chattels merely. And in Crosby *v.* Wadsworth, 6 East, 602, the sale of growing grass was held to be a contract for the sale of an interest in or concerning land, Lord Ellenborough saying: "Upon the first of these questions [whether this purchase of the growing crop be a contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them], I think that the agreement stated, conferring, as it professes to do, an exclusive right to the vesture of the land during a limited time and for given purposes, is a contract or sale of an interest in, or at least an interest concerning, lands." *Id.* 610. Afterwards, in Teal *v.* Auty, 2 Brod. & B. 99, the Court of Common Pleas held a contract for the sale of growing poles was a sale of an interest in or concerning lands. Many decisions have been announced by the English courts since the cases above noted were decided, the tendency of which have been to greatly narrow the application of the fourth section of the Statute of Frauds to crops, or timber, growing upon land. Crops planted and raised annually by the hand of man are practically withdrawn from its operation,[1] while the sale of other crops, and in some instances growing timber also, are withdrawn from the statute, where, in the contemplation of the contracting parties, the subject of the contract is to be treated as a chattel. The latest declaration of the English courts upon this question is that of Marshall *v.* Green, 1 C. P. Div. 35, decided in 1875. In view of the prior long period of unsettled professional and judicial opinion in England upon the question, that the court was not one of final resort, and that the decision has encountered adverse criticism from high authority (Benj. Sales [ed. 1892], § 126), it cannot be considered as finally settling the law of England on this subject. The conflict among the American cases on the subject cannot be wholly reconciled. In Massachusetts, Maine, Maryland, Kentucky, and Connecticut, sales of growing trees, to be presently cut and removed by the vendee, are held not to be within the operation of the fourth section of the Statute of Frauds. Claflin *v.* Carpenter, 4 Metc. (Mass.) 580; Nettleton *v.* Sikes, 8 Metc. (Mass.) 34; Bostwick *v.* Leach, 3 Day, 476; Erskine *v.* Plummer, 7 Me. 447;

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[1] Marshall *v.* Ferguson, 23 Cal. 65; Davis *v.* McFarlane, 37 Cal. 634; Bull *v.* Griswold, 19 Ill. 631; Sherry *v.* Picken, 10 Ind. 375; Bryant *v.* Crosby, 40 Me. 9; Purner *v.* Piercy, 40 Md. 212; Whitmarsh *v.* Walker, 1 Met. 313; Smock *v.* Smock, 37 Mo. App. 56; Holt *v.* Holt, 57 Mo. App. 272; Swafford *v.* Spratt, 93 Mo. App. 631; Wimp *v.* Early, 104 Mo. App. 85; Newcomb *v.* Ramer, 2 Johns. 421, *n.*; Webster *v.* Zielly, 52 Barb. 482; Walton *v.* Jordan, 65 N. C. 170; Carson *v.* Browder, 2 Lea, 701; Kerr *v.* Hill, 27 W. Va. 276, *acc.* *Conf.* Powell *v.* Rich, 41 Ill. 466; Powers *v.* Clarkson, 17 Kan. 218.

Cutler *v.* Pope, 13 Me. 377; Cain *v.* McGuire, 13 B. Mon. 340; Byassee *v.* Reese, 4 Metc. (Ky.) 372; Smith *v.* Bryan, 5 Md. 141.[1] In none of these cases, except 4 Metc. (Ky.) 373, and in 13 B. Mon. 340, had the vendor attempted to repudiate the contract before the vendee had entered upon its execution; and the statement of facts in those two cases do not speak clearly upon this point. In the leading English case before cited (Marshall *v.* Green, 1 C. P. Div. 35), the vendee had also entered upon the work of felling the trees, and had sold some of their tops before the vendor countermanded the sale. These cases, therefore, cannot be regarded as directly holding that a vendee, by parol, of growing timber to be presently felled and removed, may not repudiate the contract before anything is done under it; and this was the situation in which the parties to the case now under consideration stood when the contract was repudiated. Indeed, a late case in Massachusetts (Giles *v.* Simonds, 15 Gray, 441) holds that "the owner of land, who has made a verbal contract for the sale of standing wood to be cut and severed from the freehold by the purchaser, may at any time revoke the license which he thereby gives to the purchaser to enter his land to cut and carry away the wood, so far as it relates to any wood not cut at the time of the revocation." The courts of most of the American States, however, that have considered the question, hold expressly that a sale of growing or standing timber is a contract concerning an interest in lands, and within the fourth section of the Statute of Frauds. Green *v.* Armstrong, 1 Denio, 550; Bishop *v.* Bishop, 11 N. Y. 123; Westbrook *v.* Eager, 16 N. J. Law, 81; Buck *v.* Pickwell, 27 Vt. 157; Cool *v.* Lumber Co., 87 Ind. 531; Terrell *v.* Frazier, 79 Ind. 473; Owens *v.* Lewis, 46 Ind. 488; Armstrong *v.* Lawson, 73 Ind. 498; Jackson *v.* Evans, 44 Mich. 510, 7 N. W. Rep. 79; Lyle *v.* Shinnebarger, 17 Mo. App. 66; Howe *v.* Batchelder, 49 N. H. 204; Putney *v.* Day, 6 N. H. 430; Bowers *v.* Bowers, 95 Pa. St. 477; Daniels *v.* Bailey, 43 Wis. 566; Lillie *v.* Dunbar, 62 Wis. 198, 22 N. W. Rep. 467; Knox *v.* Haralson, 2 Tenn. Ch. 232.[2] The question is now, for the first time, before this court for determination; and we are at liberty to adopt that rule on the subject most conformable to sound reason. In all its other relations to the affairs of men, growing timber is regarded as an integral part of the land upon which it stands; it is not subject to levy and sale upon execution as chattel property; it descends with the land to the heir, and passes to the vendor with the soil. Jones *v.* Timmons, 21 Ohio St. 596. Coal, petroleum, building stone, and many other substances constituting integral parts of the land, have become articles of commerce, and easily detached and removed, and, when detached and removed, become personal property, as well as fallen timber; but no case is found in which it is suggested that sales of such substances, with a view to their immediate removal, would not be within the statute. Sales of growing timber are as likely to become the subjects of fraud and perjury as are the other integral parts of the land; and the question whether such sale is a sale of an interest in or concerning lands should depend not upon the intention of the parties, but upon the legal character of the subject of the contract, which, in the case of growing timber, is that of realty. This rule has the additional merit of being clear, simple, and of easy application, — qualities entitled to substantial weight in choosing between conflicting principles. Whether circumstances of part performance might require a modification of this rule is not before the court, and has not been considered. *Judgment affirmed.*[1]

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[1] Prater *v.* Campbell, 60 S. W. Rep. 918 (Ky.) *acc.* See, also, Sterling *v.* Baldwin, 42 Vt. 306.

[2] Haflin *v.* Bingham, 56 Ala. 574; Coody *v.* Gress Lumber Co., 82 Ga. 793; Hostetter *v.* Auman, 119 Ind. 7; Kileen *v.* Kennedy, 90 Minn. 414; Harrell *v.* Miller, 35 Miss. 700; Walton *v.* Lowrey, 74 Miss. 484; Mizell *v.* Burnett, 4 Jones (N. C.) 249; Drake *v.* Howell, 133 N. C. 162; Clark *v.* Guest, 54 Ohio St. 298; Miller *v.* Zufall, 113 Pa. 317; Fluharty *v.* Mills, 49 W. Va. 446; Seymour *v.* Cushway, 100 Wis. 580, *acc.*

A sale of bark on standing trees is similar. Thomson *v.* Poor, 57 Hun, 285.

HUMBLE *v.* MITCHELL.

In the Queen's Bench, November 27, 1839.

[*Reported in* 11 *Adolphus & Ellis*, 205.]

Assumpsit by the purchaser of shares in a joint-stock company, called the Northern and Central Bank of England, against the vendor for refusing to sign a notice of transfer tendered to him for signature, and to deliver the certificates of the shares, without which the shares could not be transferred.

Pleas. 1. The Statute of Frauds.

Replication, to the first plea, denying that the contract was for the sale of goods, wares, etc. Issue thereon.

At the trial of the cause before Coleridge, J., at the Liverpool spring assizes, 1838, the jury found a verdict for the plaintiff, subject to a motion to enter a verdict for the defendant. In the following Easter term Alexander obtained a rule *nisi* according to the leave reserved, citing *Ex parte* Vallance, 2 Deacon, B. C. 354.

Cresswell and *Crompton* now showed cause.

Alexander, contra.

Lord Denman, C. J. . . . The point is whether the shares in this company are goods, wares, or merchandises, within the meaning of § 17 of the Statute of Frauds. It appears that no case has been found directly in point; but it is contended that the decisions upon reputed ownership are applicable, and that there is no material distinction between the words used in the Statute of Frauds, and in the Bankrupt Act. I think that both the language and the intention of the two acts are distinguishable, and that the decisions upon the latter act cannot be reasonably extended to the Statute of Frauds. Shares in a joint-stock company like this are mere *choses in action* incapable of delivery, and not within the scope of the 17th section. A contract in writing was therefore unnecessary.

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[1] A portion of the opinion is omitted.

PATTESON, WILLIAMS, and COLERIDGE, JJ., concurred.

Rule discharged.[1]

SECTION III.

"FOR THE PRICE OF TEN POUNDS STERLING OR UPWARDS."

BALDEY AND ANOTHER *v.* PARKER.

IN THE KING'S BENCH, JUNE 5, 1823.

[*Reported in* 2 *Barnewall & Cresswell*, 37.]

ASSUMPSIT for goods sold and delivered. Plea, general issue. At the trial before Abbott, C. J., at the London sittings after Trinity term, 1822, the following appeared to be the facts of the case: The plaintiffs are linen-drapers, and the defendant came to their shop and bargained for various articles. A separate price was agreed upon for each, and no one article was of the value of £10. Some were measured in his presence; some he marked with a pencil; others he assisted in cutting from a larger bulk. He then desired an account of the whole to be sent to his house, and went away. A bill of parcels was accordingly made out and sent by a shopman. The amount of the goods was £70. The defendant looked at the account, and asked what discount would be allowed for ready money, and was told £5 per cent; he replied that it was too little, and requested to see the person of whom he bought the goods (Baldey), as he could bargain with him respecting the discount, and said that he ought to be allowed £20 per cent. The goods were afterwards sent to the defendant's house, and he refused to accept them. The Lord Chief Justice thought that this was a contract for goods of more than the value of £10 within the meaning of the 17th section of the Statute of Frauds, and not within any of the exceptions there mentioned, and directed a nonsuit; but gave the plaintiffs leave to move to enter a verdict in their favor for £70. A rule having accordingly been obtained for that purpose,

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[1] It is well settled in England that shares of stock are not within the statute. Bradley *v.* Holdsworth, 3 M. & W. 422; Knight *v.* Barber, 16 M. & W. 66; Heseltine *v.* Siggers, 1 Ex. 856; Tempest *v.* Kilner, 3 C. B. 249; Bowlby *v.* Bell, 3 C. B. 284; Duncuft *v.* Albrecht, 12 Sim. 189. Nor are *choses in action* generally. Colonial Bank *v.* Whinney, 30 Ch. D. 261, 283, Benjamin on Sales (6th Am. ed.), 110. Compare Evans *v.* Davies, (1893) 2 Ch. 216.

In the United States a wider effect is generally given to statutes of frauds. In some states, as New York and Wisconsin, *choses in action* are in terms included. See Artcher *v.* Zeh, 5 Hill, 200; Peabody *v.* Speyers, 56 N. Y. 200; Tompkins *v.* Sheehan, 158 N. Y. 617; Spear *v.* Bach, 82 Wis. 192. But even under statutes similar to the English original, shares of stock are held to be included. Mayer *v.* Child, 47 Cal. 142, 144; North *v.* Forest, 15 Conn. 400; Banta *v.* Chicago, 172 Ill. 204, 218; Pray *v.* Mitchell, 60 Me. 430; Colvin *v.* Williams, 3 H. & J. 38; Tisdale *v.* Harris, 20 Pick. 9; Boardman *v.* Cutter, 128 Mass. 388; Fine *v.* Hornsby, 2 Mo. App. 61; Bernhardt *v.* Walls, 29 Mo. App. 206. Webb *v.* Baltimore, &c. Railroad, 77 Md. 92, follows the English decisions, and discredits a dictum to the contrary in Colvin *v.* Williams, *supra.* See also Rogers *v.* Burr, 105 Ga. 432. Compare Meehan *v.* Sharp, 151 Mass. 564; Green *v.* Brookins, 23 Mich. 48. Likewise a bond and mortgage are within the statute, Greenwood *v.* Law, 55 N. J. L. 168; and bills and notes, Hudson *v.* Weir, 29 Ala. 294; Gooch *v.* Holmes, 41 Me. 523; Pray *v.* Mitchell, 60 Me. 430, 435; Baldwin *v.* Williams, 3 Met. 365; Somerby *v.* Buntin, 118 Mass. 279. But see *contra* Vawter *v.* Griffin, 40 Ind. 593; Whittemore *v.* Gibbs, 24 N. H. 484. In Somerby *v.* Buntin (as also in Jones *v.* Reynolds, 120 N. Y. 213) it was decided that an oral agreement for the sale of an interest in an invention before letters-patent had been obtained might be enforced, and the court said: "The words of the statute have never yet been extended by any court beyond securities which are subjects of common sale and barter, and which have a visible and palpable form." These words are quoted with approval in Meehan *v.* Sharp, 151 Mass. 564. But in Walker *v.* Supple, 54 Ga. 178, and French *v.* Schoonmaker, 69 N. J. L. 6, a sale of a simple contract debt was held within the statute.

Scarlett and *E. Lawes* now showed cause.

Denman and *Platt*, contra.

ABBOTT, C. J. We have given our opinion upon more than one occasion that the 29 Car. 2, c. 3, is a highly beneficial and remedial statute. We are therefore bound so to construe it as to further the object and intention of the Legislature, which was the prevention of fraud. It appeared from the facts of this case that the defendant went into the plaintiff's shop and bargained for various articles. Some were severed from a larger bulk, and some he marked in order to satisfy himself that the same were afterwards sent home to him. The first question is, whether this was one entire contract for the sale of all the goods. By holding that it was not, we should entirely defeat the object of the statute. For then persons intending to buy many articles at one time, amounting in the whole to a large price, might withdraw the case from the operation of the statute by making a separate bargain for each article. Looking at the whole transaction, I am of opinion that the parties must be considered to have made one entire contract for the whole of the articles. The plaintiffs therefore cannot maintain this action unless they can show that the case is within the exception of the 29 Car. 2, c. 3, § 17. Now, the words of that exception are peculiar: "except the buyer shall accept part of the goods so sold, and actually receive the same." It would be difficult to find words more distinctly denoting an actual transfer of the article from the seller, and an actual taking possession of it by the buyer. If we held that such a transfer and acceptance were complete in this case, it would seem to follow as a necessary consequence that the vendee might maintain trover without paying for the goods, and leave the vendor to his action for the price. Such a doctrine would be highly injurious to trade, and it is satisfactory to find that the law warrants us in saying that this transaction had no such effect.

HOLROYD, J. I am of the same opinion. The intention of the statute was that certain requisites should be observed in all contracts for the sale of goods for the price of £10 and upwards. This was all one transaction, though composed of different parts. At first it appears to have been a contract for goods of less value than £10, but in the course of the dealing it grew to a contract for a much larger amount. At last, therefore, it was one entire contract within the meaning and mischief of the Statute of Frauds, it being the intention of that statute that where the contract, either at the commencement or at the conclusion, amounted to or exceeded the value of £10, it should not bind unless the requisites there mentioned were complied with. The danger of false testimony is quite as great where the bargain is ultimately of the value of £10, as if it had been originally of that amount. It must, therefore, be considered as one contract within the meaning of the act. With respect to the exception in the 17th section, it may perhaps have been the intention of the Legislature to guard against mistake where the parties mean honestly as well as against wilful fraud; and the things required to be done will have the effect of answering both those ends. The words are, "except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized." Each of those particulars either shows the bargain to be complete, or still further, that it has been actually in part performed. The change of possession does not, in ordinary cases, take place until the completion of the bargain; part payment also shows the completion of it; and in like manner a note or memorandum in writing signed by the parties plainly proves that they understood the terms upon which they were dealing, and meant finally to bind themselves by the contract therein stated. In the present case there is nothing to show that some further arrangement might not remain unsettled after the price for each article had been agreed upon. There was neither note nor memorandum in writing; no part of the price was paid, nor was there any such change of possession as that contemplated by the statute. Upon a sale of specific goods for a specific price, by parting with the possession the seller parts with his lien. The statute contemplates such a parting with the possession; and therefore as long as the seller preserves his control over the goods so as to retain his lien, he prevents the vendee from accepting and receiving them as his own within the meaning of the statute. *Rule discharged.*[1]

HARMAN *v.* REEVE.

In the Common Pleas, May 31, 1856.

[*Reported in* 25 *Law Journal Reports, Common Pleas,* 257.]

The declaration stated that on the 28th of June, 1855, in consideration that the plaintiff bargained with the defendant to sell, and then sold to him, a certain mare and foal, and that the plaintiff would at his own expense keep and feed the said mare and foal for a certain time, to wit, until Michaelmas then next ensuing, and that the plaintiff would at his own expense maintain, feed, and keep a certain other mare and foal belonging to the defendant for and during the period of six weeks; the defendant agreed to purchase from the plaintiff the mare and foal first mentioned, and to fetch the same away from the plaintiff's at Michaelmas aforesaid, and pay to the plaintiff the sum of £30. Averment of performance by the plaintiff of all things on his part to be performed; and that all things had happened to entitle the plaintiff to have the contract performed on the defendant's part. Breach, that the defendant did not nor would fetch away the mare and foal so agreed to be purchased and fetched away, or either of them, or pay to the plaintiff the said sum of £30. Special damage.

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[1] Bayley and Best, JJ., delivered brief concurring opinions.

Plea denying the contract.

The cause was tried before Jervis, C. J., at the last spring assizes for Norfolk, when, the plaintiff having proved his case as stated in the declaration, it was objected on behalf of the defendant that the contract was not in writing, as required by the 17th section of the Statute of Frauds; whereupon his lordship nonsuited the plaintiff, and reserved leave to him to move to enter a verdict for £30.

Byles, Serjt., now showed cause.

O'Malley and *Couch*, in support of the rule.

JERVIS, C. J. I am of opinion that this rule should be discharged. It is now well settled that the 7th section of Lord Tenterden's Act, 9 Geo. 4, c. 14, and the 17th section of the Statute of Frauds are to be read together, and the enactments of the latter statute are extended to all contracts for the sale of goods of the value of £10 and upwards. The effect of that is to substitute the word "value" for the word "price" in the 17th section of the Statute of Frauds, so as to adopt one uniform rule in all cases; and the 17th section must now be read, "no contract for the sale of any goods, &c., of the *value* of £10 or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part payment, or that some note or memorandum in writing of the said bargain be made," &c. Now, the present is the case of a contract for the sale of goods above the value of £10, for there is no doubt that the plaintiff's mare and foal were worth more than £10; and although that may not very distinctly appear upon the face of the contract, still it might and would have been shown by parol evidence. Then it is a contract for the sale of the plaintiff's mare and foal above the value of £10; and it is not the less so because something else is included in it; and there is no note or memorandum in writing. *Prima facie*, therefore, the case is within the statute, the principal subject-matter of the contract being the sale of the plaintiff's mare and foal to the defendant, the rest being merely ancillary to it; but even if this be not so, it is still a contract for the sale of goods above the value of £10, and as such I think cannot be enforced. But then it is argued that there has been an acceptance, which takes the case out of the statute. I think not, for there has been no acceptance of the "goods so sold," — that is, of the plaintiff's mare and foal, — but the defendant has had the enjoyment of something else engrafted upon the contract, and that does not satisfy the statute. And there is no hardship in our so deciding, for the plaintiff is still at liberty to recover for the price of the agistment of the defendant's mare and foal. The answer given to this suggestion by Mr. Couch is, that the plaintiff would not have contracted for the agistment of the defendant's mare and foal unless the whole contract had been entered into, and that it is unfair that he should recover for part only. But that is a sort of thing that occurs daily. I agree to let a house to a man for a term of years, and he enters under a promise of a lease and occupies for a year, when I sue him for use and occupation. It would be no answer for him to say, "I should not have entered at all, unless you had agreed to grant me a lease." If entitled to a lease, it is his own fault if he does not get it; and it is no reason because by his own fault he has failed to get all he was entitled to, that he should not pay for what he has had. In this case the plaintiff may recover for the agistment of the defendant's mare and foal when he properly sues for it; but he cannot recover the price of his own mare and foal. "It by no means follows," as said by Bayley, B., "because you cannot sustain a contract in the whole, you cannot sustain it in part, provided your declaration be so framed as to meet the proof of that part of the contract which is good."

Rule discharged.[1]

SECTION IV.

"SHALL BE ALLOWED TO BE GOOD."

GUSTAVE AMSINCK *v.* AMERICAN INSURANCE COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH 18, 1879 — JULY 10, 1880.

[*Reported in* 129 *Massachusetts,* 185.]

ENDICOTT, J. Upon the facts reported, the court is of opinion that Machado had an insurable interest in the vessel at the time the policies attached, even if we assume that they took effect on July 5, 1876, the day of their date. On that day, the plaintiffs, as agents for Machado, made an oral agreement in New York with the owners of the vessel for her purchase for the sum of $11,000, payable on delivery of a proper bill of sale; and, having previously ascertained that the defendants would insure her, they gave directions to have the insurance closed. The policies were written on that day; the precise time of their delivery does not appear. The oral contract to purchase was reduced to writing and signed by the plaintiffs and the owners on July 7; and a portion of the purchase money was paid on that day. Possession was taken by Machado, the balance due was paid, and a bill of sale was duly executed to a third person in trust for Machado, who was a foreigner.

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[1] WILLIAMS and CROWDER, JJ., delivered concurring opinions. WILLES, J., had gone to chambers.

It is conceded by the defendants that Machado was the only person whose interest was insured, as appears by the declarations and the policies. But they contend that he had no insurable interest on July 5, for at that time he had only an oral contract for the purchase of the vessel; and that such a contract, being within the Statute of Frauds, and incapable of being enforced, gives no insurable interest.

But the oral contract to purchase was not void or illegal by reason of the Statute of Frauds. Indeed, the statute presupposes an existing lawful contract; it affects the remedy only as between the parties, and not the validity of the contract itself; and where the contract has actually been performed, even as between the parties themselves, it stands unaffected by the statute. It is therefore to be "treated as a valid subsisting contract when it comes in question between other parties for purposes other than a recovery upon it." Townsend *v.* Hargraves, 118 Mass. 325, 336; Cahill *v.* Bigelow, 18 Pick. 369; Beal *v.* Brown, 13 Allen, 114; Norton *v.* Simonds, 124 Mass. 19. See also Stone *v.* Dennison, 13 Pick. 1. Machado had under his oral agreement an interest in the vessel, and would have suffered a loss by her injury or destruction. Eastern Railroad *v.* Relief Ins. Co., 98 Mass. 420. This interest he could have assigned for a valuable consideration, and, if he had assigned it, all the rights afterwards perfected in him would have enured to the benefit of his assignee. Norton *v.* Simonds, *supra.* The case of Stockdale *v.* Dunlop, 6 M. & W. 224, relied upon by the defendants, does not sustain their position, for reasons which are stated in Townsend *v.* Hargraves, *supra.* *Verdicts set aside.*[1]

NOTE. — The decision in Amsinck *v.* American Ins. Co., was followed in Waiver *v.* Milford Mutual F. I. Co., 153 Mass. 335. Compare Stockdale *v.* Dunlop, 6 M. & W. 224, *per* PARKE, B.; Felthouse *v.* Bindley, 11 C. B. N. S. 869, *per* WILLES, J.; Pitney *v.* Glens Falls Ins. Co., 65 N. Y. 6; Cowell *v.* Phoenix Ins. Co., 126 N. C. 684.

In Maddison *v.* Alderson, 8 App. Cas. 467, 488, Lord BLACKBURN said: "I think it is now finally settled that the true construction of the Statute of Frauds, both the 4th and the 17th sections, is not to render the contracts within them void, still less illegal, but is to render the kind of evidence required indispensable when it is sought to enforce the contract."

In Townsend *v.* Hargraves, 118 Mass. 325, 333, COLT, J., said: "In carrying out its purpose, the statute only affects the modes of proof as to all contracts within it. If a memorandum or proof of any of the alternative requirements peculiar to the seventeenth section be furnished; if acceptance and actual receipt of part be shown; then the oral contract, as proved by the other evidence, is established with all the consequences which the common law attaches to it. If it be a completed contract according to common law rules, then, as between the parties at least, the property vests in the purchaser, and a right to the price in the seller, as soon as it is made, subject only to the seller's lien and right of stoppage *in transitu*.

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[1] Only so much of the opinion is here given as relates to the Statute of Frauds.

"Many points decided in the modern cases support by the strongest implication the construction here given. Thus, if one party has signed the memorandum, the contract can be enforced against him, though not against the other, — showing that the promise of the other is not wholly void, because it affords a good and valid consideration to support the promise which by reason of the memorandum may be enforced. Reuss *v.* Picksley, L. R. 1 Ex. 342.

"The memorandum is sufficient if it be only a letter written by the party to his own agent; or an entry or record in his own books; or even if it contain an express repudiation of the contract. And this because it is evidence of, but does not go to make the contract. Gibson *v.* Holland, L. R. 1 C. P. 1; Buxton *v.* Rust, L. R. 7 Ex 1. 279; Allen *v.* Bennet, 3 Taunt. 169; Tufts *v.* Plymouth Gold Mining Co., 14 Allen, 407; Argus Co. *v.* Albany, 55 N. Y. 495.

"A creditor, receiving payment from his debtor, without any direction as to its application, may apply it to a debt upon which no action can be maintained under the statute. Haynes *v.* Nice, 100 Mass. 327.

"The contract is treated as a subsisting valid contract when it comes in question between other parties for purposes other than a recovery upon it. Hence the statute cannot be used to charge a trustee, who may set up against his debt to the principal defendant a verbal promise within the statute to pay the defendant's debt to another for a greater amount. Cahill *v.* Bigelow, 18 Pick. 369. And a guarantor may recover of his principal a debt paid upon an unwritten guaranty. Beal *v.* Brown, 13 Allen, 114

"On the ground that the statute affects the remedy and not the validity of the contract, it has been held that an oral contract, good by the law of the place where made, will not be enforced in the courts of a country where the statute prevails. Leroux *v.* Brown, 12 C. B. 801. The defendant may always waive its protection, and the court will not interpose the defence. Middlesex Co. *v.* Osgood, 4 Gray, 447. And, except that the statute provides that no action shall be brought, there would be no good reason to hold that a memorandum signed, or an act of acceptance proved, at any time before the trial, would not be sufficient. Bill *v.* Bament, 9 M. & W. 36; Tisdale *v.* Harris, 20 Pick. 9.

"In a recent case in the Queen's Bench, a memorandum in writing made by the defendant, after the goods had been delivered to a carrier and been totally lost at sea while in his hands, was held sufficient to take the case out of the statute, and no notice is taken of the fact that the goods were not in existence when the memorandum was furnished. Leather Cloth Co. *v.* Hieronimus, L. R. 10 Q. B. 140."

In Jackson *v.* Stanfield, 37 Northeastern Rep. 14 (Indiana Supreme Court, April, 1894), which was an action for preventing performance of a contract with a third person for the sale of a large quantity of lumber, the defendants, the appellees, set up the defence that the contract was oral and within the Statute of Frauds. The court said: "If this be true, it is no concern of the appellees. Parties to contracts and their privies can alone take advantage of the fact that a contract is invalid under the Statute of Frauds. Many forms of expression by this and other courts illustrate the doctrine that a third person cannot make the Statute of Frauds available to overthrow a transaction between other persons; that the defence of this statute is purely a personal one, and cannot be made by strangers. Burrow *v.* Railroad Co., 107 Ind. 432; Bodkin *v.* Merit, 102 Ind. 293; Cool *v.* Peters Box, etc., Co., 87 Ind. 531; Dixon *v.* Duke, 85 Ind. 434; Wright *v.* Jones, 105 Ind. 17; Savage *v.* Lee, 101 Ind. 515; 8 Am. & Eng Enc. Law, 659, and cases cited. It concerns the remedy alone, and the modern law is well settled that, in the absence of a statutory provision to the contrary, the effect of the statute is not to render the agreement void, but simply to prevent its direct enforcement by the parties, and to refuse damages for its breach. 8 Am. & Eng. Enc. Law, 658, 659, and cases cited."

See, further, for a discussion of the effect of an oral contract within the Statute of Frauds, Browne on the Statute of Frauds, chapter VIII.; 9 American Law Review, 434-458; Taylor *v.* Great Eastern Ry. Co., [1901] 1 K. B. 774; Crane *v.* Powell, 139 N. Y. 379.

SECTION V.

"EXCEPT THE BUYER SHALL ACCEPT PART OF THE GOODS SO SOLD, AND ACTUALLY RECEIVE THE SAME."

CHAPLIN *v.* ROGERS.

IN THE KING'S BENCH, JANUARY 29, 1800.

[*Reported in* 1 *East,* 192.]

IN an action for goods sold and delivered the case proved was that, the parties being together in the plaintiff's farm-yard, the defendant, after some objections and doubts upon the quality of a stack of hay (particularly the inside part) then standing in the yard, agreed to take it at 2*s.* 6*d.* per hundred weight. Soon after he sent a farmer to look at it, whose opinion was unfavorable. But about two months afterwards another farmer of the name of Loft agreed with the defendant for the purchase of some of this hay still standing untouched in the plaintiff's yard, and the defendant told Loft to go there and ask what condition it was in, saying he had only agreed for it if it were good. The plaintiff having informed Loft it was in a good state, he agreed to give the defendant 3*s.* 9*d.* per hundred weight for it, the defendant having told him that he had agreed to give the plaintiff 3*s.* 6*d.* for it. Loft thereupon brought away thirty-six hundred weight; but this latter fact was without the knowledge and against the direction of the defendant. There was a contrariety of evidence as to the quality of the hay when the stack was afterwards cut. At the trial before Hotham, B., on the last Norfolk circuit, Sellon, Serjt., for the defendant, objected that the contract of sale was fraudulent and void by the Statute of Frauds, being for the sale of a commodity no part of which was delivered, and of which there was no acceptance by the defendant. But the learned judge left it to the jury to decide whether the sale had been fraudulent, and whether under the circumstances there had been an acceptance by the defendant; and they found for the plaintiff on both points, and gave him £50 damages, being the value of the hay at the price agreed for. In the last term a rule was obtained calling on the plaintiff to show cause why the verdict should not be set aside and a new trial had, on the grounds that the learned judge had left that as a question of fact to the jury which he himself ought to have decided as an objection in point of law arising on the Statute of Frauds; and because the evidence did not warrant the verdict.

Wilson now showed cause.

Garrow, contra.

LORD KENYON, C. J. It is of great consequence to preserve unimpaired the several provisions of the Statute of Frauds, which is one of the wisest laws in our statute book. My opinion will not infringe upon it; for here the report states that the question was specifically left to the jury whether or not there were an acceptance of the hay by the defendant, and they have found that there was, which puts an end to any question of law. I do not mean to disturb the settled construction of the statute, that in order to take a contract for the sale of goods of this value out of it there must be either a part delivery of the thing or a part payment of the consideration, or the agreement must be reduced to writing in the manner therein specified. But I am not satisfied in this case that the jury have not done rightly in finding the fact of a delivery. Where goods are ponderous, and incapable as here of being handed from one to another, there need not be an actual delivery; but it may be done by that which is tantamount, such as the delivery of the key of a warehouse in which the goods are lodged, or by delivery of other *indicia* of property. Now here the defendant dealt with this commodity afterwards as if it were in his actual possession; for he sold part of it to another person. Therefore, as upon the whole justice has been done, the verdict ought to stand.

The other judges agreed that there was sufficient evidence of a delivery to and acceptance by the defendant to leave to the jury.

Rule discharged.

HINDE *v.* WHITEHOUSE AND GALAN.

In the King's Bench, June 20, 1806.

[*Reported in* 7 *East,* 558.]

In assumpsit the plaintiff declared that on the 20th of September, 1805, at Liverpool, he was lawfully possessed of 300 hhds. of sugar, then lying in a certain warehouse there, and caused them to be put up for sale by public auction upon the following conditions: "The highest bidder to be the purchaser, and in case of dispute the lot to be put up again. The sugars to be taken with all faults and defects as they now are, at the king's weights and tares, with the allowance of draft, or re-weighed giving up the draft. To be at the purchaser's risk from the time of sale; and to be positively removed within two months, or rent to be paid for any longer time they may remain. Payment to be made on delivery of invoices by approved bills on London to the satisfaction of the seller not exceeding three months' date. Not to advance less than 3*d.* per cwt. at each bidding." Of which conditions the defendants had notice. That the defendants were the highest bidders at such sale for two lots of the said sugars, consisting of 27 hhds., and became purchasers of the same at the price of 74*s.* per cwt. at the king's weights and tares, with the allowance of draft. That the price of the 27 hhds. amounted to £1265 11*s.* 3*d.* That the plaintiff on the 23d of September delivered to the defendants an invoice of the 27 hhds., whereupon they became liable to pay him the £1265 11*s.* 3*d.* But that the defendants did not make payment, &c. There were other counts laying the contract more generally. To all which the defendants pleaded the general issue. The cause was tried before Rooke, J., at the last assizes at Lancaster; and the point in dispute was, whether the plaintiff or defendants should bear the loss of the sugars in question, which were knocked down to the defendants by the auctioneer on the 20th of September, and which were burned on the 22d of September by an accidental fire in one of the king's warehouses at Liverpool, where they were deposited. It was proved that the sugars, after being landed at Liverpool on the plaintiff's account, were deposited in one of the king's warehouses there, under the locks of the king and of the plaintiff, from whence they could not be removed until the duties were paid. Previous to the sale samples were taken of the sugars, about half a pound weight out of each hhd., according to custom. The printed catalogues of goods for sale were made out in this form and distributed: —

To be sold by auction, at Waterhouse and Sill's office on Friday, the 20th of September, 1805, at 1 o'clock, 300 hhds. Jamaica sugar, just landed. For particulars apply to Thomas Hinde, merchant, or Waterhouse and Sill, brokers.

Lot.	Mark.	Hhds.	Gross Wt.
1	I. A.	10	119 3 9
2	—	10	121 0 7
		&c.	
23	R. H.	12	169 3 13
		&c.	
27	—	15	207 2 13
		&c.	

At the time of the sale the auctioneer's printed catalogue lay on the desk before him, and he wrote down in the same line with the lot purchased the name of the highest bidder or purchaser, and the price bid per cwt., thus: —

Lot.	Mark.	Hhds.	Gross Wt.	
23	R. H.	12	169 3 13 74*s.*	Whitehouse and Galan.
27	—	15	207 2 13 74*s.*	Whitehouse and Galan.

The auction was holden at the time and place appointed, and was conducted by Mr. Sill as auctioneer. There was no other sale on the same day. The samples were exhibited in the sale room, and the lots in question were knocked down to the defendants as the highest bidders. At the commencement of the sale, the auctioneer having the catalogue, and also a written paper containing the conditions of sale in his left hand at the same time, read the latter paper, as the conditions on which the sale of the sugars mentioned in the catalogue was to proceed, to the company assembled (including one of the defendants), which paper was entitled, "Conditions of sugar sale, September 20th, 1805;" and which paper he afterwards deposited on his desk under the catalogue, on which catalogue he wrote his minutes of the bidders' names and prices; but the two papers were not fastened together in any manner. He also made the following declaration by parol to the bidders, which after the sale his clerk wrote down upon the paper of conditions of sale: "N. B. These sugars, gentlemen, have been drawn in the warehouse within the last two days; as such, no allowance whatever will be made, except where an evident error is manifest. The duties are not yet paid, but we intend paying them to-morrow morning." It is customary at such sales to give an option to the purchaser to take the sugars sold according to the weights taken at the king's beam, which were marked in the catalogue, or to have them re-weighed; to this option one of the conditions of sale points. But it is the constant practice for the purchaser to declare his option before he leaves the sale room if he wish to have them re-weighed, in order that the seller may know how to make out the invoices; otherwise, if he then declare no option, the invoices are made out according to the weight at the king's beam. In the present case the defendants declared no option. The sugars are always weighed on landing before they are put into the warehouse; on which weighing the duties are ascertained; and after that the samples are drawn. The samples are always delivered to the purchaser as a part of his purchase to make up the quantity, and were accordingly delivered to the defendants on the same day after the sale. The invoices were made out on Saturday the 21st of September, but were not delivered to the defendants till Monday the 23d, after the fire happened. The duties are always included in the price of the sugars, and such duties are always paid by the vendor, and are so required to be by the stat. 41 Geo. 3, c. 44,[1] and till paid the sugars cannot be removed from the king's warehouse. The sale was over by a quarter past 4 o'clock on Friday the 20th, but from the hours of office and the distance there was not time after the sale to get the entries made and to pay the duties. Saturday and Sunday were holidays at the custom house, and Monday the 23d was kept as such, being the king's coronation day. The circumstance of Saturday being a holiday was not recollected at the time of the sale, when the auctioneer declared that the duties should be paid on the morrow; but the circumstance was mentioned by the defendant Whitehouse to a clerk of Waterhouse and Sill. On this point the jury found that there was no neglect in the vendor as to the non-payment of the duties before the fire happened, which was in the course of Sunday the 22d. The auctioneer said that it often happened that the purchasers sold their sugars again before the duties were paid, and before they were delivered out of the warehouse; and that after the fire the defendants gave him instructions to take care of the goods and save what he could, without prejudice to the rights of the parties.

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[1] And *vide* 39 and 40 Geo. 3, c. 48.

Upon this proof it was objected that there was no legal evidence sufficient to fix the defendants with the purchase of these goods within the Statute of Frauds; there being no memorandum in writing of the contract signed by the parties or their authorized agent. That the auctioneer was no authorized agent of the vendees; but that, supposing he was so, the whole contract must appear upon the paper signed by him with the names of the defendants, whereas the conditions of sale, which formed an essential part of the contract, were not so signed, nor in any way connected, except by parol testimony which was inoperative by the statute, with the catalogues signed. And that the delivery of the samples was *diverso intuitu*, and not as part of the goods contracted for. The learned judge overruled the objection, but reserved the point ; and a verdict was found for the plaintiff for £1110. Whereupon a rule *nisi* was obtained in Easter term last for setting aside the verdict and granting a new trial upon the same grounds of objection; which rule was in this term opposed by *Park*, *Topping* and *Scarlett*, who showed cause, and supported by *Sir V. Gibbs*, *Marshall*, Serjt., *Holroyd*, and *Littledale*.

LORD ELLENBOROUGH, C. J. This was the case of a sale by auction of sugars in the king's warehouse, and which were afterwards burnt whilst they remained there under the king's lock and deposited there for the receiving of the king's duties. And the question is, Whether such a sale of those goods has taken place as is sufficient to change the property, and to make them the goods of the purchasers? The goods were put up to sale on the 20th of September, in pursuance of a catalogue of sale which had been previously distributed for that purpose, containing the lots, marks, number of hogsheads, and gross weights of the sugars, and referring for further particulars to the brokers; and they were sold on that day according to certain conditions of sale, which the auctioneer read to the bidders assembled as the conditions on which the sale of the sugars enumerated in the catalogue was to be made (his Lordship here described the catalogue, and read the conditions of sale as before stated) ; and the auctioneer also informed them that the duties were not then paid, but would be paid by the sellers on the morrow. It is admitted, however, that no laches is imputable to the sellers for the non-payment of the duties between the time of sale and the fire, which happened on the 22d of September. Two questions have been made on the 17th section of the Statute of Frauds, upon which questions it depends whether what has passed between the parties as to those goods constituted a valid contract of sale in respect to them. The first question argued upon the latter words of that section is this: Is the writing which has been put upon the catalogue of sale by the auctioneer "a note or memorandum in writing of the bargain made and signed by the parties to be charged by the contract, or their agents thereunto lawfully authorized," within the meaning of the statute? The second question is, Whether this be a case in which the buyer can be said to have "accepted part of the goods sold, and actually received the same?" But independently of and besides these questions, it has been said that sales by auction are not within the statute; and the case of Simon *v.* Motivos, reported in 3 Burr. 1921 and 1 Black. Rep. 599, has been relied on. The report in Burrow does not distinctly mention this latter point. But in the report of Sir W. Blackstone, Lord Mansfield speaking of sales by auction says, "The solemnity of that kind of sale precludes all perjury as to the fact itself of sale." He then mentions the case of a sale of sugars by auction, which were afterwards consumed by fire in the auction warehouse, and where the loss fell upon the buyer. He afterwards adds, "According to the inclination of my present opinion, auctions in general are not within the statute." And Mr. Justice Wilmot says that he "inclined to think that sales by auction, openly transacted before 500 people, are not within the statute." With all deference to these opinions, I do not at present feel any sufficient reason for dispensing with the express requisition of a memorandum in writing, in a statute applying to all sales of goods above the value of £10 without exception, merely because the *quantum* of parol evidence in the case of an auction is likely to render the danger of perjury less considerable. That argument in a degree applies to all sales in *market overt:* and if we once get loose from the positive words of the statute, it will become a question only of the *quantum* and degree of perjury in each particular instance: which opens a door to an indefiniteness of construction founded on all the varying circumstances of the time and frequency of persons attending the place of sale, and the like; which would be destructive of all certainty of practice, and render the rule of the statute perhaps more mischievous than beneficial to the trading world who are to be governed by it. I am not therefore prepared to say that sales by auction are not meant to be comprehended within the statute. Nor would I be understood as giving any conclusive opinion to the contrary: neither is it necessary that I should upon the present occasion. The first question on the letter of the statute is, Is this a memorandum of a bargain made by an agent of both parties? In respect to sales of goods, it has been uniformly so holden ever since the case of Simon *v.* Motivos; and it would be dangerous to break in upon a rule which affects all sales made by brokers acting between the parties buying and selling, and where the memorandum in the broker's book, and the bought and sold notes transcribed therefrom and delivered to the buyers and sellers respectively, have been holden a sufficient compliance with the statute to render the contract of sale binding on each. All the great transactions of sale in this great city are so conducted, and stand on this foundation of legality only; and it is too late, I conceive to draw it into question. Supposing the auctioneer or broker for sale to be the agent for both parties, the question then is, Has he made a memorandum of the bargain in this case? and it appears to me that he has not. The minute made on the catalogue of sale, which is not annexed to the conditions of sale, nor has any internal reference thereto by context or the like, is a mere memorandum of the name of a person whom perhaps we may intend to be the purchaser, and of the quantity and price of the goods, which we may perhaps on the foot of such memorandum also intend to have been sold to the person so named in the catalogue. But in treating it as such memorandum throughout, we must intend also (contrary to the fact) that the goods were sold for ready money, and unattended by the circumstances specified in the conditions of sale. And the conditions of sale, though as unsigned they cannot be evidence of the bargain itself, are yet capable of being given in evidence, and accordingly have been so, as a part of the transaction between the parties, and in order to show that it was on those conditions that the goods were sold. I am of opinion therefore that the mere writing on the catalogue, not being by any reference incorporated with the conditions of sale, is not a memorandum of a bargain under those conditions of sale.

As to the next question on the statute, inasmuch as the half pound sample of sugar out of each hogshead in this case is by the terms and conditions of sale so far treated as a part of the entire bulk to be delivered, that it is considered in the original weighing as constituting a part of the bulk actually weighed out to the buyer, and to be allowed for specifically if he should choose to have the commodity re-weighed, I cannot but consider it as a part of the goods sold under the terms of the sale, accepted and actually received as such by the buyer. And although it be delivered partly *alio intuitu*, namely, as a sample of quality, it does not therefore prevent its operating to another consistent intent also in pursuance of the purposes of the parties as expressed in the conditions of sale, namely, as a part delivery of the thing itself, as soon as in virtue of the bargain the buyer should be entitled to retain and should retain it accordingly.

As to the last point made in argument, viz., that there has been no effectual sale in this case made, because the commodity was incapable of delivery till the king's duties were paid, and which were to be paid by the seller, I think that the sale within the meaning of the parties to the conditions was complete, so as to cast the subsequent risk of loss upon the buyer. The words "time of sale" and "highest bidder to be the purchaser" all evidently relate to the transaction of selling at the time and place of auction; which was considered between them as effectual for the purpose of transferring the property, and the consequent risk of loss from the seller to the buyer, notwithstanding the intermediate right of custody or lien upon the goods in the crown until the duty should be paid. Besides, after earnest given the vendor cannot sell the goods to another without a default in the vendee; and therefore, if the vendee do not come and pay for and take away the goods, the vendor ought to go and request him; and then, if he do not come and pay for and take away the goods in a convenient time, the agreement is dissolved, and the vendor is at liberty to sell them to any other person. *Per* Holt, C. J., in Langford *v.* Administratrix of Tiler, Salk. 113. So in Noy's Maxims, 88, it is said: "If I sell my horse for money, I may keep him until I am paid; but I cannot have an action of debt until he be delivered; yet the property of the horse is by the bargain in the bargainor or buyer. But if he do presently tender me my money and I do refuse it, he may take the horse or have an action of detainment. And if the horse die in my stable between the bargain and the delivery, I may have an action of debt for my money, because by the bargain the property was in the buyer." On this latter ground therefore I do not think that the sale is incomplete. And as the statute has been satisfied by a part delivery of the goods sold, accepted by the buyer, I think the contract of sale valid as far as respects the statute also, and that the rule for a new trial should be discharged.

Some of the judges on the bench, conceiving that the Lord Chief Justice had questioned generally the authority of the case of Simon *v.* Metivier, desired to have it understood that they concurred in the judgment delivered in this case on the ground that a part delivery of the thing bought (which they considered the delivery to and acceptance of the samples by the buyer to be in this case) took the case out of the statute; leaving the authority of that case to stand as it did before on its own ground, untouched and unsanctioned by the present decision. But the Lord Chief Justice declared that the only part of that case which he meant to question, though it was unnecessary at present to decide upon it, was the opinion thrown out that auctions were not within the statute, of which he should reserve his approbation for future consideration. But as to the other point there decided, that supposing sales by auctioneers or brokers to be within the 17th section of the statute, the auctioneer or broker must be taken to be the agent of both parties, the practice had become so settled since the decision of that case that it would be dangerous to shake it, and it was not his intention to question it. *Rule discharged.*

ELMORE *v.* STONE.

IN THE COMMON PLEAS, FEBRUARY 9, 1809

[*Reported in* 1 *Taunton*, 457.]

THIS was an action brought to recover the price of two horses, which it was contended had been sold to the defendant. The declaration contained one count upon a bargain and sale, and another upon a sale and delivery Upon the trial of this cause at the Middlesex sittings in

Trinity term last, before Mansfield, C. J., it appeared that the plaintiff, who kept a livery-stable and dealt in horses, having demanded 180 guineas for these, the defendant, after offering a less price, which was rejected, at length sent word that "the horses were his, but that, as he had neither servant nor stable, the plaintiff must keep them at livery for him." The plaintiff upon this removed them out of his sale stable into another stable. Lens, Serjt., for the defendant, contended that, as this was a bargain and sale of goods of greater value than £10, a note in writing was necessary to be proved, because there was no sufficient delivery. Such a constructive delivery as this would not avail, he said, to take the case out of the statute. Mansfield, C. J., was of opinion that there was a sufficient delivery, but reserved the point; and the jury found a verdict for the plaintiff.

Best, Serjt., showed cause.

Lens, contra. *Cur. adv. vult.*

MANSFIELD, C. J., now delivered judgment. The objection made to this verdict was the want of a memorandum in writing of the sale, and of a delivery. I thought at the trial that there was no need of a memorandum in writing, because of the direction given that the horses should stand at livery. They were in fact put into another stable, but that is wholly immaterial. It was afterwards argued that this was not a sufficient delivery; but upon consideration we think that the horses were completely the horses of the defendant, and that when they stood at the plaintiff's stables they were in effect in the defendant's possession. There are many cases of constructive delivery where the price of goods may be recovered on a count for goods sold and delivered, instead of a count for goods bargained and sold. A common case is that of goods at a wharf, or in a warehouse, where the usual practice is that the key of the warehouse is delivered, or a note is given addressed to the wharfinger, who in consequence makes a new entry of the goods in the name of the vendee, although no transfer of the local situation or actual possession takes place. Thus in the present case, after the defendant had said that the horses must stand at livery, and the plaintiff had accepted the order, it made no difference whether they stood at livery at the vendor's stable, or whether they had been taken away and put in some other stable. The plaintiff possessed them from that time, not as the owner of the horses, but as any other livery-stable keeper might have them to keep. Under many events it might appear hard if the plaintiff should not continue to have a lien upon the horses which were in his own possession, so long as the price remained unpaid; but it was for him to consider that before he made his agreement. After he had assented to keep the horses at livery, they would on the decease of the defendant have become general assets; and so, if he had become bankrupt, they would have gone to his assignees. The plaintiff could not have retained them, although he had not received the price. Consequently the rule must be *Discharged.*

BLENKINSOP *v.* CLAYTON.

In the Common Pleas, June 20, 1817.

[*Reported in* 7 *Taunton*, 597.]

In this action the plaintiff declared for horses and goods sold and delivered, and for the keep of a horse sold to the defendant. Upon the trial of the cause at the York spring assizes, 1817, before Wood, B., the plaintiff proved that he had sent his servant with a horse to a fair to sell it, and that the defendant, seeing the horse, followed it into a stable, offered £45 for it, and said he should in half an hour have a stall in his stable vacant to receive it. The plaintiff's servant agreed to accept the sum named, and taking a shilling in his hand, drew the edge of it across the palm of the defendant's hand, and replaced the shilling in his own pocket, which the witnesses called striking off the bargain. The defendant afterwards brought a chapman to the stable, and stating to him that he had bought the horse, offered to sell it to him at a profit of £5, which the other, discovering a supposed unsoundness, declined; in consequence of which discovery the defendant returned to the plaintiff's stable, and declined his purchase. The plaintiff contended, first, that the act of striking off the bargain as above described bound the contract so as to satisfy the Statute of Frauds; secondly, that the defendant's declaration that he had bought the horse, and his attempt to resell it, was evidence that the sale and delivery were complete, and entitled the plaintiff to recover. Wood, B., reserved the points, subject whereto the jury found a verdict for the plaintiff.

Hullock, Serjt., in Easter term had obtained a rule *nisi* to set aside this verdict and enter a nonsuit, against which

Copley, Serjt., now showed cause. He contended, first, that the act called the striking off the bargain, which was a term well understood in the north of England, was such a part payment as complied with the Statute of Frauds. It was not invalidated by the money being instantly returned to the seller with the consent of the buyer. [But the whole court denied that there was ever any payment or transfer of the shilling, even for a moment.] Next, if a purchaser treats the property as his own, that proves a sufficient delivery, as was held by Lord Kenyon, C. J., in the case of the sale of a stack of hay (Chaplin *v.* Rogers, 1 East, 192), wherein the defendant had resold a part of it, though he afterwards refused to permit the second purchaser to take it. In Elmore *v.* Stone, 1 Taunt. 458, there was no actual delivery. The defendant cannot resort to the Statute of Frauds, after he has by his own act acknowledged the purchase. Searle *v.* Keeves, 2 Esp. N. P. Cas. 598.

Hullock, in support of his rule, denied that there was in this case any part payment or any constructive delivery.

Gibbs, C. J., interposing, relieved him. The court do not go all the way with the defendant on all his points; but the court is embarrassed by observing that it was not left to the jury to find whether there was any delivery or not; and on the first trial of the case of Chaplin *v.* Rogers the jury found there was an acceptance of the hay, and on the second trial they found that it had been delivered; and we are far from saying that we do not coincide with the learned Baron who tried the cause in his direction, but we think it ought to be left to the jury to find whether this was or was not a delivery; therefore there must be a new trial. This is very different from the case of the haystack, for there nothing more could be done to confer a possession.

Dallas, J. The only question here is, whether something else remained to be done; upon that point I have an opinion, but it is unnecessary here to disclose it, and I carefully abstain from stating what it is.

The court, altering the form of the rule, made it absolute for a new trial.[1]

TEMPEST *v.* FITZGERALD.

In the King's Bench, June 12, 1820.

[*Reported in* 3 *Barnewall & Alderson*, 680.]

Assumpsit for the price of a horse. Declaration contained counts for horses sold and delivered, bargained and sold, &c. Plea, general issue. At the trial before Park, J., at the last assizes for the county of Lancaster, the following facts were proved: In August, 1817, the defendant, then on a visit at the plaintiff's house, agreed to purchase a horse from him at the price of forty-five guineas, and to fetch it away about the 22d September as he went to Doncaster races. The parties understood it to be a ready-money bargain. The defendant said he wanted it for hunting, and the plaintiff proposed to put it in a course of physic during his absence. The defendant soon after quitted the plaintiff's house, and returned on the 20th September. He then ordered the horse to be taken out of the stable; he and his servant mounted, galloped, and leaped the horse, and after they had done so his servant cleaned him, and the defendant himself gave directions that a roller should be taken off and a fresh one put on, and that a strap should be put upon his neck, which was consequently done; he then asked the plaintiff's son if he would keep it for another week; he said that he would do it to oblige him. The defendant then said that he would call and pay for the horse when he returned from the Doncaster races, about the 26th or 27th September. He told plaintiff's groom that the horse ought to be galloped more, and that it was not then in a condition for hunting. The defendant returned on the 27th with the intention to take it away, but the horse having died on the 26th September he refused to pay the price. Upon these facts it was contended by the defendant's counsel that there had been no acceptance of the horse by him, so as to take the case out of the Statute of Frauds. The learned judge was of opinion that if the acts done by the defendant on the 20th September were to be considered as acts of ownership, that there was a sufficient acceptance; and he left it to the jury to say whether the riding of the horse on that day was by way of trial, or whether the defendant was then exercising an act of ownership; and whether the directions then given were by way of advice or as owner. If they thought that he was then exercising acts of ownership, then they were to find for the plaintiff; if otherwise, for the defendant. The jury found a verdict for the plaintiff. A rule *nisi* having been obtained for a new trial in last Easter term,

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[1] In Blackburn on Sale, (1st ed.) p. 33, after stating Chaplin *v.* Rogers, 1 East, 195, n.; Anderson *v.* Scott, 1 Camp. 235 n.; Hodgson *v.* LeBret, 1 Camp. 233; Elmore *v.* Stone, 1 Taunt. 458 and Blenkinsop *v.* Clayton, 7 Taunt. 597, the author says: "In all these cases there seems to have been ample evidence of an acceptance of the goods but scanty evidence of any actual receipt, if by that is to be understood a taking of possession; indeed, in Blenkinsop *v.* Clayton, as reported, there seems to have been none After the decision of that last case, the current of authority set the other way."

Scarlett and *Holt* now showed cause.

Cross, Serjt., and *Milner*, contra.

Abbott, C. J. The Statute of Frauds was made for wise and beneficial purposes, and ought to receive such a construction as will best accord with the plain and obvious meaning of the Legislature. By the 17th section it is enacted [quoting the section]. Now in this case there was not any earnest given, or any part payment, or any note or memorandum in writing. The question therefore is, whether the buyer had accepted part of the goods sold and actually received the same. Now the word "accepted" imports not merely that there should be a delivery by the seller, but that each party should do something by which the bargain should be bound. I do not mean, however, to say that if the buyer were to take away the goods without the assent of the seller, that would not be sufficient to bind him.[1] In this case payment of the price was to be an act concurrent with the delivery of the horse; at any rate there is nothing to show that either party understood that the one was to precede the other. In the first instance, therefore, this was a mere contract between the parties. It is urged, however, that there was evidence for the jury to find that the defendant had exercised acts of ownership as to the horse on the 20th September. It appears from the learned judge's report that on that day he came to the plaintiff's house, that he and his servant then rode the horse, and that he gave some directions as to its future treatment, and it is urged that these acts might be considered acts of ownership. I am of opinion, however, that the defendant had no right of property in the horse until the price was paid; he could not then exercise any right of ownership. If he had at that time rode away with the horse the plaintiff might have maintained trover. The distinction between this case and that of Blenkinsop *v.* Clayton is, that there the contract was not for ready money, but the horse was to be delivered within an hour, and the defendant treated it as his own by offering it for sale; here the express contract is for ready money, and the payment of the price is an act concurrent with the delivery of the horse. I think, therefore, that the rule for a new trial must be made absolute. *Rule absolute.*[1]

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[1] But see Baker *v.* Cuyler, 12 Barb. 667.

CARTER AND ANOTHER *v.* TOUSSAINT.

IN THE KING'S BENCH, JUNE 14, 1822.

[*Reported in* 5 *Barnewall & Alderson*, 855.]

ASSUMPSIT for the price of a horse, with the usual money counts. Plea, general issue. At the trial at the Middlesex sittings after last Hilary term, before Abbott, C. J., it appeared that the plaintiffs, who were farriers, sold to the defendant a race-horse by a verbal contract for £30. The horse at the time of the sale required to be fired, which was done with the approbation of the defendant and in his presence; and it was agreed that the horse should be kept by the plaintiffs for twenty days without any charge made for it. At the expiration of the twenty days the horse was, by the defendant's directions, taken by a servant of the plaintiffs to Kimpton Park, for the purpose of being turned out to grass there. It was there entered in the name of one of the plaintiffs, which was also done by the direction of the defendant, who was anxious that it might not be known that he kept a race-horse. No time was specified in the bargain for the payment of the price. The defendant afterwards refused to take the horse. The jury, under the direction of the Lord Chief Justice, found a verdict for the plaintiffs. Scarlett in last Easter term obtained a rule *nisi* for entering a nonsuit on the ground reserved at the trial, that there was not a sufficient acceptance by the defendant to take the case out of the 17th section of the Statute of Frauds.

Marryat and *Hawkins* showed cause.

Scarlett and *Lawes*, contra.

ABBOTT, C. J. In this case it appears there was a verbal bargain for the horse at £30, for the payment of which no time was fixed. The seller therefore was not compellable to deliver it until the price was paid. In Elmore *v.* Stone there was a contract of a similar description, but the court thought that the circumstance of the change of the stable altered the character in which the plaintiff there held possession of the horse. For the plaintiff, thereby consenting to have the horse placed in the livery stable, ceased to keep possession as owner, and held it only in his capacity of livery-stable keeper. There is no circumstance of that description in the present case. It is quite clear that the present plaintiffs kept possession of the horse as owners until it was sent to Kimpton Park. If indeed it had been sent there and entered in the defendant's name by his directions, I should have thought it would have amounted to an acceptance by him. But here it was entered in the plaintiffs' name, and the plaintiffs' character of owner remained unchanged from first to last, and they could not have been compelled to deliver it without the payment of the money. There was then no sufficient acceptance to take the case out of the Statute of Frauds; and consequently the action is not maintainable.

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[1] BAYLEY, HOLROYD, and BEST, JJ., delivered brief concurring opinions

BAYLEY, J. The Statute of Frauds is a remedial law, and we ought not to endeavor to strain the words in order to take a particular case out of the statute. By the 17th section it is provided that, in the case of a sale of goods above the value of £10, the buyer must accept and actually receive part of the goods so sold. There can be no acceptance or actual receipt by the buyer, unless there be a change of possession, and unless the seller divests himself of the possession of the goods, though but for a moment, the property remains in him. Here the plaintiffs had a lien on the horse, and were not compellable to part with the possession till the price was paid. Then the question is, Was there anything to deprive them of that right? It is said that the horse was fired, but after that he still remained in their possession. Then he was sent under the care of their servant to Kimpton Park, but that was no act of delivery to dispossess them of the horse. At Kimpton Park he was entered in the name of one of the plaintiffs, and they still, therefore, retained a control over him. How can it be said that the horse was in the possession of the defendant, when he had no right to compel a delivery to him. For he could not, on tendering the keep, maintain trover against the park-keeper, because the possession had not passed from the vendors to him. The case of Elmore *v.* Stone is distinguishable. There the original owner of the horse had stables in which he kept horses as owner, and others where he kept them as livery-stable keeper; and the court considered that, by changing the horse from the one to the other, he had divested himself of the possession and given up his lien. But there is no circumstance of that sort here. *Rule absolute.*[1]

BENTALL AND OTHERS, ASSIGNEES OF BAKER AND FARNLEY, BANKRUPTS, AND DYER *v.* BURN.

IN THE KING'S BENCH, NOVEMBER 9, 1824.

[*Reported in* 3 *Barnewall & Cresswell*, 423.]

ASSUMPSIT for goods bargained and sold and goods sold and delivered by Dyer and the bankrupts before their bankruptcy. This was an action brought to recover £13 14*s.*, the price of a hogshead of Sicilian wine sold to the defendant by the bankrupts, they being copartners with the other plaintiff, Dyer, who resided in Sicily. At the trial before Abbott, C. J., at the London sittings after last Trinity term, it appeared that the bankrupts had, on the 15th of February, 1822, sold, in the name of and on account ot the firm, to the defendant a hogshead of Sicilian wine, then lying in the London docks, at the price of £13 14*s.*, and at the same time a delivery order and invoice were made out and sent to the defendant, signed by the firm. But there was no contract in writing. On the 5th of June the defendant, on being applied to for payment, said that the former order had been lost, and that the wine had not been transferred to him in proper time, and he had consequently lost the sale of it; that he had not been allowed to taste it. It was proved that a delivery order is given where the wine is intended to be speedily removed, and that the party receiving it may get the goods mentioned in the order upon producing it at the London docks and paying the charges, which are always deducted from the price. Upon this evidence the Lord Chief Justice was of opinion that the acceptance of the delivery order by the vendee was not equivalent to an actual acceptance of the goods within the meaning of the Statute of Frauds; and he directed a nonsuit to be entered, with liberty to the plaintiffs to move to enter a verdict for them for the price of the wine.

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[1] HOLROYD, J., delivered a brief concurring opinion.

PER CURIAM. There could not have been any actual acceptance of the wine by the vendee until the dock company accepted the order for the delivery, and thereby assented to hold the wine as the agents of the vendee. They held it originally as the agents of the vendors, and as long as they continued so to hold it the property was unchanged. It has been said that the London Dock Company were bound by law, when required to hold the goods on account of the vendee. That may be true, and they might render themselves liable to an action for refusing so to do; but if they did wrongfully refuse to transfer the goods to the vendee, it is clear that there could not then be any actual acceptance of them by him until he actually took possession of them.

Rule refused.

ROHDE AND OTHERS *v.* THWAITES.

IN THE KING'S BENCH, HILARY TERM, 1827

[*Reported in* 6 *Barnewall & Cresswell*, 388.]

DECLARATION stated that on the 3d of December, 1825, the defendant bargained for and bought of the plaintiffs, and the plaintiffs at the request of the defendant sold to him certain goods, to wit, twenty hogsheads of sugar, at 56*s.* 6*d.* per cwt. to be delivered by the plaintiffs to the defendant upon request, and to be paid for at the expiration of two months then following; and in consideration thereof, and that the plaintiffs at the like request of the defendant had undertaken and faithfully promised the defendant to deliver the goods to him, he the defendant undertook and faithfully promised the plaintiffs to accept the goods when he should be requested, and to pay them the plaintiffs for the same at the expiration of the said credit. Averment, that the price of the goods amounted to a certain sum, to wit, &c., and that although the plaintiffs had always been ready and willing to deliver the goods to the defendant, and requested him to accept the same, and although the credit had expired, yet the defendant did not, nor would at the time when he was so requested, or at any time before or afterwards, accept the goods or pay the plaintiffs or either of them for the same, but refused so to do. There was then an *indebitatus* count for goods bargained and sold. The defendant suffered judgment to go by default. Upon the execution of the writ of inquiry the plaintiffs proved that a contract for the sale of twenty hogsheads of sugar was made on the 3d of December, 1825, at 56*s.* 6*d.* per cwt., but there was no sufficient note in writing to satisfy the Statute of Frauds. On that day the plaintiffs had in their warehouse on the floor, in bulk, a much larger quantity of sugar than would be required to fill up twenty hogsheads, but no part of it was in hogsheads. The defendant saw the sugar in this state in the plaintiffs' warehouse, and then made the contract in question. Four hogsheads were filled up and delivered to the defendant on the 10th of December, and a few days afterwards the plaintiffs filled up the remaining sixteen hogsheads, and gave notice to the defendant that they were ready, and required him to take them away; he said he would take them away as soon as he could. They were not weighed till February, 1826, when the plaintiffs delivered a bill of parcels to the defendant. The plaintiffs added to the bulk from time to time as sales were made, and it did not very distinctly appear whether the sixteen hogsheads were filled wholly with the same sugar which was in the warehouse on the 3d of December when the contract was made. The four hogsheads which were first delivered were filled with that sugar. It was admitted that there was sufficient evidence of a sale of the four hogsheads, inasmuch as there was an acceptance of them by the defendant. No contract in writing sufficient to satisfy the Statute of Frauds having been proved, it was insisted that there was no evidence of any contract of sale of the sixteen hogsheads of sugar, and that the plaintiffs could only recover for the four hogsheads which had been actually delivered; but the jury under the direction of the under-sheriff found a verdict for the value of the twenty hogsheads. A rule *nisi* for setting aside the writ of inquiry having been obtained by Hutchinson in Trinity term,

F. Pollock now showed cause.

Hutchinson, contra.

Bayley, J. Where a man sells part of a large parcel of goods, and it is at his option to select part for the vendee, he cannot maintain any action for goods bargained and sold until he has made that selection; but as soon as he appropriates part for the benefit of the vendee, the property in the article sold passes to the vendee, although the vendor is not bound to part with the possession until he is paid the price. Here there was a bargain by which the defendant undertook to take twenty hogsheads of sugar, to be prepared or filled up by the plaintiffs. Four were delivered; as to them there is no question, but as to the sixteen it is said that, as there was no note or memorandum of a contract in writing sufficient to satisfy the Statute of Frauds, there was no valid sale of them; and that the plaintiffs in their declaration having stated their claim to arise by virtue of a bargain and sale, cannot recover for more than the four hogsheads which were actually delivered to and accepted by the defendant; that in order to recover for the others they ought to have declared specially that, in consideration the plaintiffs would sell, the defendant promised to accept them. In answer to this it is said that there was an entire contract for twenty hogsheads, and that the defendant by receiving four had accepted part of the goods sold within the meaning of the 17th section of the Statute of Frauds. In fact the plaintiffs did appropriate for the benefit of the defendant sixteen hogsheads of sugar, and they communicated to the defendant that they had so appropriated them, and desired him to take them away; and the latter adopted that act of the plaintiffs, and said he would send for them as soon as he could. I am of opinion that by reason of that appropriation made by the plaintiffs, and assented to by the defendant, the property in the sixteen hogsheads of sugar passed to the vendee. That being so, the plaintiffs are entitled to recover the full value of the twenty hogsheads of sugar under the count for goods bargained and sold. The rule for setting aside this writ of inquiry must therefore be discharged.

HOLROYD, J. The sugars agreed to be sold being part of a larger parcel, the vendors were to select twenty hogsheads for the vendee. That selection was made by the plaintiffs, and they notified it to the defendant, and the latter then promised to take them away. That is equivalent to an actual acceptance of the sixteen hogsheads by the defendant. That acceptance made the goods his own, subject to the vendors' lien as to the price. If the sugars had afterwards been destroyed by fire, the loss must have fallen on the defendant. I am of opinion that the selection of the sixteen hogsheads by the plaintiffs, and the adoption of that act by the defendant, converted that which was before a mere agreement to sell into an actual sale, and that the property in the sugars thereby passed to the defendant; and consequently that they were entitled to recover to the value of the whole under the count for goods bargained and sold.

LITTLEDALE, J., concurred. *Rule discharged.*

DODSLEY *v.* VARLEY.

IN THE QUEEN'S BENCH, NOVEMBER 5 & 24, 1840.

[*Reported in* 12 *Adolphus & Ellis*, 632.]

ASSUMPSIT for goods bargained and sold. Plea, *non assumpsit.* On the trial before Littledale, J., at the last Nottingham assizes, it appeared that the action was brought for the price of wool bought of plaintiff by defendant through his agent. After the purchase the wool was deposited on the premises of a person named Townrow, under circumstances which will appear by the judgment of the court; and it had not been removed thence or paid for when the action was brought. The defendant's counsel urged, among other objections, that the evidence did not show a delivery and acceptance within stat. 29 Car. 2, c. 3, § 17. Verdict for the plaintiff.

Cur. adv. vult.

LORD DENMAN, C. J., in the same term (November 24) delivered judgment.

In this case, which was moved on three grounds for a nonsuit, we have examined our brother Littledale's notes, and are of opinion there should be no rule. The first and second grounds were that there was no proof of agency in Bamford, by whom the wools, the subject-matter of the action, were bought; or, if there were, that such agency had been countermanded before the contract was completed so as to satisfy the Statute of Frauds. (It is unnecessary to report the judgment on these points, which turned merely on the facts, and was in favor of the plaintiff.) It was contended, thirdly, that there was no contract completed by delivery and acceptance so as to satisfy the Statute of Frauds. The facts were, that the wool was bought while at the plaintiff's; the price was agreed on, but it would have to be weighed: it was then removed to the warehouse of a third person, where Bamford collected the wools which he purchased for defendant from various persons, and to which place the defendant sent sheeting for the packing up of such wools. There it was weighed together with the other wools, and packed, but it was not paid for. It was the usual course for the wool to remain at this place till paid for. No wish was expressed to take the opinion of the jury on the fact of agency, the defendant's counsel acquiescing in that of the judge, provided the circumstances would amount to it in point of law. We agree that they might; therefore all these must be taken to be the acts of the defendant. Then he has removed the plaintiff's wool to a place of deposit for his own wools; he has weighed it with his other purchases of wool; he has packed it in his own sheeting: everything is complete but the payment of the price. It was argued that, because by the course of dealing he was not to remove the wool to a distance before payment of the price,[1] the property had not passed to him, or that the plaintiff retained such a lien on it as was inconsistent with the notion of an actual delivery. We think that, upon this evidence, the place to which the wools were removed must be considered as the defendant's warehouse, and that he was in actual possession of it there as soon as it was weighed and packed; that it was thenceforward at his risk, and if burned must have been paid for by him. Consistently with this, however, the plaintiff had not what is commonly called a lien, determinable on the loss of possession, but a special interest, sometimes, but improperly, called a lien, growing out of his original ownership, independent of the actual possession, and consistent with the property being in the defendant. This he retained in respect of the term agreed on, that the goods should not be removed to their ultimate place of destination before payment. But this lien is consistent, as we have stated, with the possession having passed to the buyer, so that there may have been a delivery to and actual receipt by him. This, we think, is the proper conclusion upon the present evidence; and there will be no rule.

Rule refused.[2]

EDAN *v.* DUDFIELD.

IN THE QUEEN'S BENCH, JANUARY 12, 1841.

[*Reported in* 1 *Queen's Bench Reports,* 302.]

DEBT for goods sold and delivered, and on an account stated.

Pleas. 1. As to all but £1 9*s.* 2*d.*, parcel &c., *nunquam indebitatus.* Issue thereon.

2. As to the same, a set-off. Replication, denying the debt set off. Issue thereon.

3 As to the £1 9*s.* 2*d.*, tender of the same; which the plaintiff took out of court, and acknowledged satisfaction *pro tanto.*

On the trial before Lord Denman, C. J., at the Middlesex sittings after Hilary term, 1839, it appeared that the defendant was employed by the plaintiff to clear goods for him at the custom-house, and was accustomed to enter goods of the plaintiff, and did actually enter the goods now in question (German toys), then belonging to the plaintiff, in his own name. In the beginning of April, 1838, plaintiff was in defendant's debt to the amount of about £50, and defendant proposed to plaintiff that the goods should be sold, and that defendant should retain his debt out of the proceeds; the plaintiff assented to this, and gave defendant a written authority to sell them. Afterwards and before any sale, defendant, in conversation with an agent of plaintiff, said that he would keep the goods himself at the invoice price, less a discount of 15 per cent: this was communicated to plaintiff. The goods were subsequently sold by defendant about the end of April. Afterwards the defendant delivered an account current to the plaintiff, in which was an item, under date of April, 1838, "Two cases of toys, &c., sold for £120." The counsel for the defendant objected that there was no acceptance to satisfy § 17 of the Statute of Frauds; but the Lord Chief Justice held that there was a case for the jury, reserving leave to move for a nonsuit. *Verdict for plaintiff.*

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[1] The evidence of Bamford, the agent, was (after stating the deposit at Townrow's). It is a regular thing for the wool, when bought, to remain where it is kept until it is paid for.

[2] See Blackburn on Sale, pp. 38–41

Thomas showed cause.

Kelly, contra. *Cur. adv. vult.*

Lord Denman, C. J., in this term (January 12) delivered the judgment of the court. After stating the ground of motion to be that there was no memorandum in writing, nor, as the defendant alleged, any acceptance, his Lordship proceeded as follows: —

The facts were that the defendant had acted as agent for the plaintiff on several occasions in relation to certain merchandises imported from France, and that the goods in question were lying at the customhouse in the defendant's name, to be sold by him for the plaintiff. The plaintiff was considerably indebted to the defendant, who was pressing that a sale should be made that he might pay himself out of the proceeds, and an authority to sell dated 6th April was given by the plaintiff to the defendant, and produced in the course of the plaintiff's evidence. But a witness stated that at the end of the same month he had called on the defendant on behalf of the plaintiff, and that in that conversation the defendant finally agreed to buy these goods himself 15 per cent under the cost price. The defendant subsequently sold the goods and rendered a debtor and creditor account to the plaintiff, in which credit was given to the plaintiff for the goods by an item in these words: "Goods (describing them) sold for £120." The action was brought in effect for that sum, and the verdict passed accordingly.

The plaintiff argued that this parol contract of sale was binding within the statute, because the defendant had accepted the goods in selling them and keeping the money. This was denied; and it was said that the statute, requiring acceptance and actual receipt of the whole or part where there was no written memorandum, could not be satisfied in the case of one at the time of the bargain possessed of the goods, inasmuch as that circumstance prevents them from being delivered to him or actually received by him in virtue of the sale. At all events it was contended that no act could be relied on to prove acceptance and receipt but what was inconsistent with the purpose of the prior possession; whereas in this case all that was done, the sale and the account rendered, were perfectly consistent with the authority previously given and the defendant's character of agent. We have no doubt that one person in possession of another's goods may become the purchaser of them by parol, and may do subsequent acts without any writing between the parties which amount to acceptance [receipt?[1]]; and the effect of such acts, necessarily to be proved by parol evidence, must be submitted to the jury. We entertain this opinion after fully considering all the cases cited, especially Elmore *v.* Stone, 1 Taunt. 458; Nicholle *v.* Plume, 1 C. & P. 272; Maberley *v.* Sheppard, 10 Bing. 99;[2] agreeing that such evidence must be unequivocal, but thinking the question, whether it is so or not under all the circumstances, fact for the jury, not matter of law for the court.

It was indeed contended that parol evidence was inadmissible to explain the character of the acts relied on to prove acceptance; for that to admit it would let in all the inconvenience which the statute was intended to prevent. No case, however, warrants the holding the rule so strict: nor does convenience require it; for where there is the foundation of an act done to build upon, the admission of declarations to explain that act lets in only that unavoidable degree of uncertainty to which all transactions to be proved by ordinary parol evidence are liable. Upon this principle stat. 9 G. 4, c. 14, § 1, on a very analogous matter, has been construed in the Court of Exchequer. For, whilst in Willis *v.* Newham, 3 Y. & J. 518, it was held that part payment, to take a case out of the Statute of Limitations, could not be proved by a verbal acknowledgment only, it was held in Waters *v.* Tompkins, 2 C. M. & R. 723, s. c. Tyrwh. & Gr. 137, that, where a sum had been paid without any statement on what account, declarations were admissible to explain on what account. Therefore a nonsuit cannot be entered.

The motion for a new trial, on the ground that the verdict was against the evidence, was supported by some very strong observations on the probabilities of the case, which were not, however, exclusively in favor of the defendant. It was moved for also on defendant's affidavit, which we have thought it right to examine carefully with those on the other side. The answer which these give is complete: no subsequent information has been or can be obtained; and the defendant's case is narrowed to the improbability that that of his adversary can be true. But this has been already considered by the jury, who were satisfied with the proof of it by a witness whose character stands unimpeached. *Rule discharged.*[3]

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[1] See Benj. on Sales, § 173.

[2] And see Dodsley *v.* Varley, 12 A. & E. 632.

[3] Devine *v.* Warner, 75 Conn. 375, 379; Snider *v.* Thrall, 56 Wis. 674, *acc.*
See, also, Smith *v.* Bryant, 5 Md. 141.
Dorsey *v.* Pike, 50 Hun, 845; Follett Wool Co. *v.* Utica Trust Co., 84 N. Y. App. Div. 151; Linde *v.* Huntington, 37 N. Y. Misc. 212, *contra.*

BILL *v.* BAMENT.

In the Exchequer, November 11, 1841.

[*Reported in* 9 *Meeson & Welsby*, 36.]

Assumpsit for goods sold and delivered, and on an account stated. Plea, *non assumpsit.* At the trial before Lord Abinger, C. B., at the London sittings after Trinity term, the following facts appeared: —

The defendant ordered of one Harvey, who was an agent of the plaintiff under a *del credere* commission, a quantity of goods, including twenty dozen hair-brushes and twelve dozen clothes-brushes, to be paid for on delivery at a stipulated price, but no memorandum in writing of the bargain was made at the time. On receiving notice from Harvey that the brushes had arrived at his warehouse, the defendant on the 22d of March last went there, and directed a boy whom he saw there to alter the mark "No. 1" upon one of the packages to "No. 12," and to send the whole of the goods to the St. Catharine's Docks. The next day an invoice was delivered to the defendant, charging the brushes respectively at the rate of 8*s.* and 12*s.* each. The defendant objected to the price, alleging that by the contract, as he had understood it, the above were to be the prices of the brushes per dozen, and refused to pay for them. On the 24th of March the plaintiff commenced the present action for the price. On the 27th the defendant at Harvey's request wrote in Harvey's ledger, at the bottom of the page which contained the statement of the articles ordered by the defendant, and which page was headed "Bill & Co.," the following words: "Received the above, John Bament." The rest of the goods were sent to and received by the defendant. It was objected for the defendant that there was no evidence of any contract in writing, or of any acceptance of the brushes, sufficient to satisfy the 17th section of the Statute of Frauds. The Lord Chief Baron reserved the point, and the plaintiff had a verdict for the amount claimed, leave being reserved to the defendant to move to enter a nonsuit.

Thesiger and *Martin* now showed cause.

Erle (with whom was *Whateley*), contra.

Lord Abinger, C. B. If the question at the trial had turned altogether upon the acceptance, I should then have formed the same opinion as I do now. In order to make it such an acceptance as to satisfy the statute, it should appear that there was a delivery. Here Harvey was the plaintiff's agent, and sold for ready money; and he was not bound to deliver the goods until payment of the price. Now all that takes place is a direction by the defendant to alter the mark on the goods, and to send them to the docks; but the question is, whether this was done under such circumstances, and Harvey stood in such a situation, as that he was bound to send them to the docks. The acceptance, to be effectual under the statute, should be such as to devest the property in the goods out of the seller. Here the defendant probably meant to accept them, and to make Harvey his agent for shipping them. But can it be said that he was his agent to deliver at all events? I think clearly not. He was at liberty to say that he would not deliver to or ship for the defendant until the goods were paid for. There is nothing to show that he contracted to hold them as the defendant's agent, or by implication to make him his agent. Therefore, for want of a delivery, there was no sufficient acceptance of these goods. The rule will be absolute, but not for a nonsuit, as it appears that some goods were received by the defendant, but for a new trial on payment of costs by the plaintiff.

Parke, B. I concur in thinking that there was no evidence to go to the jury to satisfy the Statute of Frauds. With regard to the point which has been made by Mr. Martin, that a memorandum in writing after action brought is sufficient, it is certainly quite a new point; but I am clearly of opinion that it is untenable.[1] There must, in order to sustain the action, be a good contract in existence at the time of action brought; and to make it a good contract under the statute there must be one of the three requisites therein mentioned. I think therefore that a written memorandum, or part payment after action brought, is not sufficient to satisfy the statute. Then, to take the case out of the 17th section, there must be both delivery and acceptance; and the question is, whether they have been proved in the present case. I think they have not. I agree there was evidence for the jury of acceptance, or rather of intended acceptance. The direction to mark the goods was evidence to go to the jury *quo animo* the defendant took possession of them: so also the receipt was some evidence of an acceptance. But there must also be a delivery; and to constitute that the possession must have been parted with by the owner so as to deprive him of the right of lien. Harvey might have agreed to hold the goods as the warehouseman of the defendant, so as to deprive himself of the right to refuse to deliver them without payment of the price; but of that there was no proof. There was no evidence of actual marking of the goods, or that the order to mark was assented to by Harvey. I am of opinion, therefore, that there was no sufficient proof of acceptance to satisfy the statute, and that the case falls within the 17th section.

Gurney, B., and Rolfe, B., concurred.

Rule absolute accordingly.

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[1] Lucas *v.* Dixon, 22 Q. B. D. 357, *acc.* Remington *v.* Linthicum, 14 Pet. 84 (land), *contra.* See, also, Cash *v.* Clark, 61 Mo. App. 636.

LILLYWHITE *v.* DEVEREUX.

In the Exchequer, February 21, 1846.

[*Reported in* 15 *Meeson & Welsby*, 285.]

This was an action brought against the defendant as executrix in her own wrong of James Edward Devereux, deceased. The declaration contained amongst others a count for the use and occupation of a dwelling-house, and also a count for goods sold and delivered to the deceased in his lifetime, and promises by him. Nothing turned on the other two counts. At the trial before Tindal, C. J., at the last assizes for Surrey, it appeared that the defendant was the daughter of the deceased and had intermeddled with his property after his decease. It was proved in evidence that the house had been let furnished by the plaintiff to the deceased at £1 5*s.* per week. About the middle of December, 1845, the plaintiff, who was himself a tenant to a Wm. Kent, was desirous of getting rid of that tenancy from the 25th of the month, the end of the current year of his holding, and offered to sell the furniture of the house to the deceased for £50. This the deceased thought too much, but verbally agreed to have the goods valued, and pay as much as they should be found worth, Mr. Kent agreeing to accept the deceased as tenant from that day. On the 14th a valuer of the name of Piggott was sent for, with the approbation of both parties, who valued the goods at £80. This the defendant refused to give, but offered to give the amount, £50, at which the plaintiff had before offered to sell them. On Christmas eve, one Elland, the brother-in-law of the plaintiff, took the key out of the street door of the house and gave it to the defendant, — the deceased being at that time very ill, — with a view of giving up the house to the deceased, that a new holding should be commenced after that period under Kent. On that occasion the defendant said, after she received the key, "How about the furniture?" to which Elland replied, "You must settle about that with Wm. Lillywhite" (the plaintiff). Kent refused to receive the deceased as his tenant, and he continued to occupy the house and furniture as before, giving to the plaintiff, however, continually notice to take away the furniture, which he refused to do; and ultimately, about the 17th of March following, it was removed by the deceased to a broker's near, and notice thereof was given to the plaintiff. Soon afterwards the deceased removed to another house with his daughter. The action was brought to recover the rent up to this period, and also the price of the furniture. The Lord Chief Justice directed the jury, first, that there was no evidence of any change in the terms of the tenancy, as the intended holding under Kent had gone off, and without the consent of the plaintiff to letting the house at a lower rent than the £1 5*s.* per week; and, secondly, that it was for the jury to say, whether by continuing in possession after the valuation the deceased did not accept and take possession of the furniture at the valued price. The jury found a verdict on both counts, damages £92.

Dowling, Serjt., now showed cause.

Chambers and *Fortescue*, in support of the rule. *Cur. adv. vult.*

The judgment of the court was now delivered by

ALDERSON, B. This case was argued last term before my Lord Chief Baron, my brother Platt, and myself. The motion was that there should be a new trial unless the plaintiff would consent to reduce the verdict. There were two demands: One for the use and occupation of a house; and the question as to that was, whether the rate of charge should be as for a furnished or an unfurnished house; in the one case the amount of damages being, as to this part of the demand, £5, in the other £17 10*s*. The second demand was for the price of the furniture, alleged to have been sold by the plaintiff to the deceased. This question turned upon the fact, whether there had been an acceptance of goods by the testator, so as to take the case out of the operation of the Statute of Frauds: there was no contract in writing for the purchase. The Lord Chief Justice left the question to the jury, who found in favor of the plaintiff. The goods in question, the subject of dispute, were in the possession of the defendant at the time when the contract was made.

No doubt can be entertained, after the case of Edan *v.* Dudfield, which was well decided by the Court of Queen's Bench, that this is a question of fact for the jury; and that, if it appears that the conduct of a defendant in dealing with goods already in his possession is wholly inconsistent with the supposition that his former possession continues unchanged, he may properly be said to have accepted and actually received such goods under a contract, so as to take the case out of the operation of the Statute of Frauds; as for instance if he sells or attempts to sell goods, or if he disposes absolutely of the whole or any part of them or attempts to do so, or alters the nature of the property, or the like. But we think such facts must be clearly shown; and in this case, after careful consideration of all the facts contained in my Lord Chief Justice's notes, we can find no sufficient evidence of this sort. We therefore think the verdict of the jury as to this part of the case is altogether wrong, and that there really was no evidence of acceptance so as to take this case out of the operation of the Statute of Frauds. And if so, it is clear that the subsequent possession by the testator was the use and occupation of a furnished and not of an unfurnished house. We therefore think there should be a new trial unless the plaintiff consents to reduce the damages to £17 10*s*.

Rule absolute accordingly.

FARINA *v.* HOME.

In the Exchequer, November 16, 1846.

[*Reported in* 16 *Meeson & Welsby*, 119.]

Debt for goods sold and delivered, and on an account stated. Plea, *nunquam indebitatus.*

At the trial before the under-sheriff of Middlesex it appeared that the action was brought by the plaintiff, the well-known manufacturer of eau-de-Cologne, residing at the city of Cologne, to recover from the defendant, a dealer in eau-de-Cologne in London, the sum of £15, price of twenty-five dozen of eau-de-Cologne, which in July, 1845, the defendant had verbally ordered from the plaintiff. It was accordingly sent by the plaintiff from abroad to a shipping agent of the plaintiff in London named Brenchley, who received it and warehoused it with one Barber a wharfinger, at the same time informing the defendant of its arrival. On receipt of the goods Barber handed to Brenchley a delivery warrant dated 21st July, whereby they were made deliverable to Brenchley or his assignee by indorsement on payment of rent and charges from the 25th of July. Brenchley forthwith indorsed and sent it to the defendant. The defendant kept the warrant for about ten months; and, although repeatedly applied to to pay the price of and charges on the goods, he did not do so; and he refused also to give back the warrant, saying that he had sent it to his solicitor and that he intended to defend the action, for he had never ordered the goods; and adding that they would remain for the present in bond.

Upon these facts it was contended for the defendant that there was no evidence of the delivery and acceptance of the goods sufficient to satisfy the Statute of Frauds. The under-sheriff left the question to the jury, whether the defendant had accepted and received the goods, stating that to bring the case within the statute it must be an acceptance with the intention of taking possession as owner. The jury found a verdict for plaintiff, damages £16 11*s.*

Thomas showed cause.

Prentice, in support of the rule.

The judgment of the court was now delivered by

Parke, B. In this case, which was argued before us in the absence of the Lord Chief Baron a few days ago, the only point we wished to consider was, whether there was sufficient evidence of the acceptance and actual receipt of the goods to satisfy the 17th section of the Statute of Frauds. The evidence as to this part of the case was that, after the defendant had verbally ordered a quantity of eau-de-Cologne, and at the price of more than £10, from the plaintiff's agent in London (the plaintiff residing at Cologne), a case containing the quantity ordered was received by the agent, and warehoused by him with a wharfinger and warehouse-keeper who gave for it a document dated the 21st of July which is called a warrant, by which the case was made deliverable to the agent or his assignee by indorsement, on payment of rent and charges from the 25th of July, and the agent indorsed it to the defendant and sent it to him. This warrant the defendant kept for some months. He was repeatedly applied to for the charges upon and price of the eau-de-Cologne, which he did not pay; nor did he return the warrant when asked for it, but said he had sent it to his solicitor, and meant to defend the action, as he had never ordered the goods; and he further said the goods would remain at present in bond.

It was contended on the trial before the under-sheriff that there was no such evidence of the acceptance and receipt of the goods as to bind the bargain. The under-sheriff left the question of receipt and acceptance to the jury, stating, and correctly stating, that to bring the case within the statute the acceptance must be with the intention of taking possession as owner. The jury found a verdict for the plaintiff. The under-sheriff ordered the writ of trial to be retained, in order to allow time for an application to the court. On a motion for a new trial we intimated our opinion that there was evidence to go to the jury of the defendant's acceptance of the goods by retaining the delivery warrant; but Mr. Prentice insisted that there was no sufficient evidence of the actual receipt of the goods, that is, the delivery of the possession of the goods on behalf of the vendor to the vendee, and the receipt of the possession by the vendee; and that the delivery and receipt of the warrant was not in effect the same thing as the delivery and receipt of the goods; and we are all of that opinion. This warrant is no more than an engagement by the wharfinger to deliver to the consignee or any one he may appoint; and the wharfinger holds the goods as the agent of the consignee (who is the vendor's agent), and his possession is that of the consignee until an assignment has taken place, and the wharfinger has attorned, so to speak, to the assignee, and agreed with him to hold for him. Then, and not till then, the wharfinger is the agent or bailee of the assignee, and his possession that of the assignee, and then only is there a constructive delivery to him. In the mean time the warrant, and the indorsement of the warrant, is nothing more than an offer to hold the goods as the warehouseman of the assignee. The case is in principle the same as that of Bentall *v.* Burn, and others, which are stated and well discussed in a recent able work of Mr. Blackburn, "On the Contract of Sale," pp. 27–41, 297; and in Mr. C. Addison's work, p. 70. We all therefore think that, though there was sufficient evidence of the acceptance if the goods had been delivered to the defendant, there is none of the receipt; and therefore there must be a new trial.

Rule absolute.[1]

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[1] See, also, Boardman *v.* Spooner, 13 Allen, 353; Bassett *v.* Camp, 54 Vt. 232. *Conf.* Rodgers *v.* Phillips, 40 N. Y. 519, 527.

MORTON *v.* TIBBETT.

In the Queen's Bench, May 31, 1850.

[*Reported in* 15 *Queen's Bench Reports*, 428.]

Debt for goods sold and delivered, and goods bargained and sold Plea, *nunquam indebitatus.* Issue thereon.

On the trial before Pollock, C. B., at the Cambridgeshire spring assizes, 1849, it appeared that the action was brought to recover the price of fifty quarters of wheat. On 25th August, 1848, the plaintiff sold the wheat to the defendant by sample. The defendant said that he would send one Edgley, a general carrier and lighterman, on the following morning to receive the residue of the wheat in a lighter for the purpose of conveying it by water from March, where it then was, to Wisbeach; and the defendant himself took the sample away with him. On 26th August Edgley received the wheat accordingly. On the same day the defendant sold the wheat at a profit, by the same sample, to one Hampson at Wisbeach market. The wheat arrived at Wisbeach in due course on the evening of Monday the 28th August, and was tendered by Edgley to Hampson on the following morning, when he refused to take it, on the ground that it did not correspond with the sample. Up to this time the defendant had not seen the wheat; nor had any one examined it on his behalf. Notice of Hampson's repudiation of his contract was given to the defendant; and the defendant on Wednesday the 30th August sent a letter to the plaintiff repudiating his contract with the plaintiff on the same ground. There was no memorandum in writing of the bargain within §17 of the Statute of Frauds, 29 Car. 2, c. 3; and it was objected for the defendant that there was no evidence of acceptance and receipt to satisfy the requirements of the same section. The Lord Chief Baron overruled the objection; and the counsel for the defendant addressed the jury exclusively on the question of such acceptance and receipt. A verdict was found for the plaintiff, and leave given to move to enter a nonsuit, if the court should think either that there was no evidence of acceptance and receipt or no such evidence as justified the verdict. Worlledge in Easter term, 1849, obtained a rule *nisi* accordingly. In this term (May 22d),

Andrews and *O'Malley* showed cause.

Worlledge and *Couch*, contra. *Cur. adv. vult.*

Lord Campbell, C. J., now delivered judgment.

In this case the question submitted to us is, whether there was any evidence on which the jury could be justified in finding that the buyer accepted the goods and actually received the same, so as to render him liable as buyer, although he did not give anything in earnest to bind the bargain or in part payment, and there was no note or memorandum in writing of the bargain.

It would be very difficult to reconcile the cases on this subject; and the difference between them may be accounted for by the exact words of the 17th section of the Statute of Frauds not having been always had in recollection. Judges as well as counsel have supposed that, to dispense with a written memorandum of the bargain, there must first have been a receipt of the goods by the buyer, and after that an actual acceptance of the same. Hence perhaps has arisen the notion that there must have been such an acceptance as would preclude the buyer from questioning the quantity or quality of the goods, or in any way disputing that the contract has been fully performed by the vendor. But the words of the Act of Parliament are [stating them]. It is remarkable that, notwithstanding the importance of having a written memorandum of the bargain, the Legislature appears to have been willing that this might be dispensed with where by mutual consent there has been part performance. Hence the payment of any sum in earnest to bind the bargain or in part payment is sufficient. The same effect is given to the corresponding act by the vendor of delivering part of the goods sold to the buyer, if the buyer shall accept such part and actually receive the same. As part payment however minute the sum may be is sufficient, so part delivery however minute the portion may be is sufficient. This shows conclusively that the condition imposed was not the complete fulfilment of the contract to the satisfaction of the buyer. In truth the effect of fulfilling the condition is merely to waive written evidence of the contract and to allow the contract to be established by parol as before the Statute of Frauds passed. The question may then arise, whether it has been performed either on the one side or the other. The acceptance is to be something which is to precede or at any rate to be contemporaneous with the actual receipt of the goods, and is not to be a subsequent act after the goods have been actually received, weighed, measured, or examined. As the Act of Parliament expressly makes the acceptance and actual receipt of any part of the goods sold sufficient, it must be open to the buyer to object at all events to the quantity and quality of the residue, and even where there is a sale by sample that the residue offered does not correspond with the sample. We are therefore of opinion that, whether or not a delivery of the goods sold to a carrier or any agent of the buyer is sufficient, still there may be an acceptance and receipt within the meaning of the Act without the buyer having examined the goods or done anything to preclude him from contending that they do not correspond with the contract. The acceptance to let in parol evidence of the contract appears to us to be a different acceptance from that which affords conclusive evidence of the contract having been fulfilled.

We are therefore of opinion in this case that, although the defendant had done nothing which would have precluded him from objecting that the wheat delivered to Edgley was not according to the contract, there was evidence to justify the jury in finding that the defendant accepted and received it.

We will now examine the cases which are supposed to prove the doctrine that there can be no acceptance within the meaning of the Statute of Frauds unless the buyer is precluded from objecting that the vendor has not fully performed the contract on his part. The first of these was Howe *v.* Palmer, 3 B. & Ald. 321, which we clearly think was well decided, although we cannot concur in all the reasons given for the decision. There the only evidence of acceptance and receipt was that the agent of the vendor who had verbally sold to the defendant twelve bushels of tares, part of a larger quantity in the vendor's possession, had measured off twelve bushels of the tares, and set them apart for the purchaser. According to the contract they were to remain in the possession of the vendor till called for. The purchaser therefore neither had accepted nor received the goods. Abbott, C. J., does say: "If he had once accepted he could not afterwards make any objection, even if it turned out that the tares did not correspond with the sample." But this observation was quite unnecessary for the determination of the case; and, with the most sincere respect to the great judge from whom it fell, we do not think that it is applicable. The proper *ratio decidendi* seems to us to be given by Holroyd, J., where he says; "In this case there has been no actual receipt of any part of the goods sold within the usual meaning of the term, and I think that what has been done ought not to be considered in point of law as an acceptance. For supposing that it was made part of the contract in this case that the seller should set apart and measure the thing sold, that would not make the act of measuring amount to a virtual acceptance or receipt of the goods by the buyer." The next case relied upon is Tempest *v.* Fitzgerald, 3 B. & Ald. 680, where in an action for the price of a horse that had died after the time when he was sold by parol and before he was delivered or paid for, the question arose upon whom the loss should fall. The only evidence of acceptance and receipt was that while the horse remained in the possession of the vendor, the purchaser made his servant gallop the horse and gave some directions about his treatment, requesting that he might be kept by the vendor a week longer. The court held that there had been no acceptance and receipt of the horse by the purchaser. But the case has little connection with the doctrine contended for, that there must be an opportunity for the vendor to inspect the quality of the thing sold; and Abbott, C. J., founds his judgment upon this consideration, that the defendant had no right of property in the horse till the price was paid, and could not till then exercise any act of ownership over him. Holroyd, J., says: "There is no evidence to show that" the vendor "had ever parted with the possession" of the horse. Next comes Hanson *v.* Armitage, 5 B. & Ald. 557. There the vendor, who resided in London, having been in the habit of selling goods to a customer in the country and of delivering them to a wharfinger to be forwarded by the first ship, in pursuance of a verbal order from the customer delivered a parcel of goods to the wharfinger to be forwarded in the usual manner. The customer had done nothing beyond giving the verbal order for the goods. Abbott, C. J., in a very few words delivered the judgment of the court that an action could not be maintained for the price of the goods, on the ground that the acceptance in this case not being by the party himself was not sufficient, referring to Howe *v.* Palmer, 3 B. & Ald. 321, where he says: "It was held that there could be no actual acceptance so long as the buyer continued to have a right to object either to the *quantum* or quality of the goods." But the decision may well stand on other grounds; and we may observe that it is an actual receipt of the goods which the statute requires, and not an actual acceptance. Carter *v.* Toussaint, 5 B. & Ald. 855, was likewise relied upon, but it was merely (like Tempest *v.* Fitzgerald, 3 B. & Ald. 680), a case of a sale by parol of a horse that remained always in the possession and under the control of the vendor, so that he could not have been accepted and received by the purchaser. Abbott, C. J., says: "The plaintiff's character of owner remained unchanged from first to last." The next case is Smith *v.* Surman, 9 B. & C. 561, and there after a sale of timber by parol the purchaser had offered to sell the butts, and had given some directions about cross-cutting the timber; but the evidence clearly proved that the whole continued to remain in the possession of the vendor. The court, as might have been expected, held that there could be no receipt by the purchaser while the possession of the goods remained with the vendor. A very learned judge, my brother Parke, does unnecessarily add, 9 B. & C. 577: "That the later cases have established that, unless there has been such a dealing on the part of the purchaser as to deprive him of any right to object to the quantity or quality of the goods, or to deprive the seller of his right of lien, there cannot be any part acceptance." That there can be no acceptance and receipt by the purchaser while the lien of the vendor remains is clear enough, for the vendor's lien necessarily supposes that he retains the possession of the goods; but I must be permitted to doubt whether the cases referred to have established the residue of the rule. The last case cited on behalf of the defendant was Norman *v.* Phillips, 14 M. & W. 277. This case very much resembled Hanson *v.* Armitage, 5 B. & Ald. 557, and presented no stronger evidence of acceptance and receipt. The defendant living at Wallingford gave the plaintiff, a timber merchant in London, a verbal order for timber, directing it to be sent to the Paddington station of the Great Western Railway so that it might be forwarded to him at Wallingford. The timber was accordingly forwarded to the Wallingford station; but the defendant being informed of its arrival refused to have anything to do with it. The court held that although there might be a scintilla of evidence for the jury of an acceptance of the timber within the Statute of Frauds, yet there was not sufficient to warrant them in finding that there was such an acceptance; and the court set aside a verdict for the plaintiff as not warranted by the evidence. Alderson, B., says: "The true rule appears to me to be that acceptance and delivery under the Statute of Frauds means such an acceptance as precludes the purchaser from objecting to the quality of the goods." He adds what, with great deference, is a better reason: "The carrier is only an agent for the purpose of carrying, and here the purchaser himself immediately refused to take the goods." It was upon this reason that the rest of the court appears to have proceeded.

If there were such a rule as is contended for it would be decisive against the plaintiff in this case, for the defendant never had an opportunity of examining the goods sold; there is no evidence that Edgley was his agent for that purpose; and he had done nothing to preclude him from objecting to the quality of the wheat. But if there be no such rule, then surely there was evidence to submit to the jury and to justify them in finding an acceptance and receipt. He specially sent Edgley to receive the wheat: after the delivery of the wheat to his agent and when it was no longer in the possession of the vendor, instead of rejecting it as in other cases, he exercised an act of ownership over it by re-selling it at a profit, and altering its destination by sending it to another wharf, there to be delivered to his vendee. The wheat was then constructively in his own possession; and could such a re-sale and order take place without his having accepted and received the commodity? Does it lie in his mouth to say that he has not accepted that which he has re-sold and sent on to be delivered to another? At any rate is not this evidence from which such an acceptance and receipt may be inferred by the jury? Upon similar evidence the finding of an acceptance and receipt has been sanctioned by very eminent judges. In Hart *v.* Sattley, 3 Campb. 528, where goods had been verbally ordered to be sent fron London to Dartmouth, and were sent by a carrier employed by the defendant, and were not proved to have been rejected by him, although there was no proof that they had come to his hands, Chambre, J., is reported to have said: "I think under the circumstances of this case the defendant must be considered as having constituted the master of the ship his agent to accept and receive the goods." The plaintiff recovered a verdict which was not disturbed. In Chaplin *v.* Rogers, 1 East, 192, where a stack of hay being sold by parol to the defendant he, without paying for it or removing it, re-sold a part of it to another person who took it away, and the jury found that the defendant had accepted and received the stack of hay, Lord Kenyon said: "The question was specifically left to the jury whether or not there were an acceptance of the hay by the defendant, and they have found that there was, which puts an end to any question of law." "Here the defendant dealt with this commodity afterwards as if it were in his actual possession; for he sold part of it to another person" "The other judges agreed that there was sufficient evidence of a delivery to and acceptance by the defendant to leave to the jury." And the verdict for the plaintiff was confirmed. So in Blenkinsop *v.* Clayton, 7 Taunt. 597, Gibbs, C. J., and the whole Court of Common Pleas, agreed that if a person who has contracted for the purchase of goods offers to re-sell them as his own, whether this be proof of an acceptance and receipt of the goods by himself is a question for the jury. I will only further mention the well-considered case of Bushel *v.* Wheeler, 8 Jurist, 532, 15 Q. B. 442, note, decided in this court. The defendant residing in Herefordshire had verbally ordered goods from a manufacturer at Bristol; according to his orders they were sent to Hereford and deposited in a warehouse there. After they had been a considerable time there the defendant repudiated them. In an action for the price before a most learned and cautious judge, Mr. Justice Erskine, it was left to the jury whether upon the evidence the buyer had accepted and received the goods; and the verdict was for the defendant, with liberty to enter a verdict for the plaintiff if the court should be of opinion that there was an acceptance. A rule to show cause was granted; and cause being shown the court unanimously approved of the direction, but declined to take upon themselves to enter a verdict for the plaintiff, and made a rule absolute for a new trial. I particularly rely upon the pointed language in that case of my brother Coleridge, who, after observing that the acceptance required by the statute must be very clear and unequivocal, says that it may be constructive; and adds that "it is a question for the jury, whether under all the circumstances" "the acts which the buyer does or forbears to do are an acceptance or otherwise."

These are express decisions through a long course of years that there may be an acceptance and receipt of goods by a purchaser within the Statute of Frauds, although he has had no opportunity of examining them, and although he has done nothing to preclude himself from objecting that they do not correspond with the contract. We approve of these decisions, thinking that they do not infringe upon the Statute of Frauds, and that they conduce to fair dealing in trade.

We are therefore of opinion that in this case the rule for entering a nonsuit should be discharged. *Rule discharged.*

HUNT *v.* HECHT.

In the Exchequer, June 6, 1853.

[*Reported in* 8 *Exchequer Reports*, 814.]

Declaration for goods sold and delivered. Plea, never indebted.

At the trial before Martin, B., at the London sittings after Easter term, it appeared that in February last the defendant went to the warehouse of the plaintiff, who was a bone merchant, for the purpose of purchasing some bones. The defendant there inspected a heap consisting of ox bones mixed with cow bones and other bones of an inferior description. The defendant objected to the latter, but verbally agreed to purchase a quantity of the other bones, to be separated from the rest and to contain not more than 15 per cent of cow bones; and he directed them to be sent in sacks bearing particular marks to the wharf of one Barber in Lower Thames Street. Shortly afterwards the defendant sent to the plaintiff the following shipping note: —

BREWER'S, CHESTER'S, AND GALLEY QUAYS, LOWER THAMES STREET.
J. BARBER, Wharfinger and Warehouse-keeper.

Receive and ship per James Stuckbury & Sons, lighters, the undermentioned goods: —

MARK	NO.

Wharf charges to be paid by Hecht Brothers, London.

The above shipping note was enclosed in the following letter: —

35 SEETHING LANE, Feb. 7, 1853.

DEAR SIR, — We beg to enclose you shipping note for the bones, the leg bones to be marked $\frac{\text{OS}}{\text{A}}$, and the bullocks $\frac{\text{OS}}{\text{B}}$. Please fill up the number of bags in the shipping note and send the goods to the wharf, latest by Wednesday morning next. Waiting your invoice stating how many bags of each sort, we are, sir,

Yours sincerely, HECHT BROTHERS.

MR A. JARRED HUNT, LAMBETH.

The plaintiff accordingly sent fifty bags marked as requested, and filled up the shipping note. The bags were delivered at the wharf and received by the wharfinger on Wednesday the 9th of February, but the defendant was not aware of their having been sent until the following day when the invoice was received. The defendant then examined the bones, and refused to accept them, on the ground that they were not what he had bargained for. It was objected on behalf of the defendant that there was no evidence of acceptance and receipt to satisfy the requirements of the 17th section of the Statute of Frauds, 29 Car. 2, c. 3; and the learned judge being of that opinion nonsuited the plaintiff, reserving leave for him to move to enter a verdict for the amount claimed.

Bramwell showed cause.

Maule to support the rule.

MARTIN, B. The question is, Whether the defendant has accepted and actually received the goods bargained for? The contract was to buy such bones as were ordinary merchantable bones. It appears that there were various sorts of bones intermixed in a heap, and that there was no purchase of the bulk, but of a certain article to be selected from it. The defendant was only bound to accept merchantable bones; and an order is given to a wharfinger to receive those bones. No doubt in one sense the goods were received by the defendant, because they were received by a wharfinger directed by him to receive them. But the question is, whether there has been an acceptance to satisfy the statute. There are various authorities to show that, for the purpose of an acceptance within the statute, the vendee must have had the opportunity of exercising his judgment with respect to the article sent. Morton *v.* Tibbett, 15 Q. B. 428, has been cited as an authority to the contrary; but in reality that case decides no more than this, that where the purchaser of goods takes upon himself to exercise a dominion over them, and deals with them in a manner inconsistent with the right of property being in the vendor, that is evidence to justify the jury in finding that the vendee has accepted the goods and actually received the same. The court indeed there say that there may be an acceptance and receipt within the statute, although the vendee has had no opportunity of examining the goods, and although he has done nothing to preclude himself from objecting that they do not correspond with the contract. But in my opinion an acceptance to satisfy the statute must be something more than a mere receipt; it means some act done after the vendee has exercised or had the means of exercising his right of rejection.

Rule discharged.[1]

WILLIAM PARKER *v.* HENRY WALLIS AND ABRAHAM WALLIS.

IN THE QUEEN'S BENCH, MAY 5, 1855.

[*Reported in* 5 *Ellis & Blackburn,* 21.]

COUNT alleging that plaintiff sold to defendants turnip-seed then growing, to be harvested and thrashed by plaintiff and then delivered to defendants as they should direct; that the seed was harvested and thrashed, and plaintiff delivered part which was accepted and actually received by the defendants. General averments of performance. Breaches; that defendants would not accept the residue, nor pay for the part received.

Pleas: amongst others, that plaintiff did not sell to the defendants, nor did they buy of the plaintiff the seed; and that the plaintiff did not deliver, nor did the defendants accept the part. Issues thereon.

On the trial before Wightman, J., at the last spring assizes for Suffolk, the plaintiff gave evidence by which it appeared that the plaintiff was a farmer, and the defendants were in partnership as seed and corn merchants at Ipswich. On the 21st June, 1854, the plaintiff and the defendants being at Bury market verbally made a contract for the sale of seed of the value exceeding £10 to the effect set forth in the count; and the defendants named the railway to Ipswich as one mode by which the seed might, when harvested, be sent to them at Ipswich. In July the seed was harvested and thrashed; and on the 24th July twenty sacks of the seed were sent by the plaintiff by railway to the defendants at Ipswich. On Wednesday, 26th July, the twenty sacks arrived at Ipswich. On that same day the plaintiff and the defendant Abraham Wallis were both at Bury market. The defendant Abraham Wallis said to the plaintiff that a messenger had just come up from Ipswich from his brother Henry, to say that the seed sent by plaintiff had just arrived and was out of condition. The plaintiff said that the seed was in good condition, and so Abraham Wallis would find when he examined it. Abraham Wallis said he could say no more, as he had not seen it himself. The only evidence of this conversation was given by the plaintiff; and according to his recollection nothing more then passed. The following correspondence was given in evidence: —

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[1] POLLOCK, ALDERSON, and PLATT, BB., delivered brief concurring opinions

Defendants to plaintiff: —

IPSWICH, 7 Mo. 28.

RESPECTED FRIEND, — A personal inspection of the twenty sacks turnip-seed fully confirmed what we said on Wednesday. It is both hot and mouldy; and we must beg to decline it altogether. It now waits your instructions for removal.

Plaintiff to defendants: —

MILDENHALL, 31st July, 1854.

The twenty combes of turnip-seed was in good condition this day week when delivered, as good as any that I have delivered this season, which I have witness to prove, and I duly advised you of it; and as to what may have happened to it since, of course I cannot be accountable for. I have the remaining forty combes ready for delivery, waiting your order.

Defendants to plaintiff: —

IPSWICH, 8 Mo. 1, 1854.

As you have failed to fulfil your contract, we shall purchase seed elsewhere. The twenty sacks which you authorized us to receive for you, and to lay out thin in consequence of its being hot and mouldy, we have now directed to be returned to the Eastern Counties Railway Station to wait your orders, and must request you to return and empty sacks.

Plaintiff's attorney to defendants (extract): —

GENTLEMEN, — I am instructed by Mr. William Parker of Mildenhall to apply to you for payment of the turnip seed you purchased of him, twenty sacks of which have been delivered, and the remainder has been for some time past waiting your directions and standing at your expense. The authority you alluded to in your letter of the 1st instant is most positively denied by my client; and the date of the delivery to you, and of the letters passing between you and Mr. Parker, plainly show that such an authority could never have been given, and certainly never was contemplated by my client.

Defendants to plaintiff's attorney (extract): —

IPSWICH, 8 Mo. 8, 1854.

In reply to thy letter we beg to say that, as Mr. Parker's memory seems so very forgetful, we fortunately are able to remember for him; and we have full and sufficient witness to the authority upon which we acted, and to which allusion is made in our letter of the 1st instant, in our young man who stood by and heard the order given to us to receive it on his account and lay it out thin to cool.

The rest of the evidence of the plaintiff went to show that the seed in point of fact was good when it went to the railway; that the condition of the seed can easily be ascertained without spreading it out thin; and that prices had fallen very much between the 21st June and the 26th July.

The defendants claimed a nonsuit on the ground that there was no evidence to satisfy the Statute of Frauds. The learned judge directed a nonsuit, with leave to move to enter a verdict for £140 if there was evidence of an acceptance and actual receipt of any part of the turnip-seed.

D. Power and *H. Mills* now showed cause.

O'Malley and *Worlledge*, contra.

LORD CAMPBELL, C. J. I do not think we should be justified in making the rule absolute to enter a verdict for the plaintiff; for whether the evidence would have warranted the jury in finding that there was an acceptance is at least very doubtful; but at the same time I cannot say that there is not some evidence to go to the jury.

Of the law there is no doubt. To make an acceptance, it is not necessary that the vendee should have acted so as to preclude himself from afterwards making objection to the quality of the article delivered; but he must have done something indicating that he has accepted part of the goods and taken to them as owner. This may be indicated by his conduct, as when he does any act which would be justified if he was the owner of the goods and not otherwise. In such a case the vendee doing that act is supposed to have accepted the goods and become owner of them. Thus detention of the goods for a long and unreasonable time by the vendee is evidence that he has accepted them; but in the present case there was no detention of that kind before the letter of the 28th of July; and detention after that letter, stating that the seed was rejected and waited the plaintiff's order for its removal, amounted to nothing. But then it appears by the defendants' own letters that they had spread the seed out thin. That is an act of a doubtful character. If the seed was, as the defendants assert, hot and mouldy, I should say that spreading it out thin was an act done by the vendee, not as an act of ownership, but for the benefit of the vendor; but in this case there was evidence that the seed was good. Whether it was an act of acceptance depends on whether it was an act done by the defendants as owners of the goods, or an act done for the benefit of the article by the disappointed vendee acting for the benefit of the vendor. On the evidence it is left in doubt which it was; and I think that was a question for the jury. I think, therefore, that the rule should be moulded, and made absolute for a new trial.

Crompton, J. The question is, whether there is any evidence that the defendants in spreading out this seed thin acted as owners receiving it under the parol contract. Of the fact that they did so spread it out there is no doubt; but it is an act explainable on three suppositions: First, they may have spread it out by the authority of the vendor, the plaintiff; second, they may have done it for the benefit of the seed, a perishable article in such a condition as to render the step proper; third, they may have done the act as owners, spreading it out for their own convenience; for it is not denied that it was a more extensive act than was necessary for mere examination to see if it was good. Now there was contradictory evidence as to whether the plaintiff had authorized it; so the plaintiff was not bound by that first explanation, unless the jury found that there was authority. Then there was evidence that the seed was in such a condition that the defendants could not have done the act for its benefit; so that the plaintiff was not bound by that explanation. If these two were negatived by the jury, there remained the third explanation only; so that I cannot say that there is no evidence of an acceptance; but I think that the court do right to mould the rule, as the evidence is not sufficiently satisfactory to justify us in entering a verdict. *Rule absolute for a new trial.*[1]

MARVIN *v.* WALLIS.

In the Queen's Bench, June 5, 1856.

[*Reported in* 6 *Ellis & Blackburn,* 726.]

Action for money payable by defendant to plaintiff for horses, mares, and geldings, bargained and sold, and sold and delivered by plaintiff to defendant; and on accounts stated. Plea, never indebted, Issue thereon.

On the trial before Lord Campbell, C. J., at the last Warwickshire assizes, it appeared that the action was brought to recover the price of a horse. It was agreed that there had been a complete verbal bargain for the sale of the horse by the plaintiff to the defendant for a price above £10, and that about a fortnight afterwards the plaintiff sent the horse to the defendant, who refused to take or pay for him; alleging that the horse had been ill-used in the interval. The plaintiff's evidence was that the bargain was complete for immediate delivery; that after it was complete the plaintiff asked the defendant to lend him the horse for a few weeks till he got another, to which the defendant agreed if the plaintiff would take care of it; and that in consequence the plaintiff kept the horse from that time, not as vendor but as borrower of the horse. There was no part payment, nor any memorandum in writing. It was objected that there was no evidence to go to the jury of any acceptance and actual receipt of the horse. The Lord Chief Justice refused to stop the case. The defendant then gave evidence, according to which the original verbal bargain was that the horse should not be delivered for a month; and the plaintiff retained possession, not as a borrower, but in virtue of the original bargain. The Lord Chief Justice left the question to the jury, whether the verbal contract for the sale of the horse was complete before there was any agreement about the horse being retained by the plaintiff, and the horse was lent to the plaintiff by the defendant as his owner; or whether the retainer of the horse was part of the bargain. The jury found that the contract was complete before the permission to keep the horse was given to the plaintiff, and that the horse was lent by the defendant as his owner.

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[1] Wightman and Erle, JJ., delivered concurring opinions.

The Lord Chief Justice then directed a verdict for the plaintiff, with leave to move as after mentioned.

Hayes, Serjt., and *Bittleston* showed cause.

Mellor and *Field*, in support of the rule.

COLERIDGE, J. I am of opinion that we ought to discharge this rule. The question is, whether on the facts found by the jury the Statute of Frauds is satisfied, and whether there is any evidence for that finding. The Statute of Frauds requires an actual receipt, which implies delivery and acceptance. It is admitted that if there be an actual visible possession in the vendee for a single moment, that is enough: the question cannot turn on time. It must also be admitted that it is enough if a third party has such possession for the vendee. It is said that nothing short of that will do; and as I understand Mr. Field he contends that there must be some positive act, and that without that, words alone will not satisfy the statute. Here it is found that the bargain was complete, and that after that the vendor asked the vendee to lend him the horse for a specific purpose, to which the vendee assented. The vendor retains the apparent possession, but holds for the vendee, unless there be a distinction between this state of things and what is admitted to be sufficient to satisfy the Statute of Frauds. Try then how that is. Must there be an actual transfer? The case of Elmore *v.* Stone, 1 Taunt. 458, furnishes an answer to that question; for there, there was a removal of the horse from one stable of the vendor to another stable of the vendor; in the first of these the vendor kept his own horses, in the other the horses belonging to other people: so that the horse still continued in his apparent possession, but the character of the possession was altered. So here there is the same apparent possession throughout, but the evidence shows that its character was changed. Much has been said as to whether the lien here was retained or not; but it seems to me that this is not material to the argument, and that the legal result arises from the preceding part of the transaction. Had the plaintiff retained the horse in the character of an unpaid vendor, there would not have been a delivery; but the verdict negatives that supposition. *Rule discharged.*[1]

NICHOLSON AND ANOTHER, ASSIGNEES OF WILLIAM PAVITT, DANIEL PAVITT, AND GEORGE PAVITT, BANKRUPTS, *v.* BOWER.

IN THE QUEEN'S BENCH, NOVEMBER 18, 1858.

[*Reported in* 1 *Ellis & Ellis,* 172.]

FEIGNED issue to try whether "certain wheat which was on the 11th day of May, 1857, lying in the warehouse of the Eastern Counties Railway Company at Brick Lane station, and the delivery of which to the said bankrupts or their said assignees was afterwards stopped by the defendant, was at the time of such stoppage the property of the said bankrupts or their said assignees as against the defendant."

On the trial before Erle, J., at the London sittings after last Trinity term, it appeared that on 4th May, 1858, the defendant, who was a corn merchant at Peterborough, sold at London to Pavitt & Co., who were millers carrying on business in London, 141 quarters of wheat to be delivered in London. The defendant sent up the wheat from Peterborough in two parcels, on the 7th and 8th of May, by the Eastern Counties Railway to their station at Brick Lane, consigned to Pavitt & Co., and wrote to them giving them notice of its having been so sent, and requesting their "immediate instructions for removal." The wheat was warehoused by the company and entered by them in their books as follows: "8th May, Peterborough, from S. Bower, for Messrs. Pavitt & Co., Brick Lane station, carriage paid." The usual course of business of the company in warehousing grain is to keep it, if required, for fourteen days free of charge, at the end of which time it is to be taken away by the consignee or delivered by the company to him at his expense. It is also usual in the corn trade, when corn is warehoused for the consignee, before finally accepting it to take a sample from the bulk as delivered at the warehouse, and compare it with the sample by which it was purchased. On Friday the 8th May, Pavitt & Co. sent their carman to the station for a bulk sample of the wheat, which he brought back. On the morning of Saturday the 9th May, George Pavitt, one of the partners, examined it, and said, "Do not work it at present;" "to work" being explained at the trial to mean to cart it home. On the same day Pavitt & Co. being in embarrassed circumstances decided upon calling a meeting of their creditors on Monday, May 11th, and gave immediate notice to the creditors. The defendant in consequence came to Pavitt & Co. on that day and asked them for an order for the wheat, which they were about to give when some of the other creditors present interfered. The defendant afterwards sent to the railway station and stopped the wheat, directing the company to hold it to his order, which they accordingly did. The defendant's witnesses stated, which George Pavitt denied, that George Pavitt had told the defendant on the Monday, 11th May, that he had refused the wheat on 9th May because it was not equal to sample. It was admitted that the wheat was actually equal to sample.

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[1] ERLE and CROMPTON, JJ., and Lord CAMPBELL, C J., delivered concurring opinions.

The jury, in answer to a question of the learned judge, found that George Pavitt had told the defendant that he refused the wheat because it was not according to sample; but that it was not really refused by him on that ground. A verdict was entered for the plaintiffs, with leave to move to enter it for the defendant, either if there had been no acceptance of the wheat by the bankrupts within the Statute of Frauds, or if the *transitus* of the wheat was not at an end when it was stopped by the defendant.

Bovill now showed cause.

Skinner and *Field*, contra.

Erle, J. I think that the plaintiffs have failed to show an acceptance of part of the goods by the vendee sufficient to satisfy the Statute of Frauds. When the goods arrived at the warehouse ready to be delivered to the vendee, he had power to inspect a bulk sample before accepting. He does inspect a sample, and apparently found that it corresponded; but at that very instant he says, "Do not work it at present," meaning, as I think, "I shall hold my hands in respect of this transaction; because, unless I succeed in making arrangements with my creditors, this corn ought to go back to the consignor." On the next working day he actually does that which is equivalent to giving notice to the consignor to take it back. That notice he had a right to give, if he had not accepted; and I think that upon the evidence he had purposely abstained from accepting. *Rule absolute.*[1]

CUSACK AND OTHERS *v.* ROBINSON.

In the Queen's Bench, May 25, 1861.

[*Reported in* 1 *Best & Smith*, 299.]

Declaration for goods sold and delivered, and goods bargained and sold. Plea, never indebted. At the trial before Blackburn, J., at the Liverpool winter assizes in 1860, it appeared that the defendant, who was a London merchant, on the 24th October, 1860, at Liverpool called on the plaintiffs, who are importers of Canadian produce, and said he wanted to buy from 150 to 200 firkins Canadian butter. He then went with one of the plaintiffs to their cellar, where he was shown a lot of 156 firkins of butter, "ex Bohemian," belonging to the plaintiffs, which he then had the opportunity of inspecting, and in fact he did open and inspect six of the firkins in that lot. After that examination, they went to another cellar to see other butter, which however did not suit the defendant. At a later period of the same day the plaintiffs and the defendant made a verbal agreement by which the defendant agreed to buy that specific lot of 156 firkins at 77*s.* per cwt. When the price had been agreed on, the defendant took a card on which his name and address in London were written, "Edmund Robinson, 1 Wellington Street, London Bridge, London," and wrote on it "156 firkins butter to be delivered at Fenning's Wharf, Tooley Street." He gave this to the plaintiffs, and at the same time said that his agents Messrs. Clibborn, at Liverpool, would give directions how the goods were to be forwarded to Fenning's Wharf. The plaintiffs by Clibborn's directions delivered the butter to Pickford's carts to be forwarded to the defendant at Fenning's Wharf. The plaintiffs sent an invoice dated the 25th October, 1860, to the address on the defendant's card. They received in answer a letter purporting to come from a clerk in the defendant's office, acknowledging the receipt of the invoice, and stating that on the defendant's return he would no doubt attend to it. There was no evidence that the writer of this letter had any authority to sign a memorandum of a contract. On the 27th October the plaintiffs in Liverpool received a telegram from the defendant in London, in effect asserting that the butters had been sold by the plaintiffs subject to a warranty that they were equal to a sample, but that they were not equal to sample, and therefore would be returned. The plaintiffs replied by telegram that there was no such warranty, and they must be kept. A clerk at Fenning's Wharf proved that Messrs. Fenning stored goods for their customers, and had a butter warehouse; that the defendant had used the warehouse for fifteen years, and was in the habit of keeping his butters there till he sold them. On the 26th October Pickford & Co. had delivered a part of the 156 firkins in question at the warehouse, and delivered the residue on the morning of the 27th October. The witness could not say whether any one came to inspect them or not, but he proved that they were delivered up by Fenning to Pickford & Co. under a delivery order from the defendant dated 27th October. The defendant's counsel admitted that it must be taken that the sale was not subject to any warranty; but objected that the price of the goods exceeded £10, and that there was nothing proved to satisfy the requisitions of the Statute of Frauds. The verdict was entered for the plaintiffs for £420 10*s.* 1*d.*, with leave to the defendant to move to enter a nonsuit, if there was no evidence proper to be left to the jury either of a memorandum of the contract or of an acceptance and actual receipt of the goods.

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[1] Lord Campbell, C.J., and Wightman and Hill, JJ., delivered concurring opinions.

Mellish and *Quain* showed cause.

Millward, in support of the rule. *Cur. adv. vult.*

The judgment of the court was now delivered by

BLACKBURN, J. (After fully stating the facts his Lordship proceeded.) It was not contended that there was any sufficient memorandum in writing in the present case; but it was contended that there was sufficient evidence that the defendant had accepted the goods sold and actually received the same; and on consideration we are of that opinion.

The words of the statute are express that there must be an acceptance of the goods or part of them, as well as an actual receipt; and the authorities are very numerous to show that both these requisites must exist, or else the statute is not satisfied. In the recent case of Nicholson *v.* Bower, 1 E. & E. 172, which was cited for the defendant, 141 quarters of wheat were sent by a railway, addressed to the vendees. They arrived at their destination, and were there warehoused by the railway company under circumstances that might have been held to put an end to the unpaid vendor's rights. But the contract was not originally a sale of specific wheat, and the vendees had never agreed to take those particular quarters of wheat: on the contrary it was shown to be usual, before accepting wheat thus warehoused, to compare a sample of the wheat with the sample by which it was sold; and it appeared that the vendees, knowing that they were in embarrassed circumstances, purposely abstained from accepting the goods; and each of the judges mentions that fact as the ground of their decision. In Meredith *v.* Meigh, 2 E. & B. 364, the goods, which were not specified in the original contract, had been selected by the vendor and put on board ship by the directions of the vendee, so that they were in the hands of a carrier to convey them from the vendor to the vendee. It was there held, in conformity with Hanson *v.* Armitage, 5 B. & Ald. 557, that the carrier, though named by the vendee, had no authority to accept the goods. And in this we quite agree; for though the selection of the goods by the vendor, and putting them in transit, would but for the statute have been a sufficient delivery to vest the property in the vendee, it could not be said that the selection by the vendor, or the receipt by the carrier, was an acceptance of those particular goods by the vendee.

In Baldey *v.* Parker, 2 B. & C. 37, which was much relied on by Mr. Millward in arguing in support of this rule, the ground of the decision was that pointed out by Holroyd, J., who says (p. 44): "Upon a sale of specific goods for a specific price, by parting with the possession the seller parts with his lien. The statute contemplates such a parting with the possession; and therefore as long as the seller preserves his control over the goods so as to retain his lien, he prevents the vendee from accepting and receiving them as his own within the meaning of the statute." The principle here laid down is, that there cannot be an actual receipt by the vendee so long as the goods continue in the possession of the seller as unpaid vendor so as to preserve his lien; and it has been repeatedly recognized. But though the goods remain in the personal possession of the vendor, yet if it is agreed between the vendor and the vendee that the possession shall thenceforth be kept, not as vendor, but as bailee for the purchaser, the right of lien is gone, and then there is a sufficient receipt to satisfy the statute. Marvin *v.* Wallis, 6 E. & B. 726, Beaumont *v.* Brengeri, 5 C. B. 301. In both of these cases the specific chattel sold was ascertained, and there appear to have been acts indicating acceptance subsequent to the agreement which changed the nature of the possession.

In the present case there was ample evidence that the goods when placed in Fenning's Wharf were put under the control of the defendant to await his further directions, so as to put an end to any right of the plaintiffs as unpaid vendors, as much as the change in the nature of the possession did in the cases cited. There was also sufficient evidence that the defendant had at Liverpool selected these specific 156 firkins of butter as those which he then agreed to take as his property as the goods sold, and that he directed those specific firkins to be sent to London. This was certainly evidence of an acceptance; and the only remaining question is, whether it is necessary that the acceptance should follow or be contemporaneous with the receipt, or whether an acceptance before the receipt is not sufficient. In Saunders *v.* Topp, 4 Exch. 390, which is the case in which the facts approach nearest to the present case, the defendant had, according to the finding of the jury, agreed to buy from the plaintiff forty-five couple of sheep, which the defendant, the purchaser, had himself selected, and the plaintiff had by his directions put them in the defendant's field. Had the case stopped there, it would have been identical with the present. But there was in addition some evidence that the defendant, after seeing them in the field, counted them, and said it was all right; and as this was some evidence of an acceptance after the receipt, it became unnecessary to decide whether the acceptance under the statute must follow the delivery. Parke, B., from the report of his observations during the argument, seems to have attached much importance to the selection of particular sheep by the defendant; but in his judgment he abstains from deciding on that ground, though certainly not expressing any opinion that the acceptance must be subsequent to the delivery. The other three Barons — Alderson, Rolfe, and Platt — express an inclination of opinion that it is necessary under the statute that the acceptance should be subsequent to or contemporaneous with the receipt; but they expressly abstain from deciding on that ground. In the elaborate judgment of Lord Campbell in Morton *v.* Tibbett, 15 Q. B. 428, in which the nature of an acceptance and actual receipt sufficient to satisfy the statute is fully expounded, he says (p. 434): "The acceptance is to be something which is to precede or at any rate to be contemporaneous with the actual receipt of the goods, and is not to be a subsequent act after the goods have been actually received, weighed, measured, or examined. The intention of the Legislature seems to have been that the contract should not be good unless partially executed; and it is partially executed if, after the vendee has finally agreed on the specific articles which he is to take under the contract, the vendor by the vendee's directions parts with the possession, and puts them under the control of the vendee, so as to put a complete end to all the rights of the unpaid vendor as such. We think therefore that there is nothing in the nature of the enactment to imply an intention, which the Legislature has certainly not in terms expressed, that an acceptance prior to the receipt will not suffice. There is no decision putting this construction on the statute, and we do not think we ought so to construe it.

We are therefore of opinion that there was evidence in this case to satisfy the statute, and that the rule must be discharged.

Rule discharged

KIBBLE *v.* GOUGH.

IN THE COMMON PLEAS DIVISION, COURT OF APPEAL, FEBRUARY 14, 15, 1878.

[*Reported in* 38 *Law Times Reports*, 204.]

APPEAL from a decision of the Common Pleas Division. Defendant, a maltster, agreed to purchase of the plaintiff, a farmer, a quantity of barley, a sample of which was produced, but which was not dressed, at 35*s.* a quarter, on condition that it should be well dressed. The plaintiff promised that it should be dressed as well as machine could do it. A few days afterwards the plaintiff sent to the defendant for some sacks in which to send the barley, and a quantity were sent to him in the absence of the defendant by the defendant's foreman. On the same day the plaintiff sent in the first instalment of barley, 13 qrs., which were received by the defendant's foreman, who examined the barley, and who returned a receipt with the words "not equal to sample."

The defendant returned home late in the evening and was informed of the delivery of the barley, and on the following morning inspected the barley and wrote to the plaintiff in the following terms: "I must refuse the barley, and do not send any more. It is full of grown corns and very spiky, and a lot of thin, and is not dressed as well as machine can do it."

The plaintiff, however, sent a second instalment, and also a third, which were also received, in the absence of the defendant, by his foreman, who returned a receipt for each with the words "not dressed well," for the second instalment, and "not equal to sample," for the third.

The defendant wrote to the plaintiff and asked him to take back the barley, but the plaintiff refused to do so.

The defendant refused to pay for the barley, and wrote to the plaintiff that it was standing in the defendant's warehouse, at the plaintiff's risk, and subject to hire for warehousing, etc.

The plaintiff brought an action against the defendant for goods sold and delivered, and at the trial at the Aylesbury Summer Assizes, 1877, the judge, Pollock, B., left the following questions to the jury: —

Was there a contract? Was there acceptance by the defendant of part of the barley? and was the barley equal to sample and properly dressed?

The jury found in the affirmative for the plaintiff.

On Nov. 6 the Common Pleas Division (Lord Coleridge, C. J., and Denman, J.) granted a rule *nisi* for a new trial on the grounds (1) of misdirection by the learned judge in holding that there was evidence of acceptance of the barley by the defendant for the jury, and in leaving to the jury the question whether the barley delivered to the defendant was equal to sample and dressed according to contract; (2) That the verdict was against the weight of evidence on the questions left to the jury.

On motion before Grove and Lindley, JJ., to make the rule absolute, the Court refused, and the defendant appealed against this decision.

Mellor, Q. C. (with him *Hensman*), for defendant.

Lawrence, Q. C. (with him *Graham*), for the plaintiff.

BRAMWELL, L. J. I am of opinion that the judgment of the court below must be affirmed. The first question is on the Statute of Frauds, was there part delivery, and did the defendant actually receive and accept part of these goods? I do not like to lay down a general rule; but this was undoubtedly a sale of an ascertained quantity of goods. The defendant agreed to purchase all the plaintiff's year's growth of barley, and it was therefore a sale of specific goods, only there was this proviso, that the barley should be dressed in a particular way; but for that stipulation it would certainly have passed at once. There was here no contract in writing. There is no doubt about the delivery of the first thirteen quarters; was there an acceptance of them? I will not say that the decision in Morton *v.* Tibbett (*ubi sup.*) was wrong; on the contrary, I think it was right. A man may accept goods without losing his right of objection to them; there must be such an acceptance to satisfy the statute as amounts to a recognition of the contract between the parties; and I can quite understand that there may be a delivery without an acceptance by the vendee, and without a recognition on his part that he has bought the goods. But in this case the goods had been brought to the defendant's warehouse, and were received, not by the defendant himself, but by a person in whom, as the evidence showed, he put trust and confidence, and this person compared the barley with the sample and took it in. There is no doubt whatever that he received it. Suppose that the defendant himself had been present, the question would be just the same, and it can make no difference that his manager received the goods. It is to be remembered that these were specific goods. I am of opinion that there is sufficient evidence of acceptance. The defendant might have complained just as though there had been a contract in writing, if the goods were not up to sample. There may be defects in goods which are not ascertainable on inspection, or which require an elaborate inspection, or which require the goods to be used before the defects can be discovered, so as not to preclude sufficient evidence to take the case out of the statute. Mr. Mellor says that an action for goods sold and delivered will not lie here, because the property did not pass by the sale, for there was something remaining to be done, — the wheat was to be dressed. Now, there are cases which show that where anything remains to be done to ascertained property the property does not pass, but as soon as it has been done then it has passed. Suppose a man sees a watch in a shop, and says to the shopkeeper, "If you clean this watch, I will buy it of you for £8." Whose watch is it when it is cleaned? I say that, in such a case, the money must be paid to the seller, or, if the vendee refuses, the seller can maintain an action for goods bargained and sold. Here no further delivery could be made. The second and third parcels have also passed to the defendant; and therefore the action for goods sold and delivered is good, and this judgment must be affirmed.

Brett, L. J. In cases where a contract is made by inspection of sample without the bulk being produced, the sale is a sale according to sample; but it is different when an inspection of the bulk is given as well as of the sample, — then it is a sale of the bulk, and there can be no return of the goods; and, when a man undertakes to do something to the goods he is selling, then that becomes a part of the contract. In this case the goods were sold as equal to the sample, and there was a power to refuse; and there was also an undertaking on the part of the vendor to dress the barley. The purchaser had therefore a right to see if the barley was equal to the sample and if it was properly dressed. The first lot was sent, and the foreman of the defendant was present when it was sent, and did take the delivery of it, and actually received it as goods sent under the contract. The defence here seems to me the same as if the master had been there at the time and had said, "I will reserve my right of inspection until to-morrow." The question for us here is, Is such an acceptance sufficient to make the contract binding under the Statute of Frauds? There must be an acceptance and an actual receipt; no absolute acceptance, but an acceptance which could not have been made except on admission of the contract and the goods sent under it. I am of opinion that there was a sufficient acceptance under the Statute of Frauds, although there is a power of rejection. That seems to me to be the decision in Morton *v.* Tibbett, *supra*, and in Cusack *v.* Robinson, 4 L. T. Rep. N. S. 506, 30 L. J. 261 Q. B..

1 B. & S. 299, Blackburn, J., cites Morton *v.* Tibbett, *supra*, with approbation. But the most remarkable approbation of Morton *v.* Tibbett, *supra*, is by Crompton, J., in Currie *v.* Anderson, 29 L. J. N. S. 87 Q. B., when citing from Lord Campbell's judgment, "After a careful review of the cases, the court came to the conclusion (which in this court must be considered to be the law of the land) that, in order to make an acceptance and receipt within the Statute of Frauds, it was not necessary that the vendee should have done anything to preclude himself from objecting to the goods." That was the decision in Morton *v.* Tibbett; and from the discussion of to-day I see reason to be more satisfied than ever with it. Having considered all these cases, I think the decision in Morton *v.* Tibbett, *supra*, is right, and that such an acceptance is sufficient, although the purchaser in certain cases may still have his right of rejection. Here there was sufficient receipt and acceptance to pass the property, and there was a binding contract, and the question is, Can an action be maintained for the price of the goods? Now, the first lot was actually delivered, and I shall use the term "actually received." The goods were sold by valid contract, actually delivered and received, and after this the vendee objects to them. If they had not been equal to the sample I say that it was not even then too late to object; but they were equal to the sample, and they were dressed. Now, where by a contract under which there is a right to reject, and there has been an actual delivery and an actual receipt, and the state of the goods is such as to give no right to reject, any attempt to reject them without such right is futile, and the goods are goods not only sold, but sold and delivered; and this, I think, is the case here. Now, as to the evidence of the dressing of the barley. Experts were called who said that they dressed the barley over again and made it look better; but the jury here was a jury of agriculturists, and they saw the sample and understood what they were looking at. I am of opinion that the judgment of the court below must be affirmed on both points.[1]

PAGE *v.* MORGAN.

IN THE QUEEN'S BENCH DIVISION, COURT OF APPEAL, JUNE 10, 1885.

Reported in 15 *Queen's Bench Division*, 228.]

APPEAL from the judgment of the Queen's Bench Division refusing an application for a new trial, or to enter judgment for the defendant.

The action was for the price of wheat, or in the alternative for damages for non-acceptance of the wheat.

The statement of defence denied the contract of purchase, alleged that the wheat was sold by sample, and the bulk was not equal to the sample, and set up non-compliance with the Statute of Frauds.

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[1] COTTON, L. J., delivered a brief concurring opinion.

The case was tried before Bulwer, Q. C., sitting as commissioner at the Chelmsford Summer Assizes, 1884, when the facts were as follows: —

The defendant, a miller, bought of the plaintiff by oral contract through the plaintiff's agent eighty-eight quarters of wheat. The sale was by sample. The wheat was shipped by the plaintiff's agent on a barge for carriage to the defendant's mill, which was upon a navigable canal. The barge arrived at the mill on the evening of Tuesday the 25th of March, and at eight o'clock on the morning of the 26th some of the sacks containing the wheat were, by direction of the defendant's foreman, hoisted up out of the barge on to the mill and examined by him. After twenty-four sacks had been hoisted up and examined, the foreman sent for the defendant, who came to the mill and inspected the contents of the sacks already delivered, and ordered some more to be sent up for examination, and after having examined thirty-eight sacks in all, he at nine o'clock told the bargeman to send up no more, as the wheat, he said, was not equal to sample. The defendant then on the same day went off to see the plaintiff's agent at a neighboring market town, and told him that the wheat was not equal to sample, and that he should not take it. Some days afterwards, the exact interval, however, was not stated, the wheat taken into the mill was returned by defendant's order to the barge, which remained at the defendant's mill with the wheat in it, the plaintiff refusing to take the wheat away, for seven weeks and until after action was brought, when the wheat was sold by the order of a judge at chambers, and the proceeds paid into court to abide the event of the action.

The learned commissioner directed the jury, on the authority of Morton *v.* Tibbett, 15 Q. B. 428, and Kibble *v.* Gough, 38 L. T. (N. S.) 204, that there was evidence of an acceptance by the defendant sufficient to constitute a contract within the 17th section of the Statute of Frauds, although the defendant was not precluded from rejecting the wheat if not equal to sample. The jury found that the wheat was equal to sample, and that the defendant had accepted it within the meaning of the 17th section of the Statute of Frauds, and accordingly gave a verdict for the plaintiff.

A rule for a new trial, or to enter judgment for the defendant, was moved for on the ground that there was no evidence for the jury of an acceptance of the wheat by the defendant to satisfy the statute, but the Queen's Bench Division (Lord Coleridge, C. J., and Cave, J.) refused the application.

Morten (*Murphy*, Q. C., with him), for the defendant.

Philbrick, Q. C., and *R. Vaughan Williams*, for the plaintiff.

BRETT, M. R. It seems to me that the case of Kibble *v.* Gough, *supra*, lays down the governing principle with regard to the question whether there is evidence of an acceptance to satisfy the 17th section of the Statute of Frauds. It was there pointed out that there must be under the statute both an acceptance and actual receipt, but such acceptance need not be an absolute acceptance; all that is necessary is an acceptance which could not have been made except upon admission that there was a contract, and that the goods were sent to fulfil that contract. Cotton, L. J., in giving judgment in that case, said: "All that is wanted is a receipt and such an acceptance of the goods as shows that it has regard to the contract, but the contract may yet be left open to objection; so that it would not preclude a man from exercising such a power of rejection. I think that in this case enough had been done to satisfy the statute." Now what had been done in that case? The goods had been taken into the defendant's warehouse and kept for some time, though not so long as to make it unreasonable that the defendant should exercise his right of rejection if the goods had not been according to contract, and the defendant had inspected the goods. They therefore had been delivered and actual possession of them had been taken, and they had been dealt with by the defendant for the purposes of the contract. It was held that under those circumstances what had been done in respect to the goods by the defendant must be considered as having been done with regard to a contract for the purchase of the goods, and as amounting to a recognition of the existence of such contract, and that therefore, though the defendant might still have a right to reject the goods if not equal to sample, there was evidence on which the jury might find that the defendant had accepted the goods within the meaning of the statute. That being the law as laid down by that decision, what was the evidence on the question of acceptance in the present case? The wheat was sent to the defendant's mill in a barge, which was brought under the mill in the evening. The next morning a considerable quantity of wheat was taken up by the defendant's servants into the defendant's mill and remained there some time more or less until the defendant had opened the sacks and examined their contents to see if they corresponded with the sample. How could the defendant have these sacks taken into his mill and there opened and examined without a recognition of the existence of a contract entitling him so to deal with them? How could any reasonable men come to any other conclusion from his dealing with them than that he had made a contract of purchase with regard to them, and that the goods were delivered to and received by him under such contract, and examined by him to see if they were according to the contract? It seems to me clear that under these circumstances there was evidence for the jury of an acceptance within the meaning of the statute. I can conceive of many cases in which what is done with regard to the delivery and receipt of the goods may not afford evidence of an acceptance. Suppose that, goods being taken into the defendant's warehouse by the defendant's servants, directly he sees them, instead of examining them, he orders them to be turned out or refuses to have anything to do with them. There would there be an actual delivery, but there would be no acceptance of the goods, for it would be quite consistent with what was done that he entirely repudiated any contract for the purchase of the same. I rely for the purposes of my judgment in the present case on the fact that the defendant examined the goods to see if they agreed with the sample. I do not see how it is possible to come to any other conclusion with regard to that fact than that it was a dealing with the goods involving an admission that there was a contract. It appears to me that, having regard to the case of Kibble *v.* Gough, which is an authority binding on us, there was clearly evidence in this case for the jury of an acceptance, and that upon such evidence there was only one conclusion to which they reasonably could come. The counsel for the defendant placed reliance on the case of Rickard *v.* Moore, 38 L. T. (N. S.) 841.[1] It is alleged that in that case Lord Bramwell doubted the correctness of what he had said in the previous case of Kibble *v.* Gough, *supra.* However that may be, it is quite clear that that case cannot overrule Kibble *v.* Gough, *supra.* For these reasons I am of opinion that this appeal must be dismissed. *Appeal dismissed.*[2]

TAYLOR *v.* SMITH.

In The Queen's Bench Division, Court of Appeal, February 26, 1892.

[*Reported in* [1893] 2 *Queen's Bench*, 65.]

Lord Herschell. This action is brought in respect of an alleged contract for the sale of deals, and the question is whether there is a contract complying with the requisitions of the 17th section of the Statute of Frauds. The bargain was made by word of mouth. An invoice was made out which was dated October 21, but not sent to the defendant till October 30, which was in these terms: "Mr. John

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[1] That was an action for the price of wool. At the trial a verbal agreement to sell six bales of wool like various samples was proved. The plaintiff delivered the wool at Wilton Station and defendant removed it, unpacked it, found two bales unequal to sample, and on the same day wrote the plaintiff this and asked: "What is to be done in the matter ?" August 1 the plaintiff replied denying the inferiority. The defendant then sent the wool to the railway station and telegraphed his refusal to take it. The jury found that two bales were not equal to sample, and Hawkins, J., gave judgment for the plaintiff. An appeal by the plaintiff was dismissed. Bramwell, L. J., distinguished Kibble *v.* Gough on the ground that in that case the jury might find sufficient evidence of acceptance under the statute, though there might not be sufficient to prevent objections to the goods as not equal to sample.

[2] Bowen and Baggallay, L. JJ., delivered a concurring opinion.

Abbott *v.* Wolsey, [1895] 2 Q. B. 97; Sale of Goods Act, § 4 (3), *acc.* Dierson *v.* Petersmeyer, 109 Ia. 233; Remick *v.* Sandford, 120 Mass. 309; Mechanical Boiler Co. *v.* Kellner, 62 N. J. L. 544; Stone *v.* Browning, 51 N. Y. 211, 68 N. Y. 598; Scott *v.* Melady, 27 Ont. App. 193, *contra.* *Conf.* Standard Paper Co. *v.* Towns, 72 N. H. 324.

Smith, Manchester. Bought from Messrs. Charles Taylor, Sons, & Co., 1060 spruce deals. Free to flat, £100 11*s.* 4*d.*, *per* Kenworthy's flat, Arthur." Kenworthy was a carrier who carried goods to Manchester, and part of the arrangement was that the deals should be sent by Kenworthy's flat. The first question is whether there was a memorandum in writing signed by the defendant of the terms of the contract. No letter was written by him which contained any direct reference to the invoice. He signed the following memorandum on the advice note sent him by the carrier: "Refused. Not according to representation. John Smith." The only other document signed by the defendant was a letter dated November 8, written by him to the plaintiffs, which was as follows: "With reference to the deals refused by me now lying at Kenworthy's, they are not according to representation, and much inferior in quality to any St. Johns spruce deals I have seen. I consider them fully 10*s.* per standard below average value, and therefore cannot accept same." The question is whether either or both of these documents can be said to be, in conjunction with any document incorporated with or referred to in them, or either of them, a memorandum within the statute. It is obvious that the advice note, the indorsed memorandum, and the letter do not by themselves constitute such a memorandum, for the terms of the bargain are not to be found in them. If any of them had referred to or incorporated the invoice I think there would have been a sufficient memorandum; but it is impossible to say that the invoice is incorporated with or referred to in any of them. There is therefore no memorandum to satisfy the statute.

The second point is this — it was strongly insisted upon by the plaintiffs — that there was an acceptance of the goods and an actual receipt of them by the purchaser. About the receipt there is no difficulty. The goods were sent to the defendant on the flat of Kenworthy, the carrier chosen by him, were landed at Kenworthy's wharf, and notice of their arrival was sent to the defendant by Kenworthy, informing him that they were then at his order. But the statute requires that the goods, or some part thereof, shall have been accepted as well as received. Acceptance therefore means something beyond receipt; receipt alone is not enough. That receipt by a carrier designated by the purchaser is not enough to constitute an acceptance has been settled by numerous authorities which have not been overruled, though some of the *dicta* in them may be inconsistent with later decisions. What have we here beyond the receipt? The defendant examined the goods on October 28 and 29. There is a controversy as to whether he did not examine them again on November 5. He denies that he did, and it would not be safe to act on the view that he did make this later examination. On the 29th of October, as he says, he wrote the memorandum of refusal on the advice note, and there is no evidence on which we could safely act that he wrote it at any later date. Then on November 8 he writes the letter I have read. Can he under these circumstances be said to have accepted as well as received the goods? It has been decided that there may be an acceptance of goods within the meaning of the statute, though the right to reject the goods as not being according to sample has not been lost; but unfortunately the cases give no clear explanation of what is an acceptance within the meaning of the statute. The statute has not said that there must be some act recognizing the contract; it requires recognition in a particular way, by acceptance of the goods or some portion of them. "Acceptance" is not used in the statute according to its common acceptation, and in what precise sense it is used has never been determined. The plaintiffs in support of the view that there has been an acceptance rely on Morton *v.* Tibbett, 15 Q. B. 428, and the two recent cases in the Court of Appeal of Kibble *v.* Gough, 38 L. T. (N. S.) 204, and Page *v.* Morgan, 15 Q. B. D. 228. In the two latter cases the action was tried by a jury, and the question before the Court of Appeal was not whether there had been an acceptance, but whether there was evidence of acceptance to go to the jury, and the court held that there was. Page *v.* Morgan was most relied on, where the law was laid down by Bowen, L. J., in these terms: "Having regard to the mischiefs at which the statute was aimed, it would appear a natural conclusion that the acceptance contemplated by the statute was such a dealing with the goods as amounts to a recognition of the contract." In that case the goods, which consisted of bags of flour, had been taken in part into the defendant's mill, and he there opened some of them for examination. It was held that there was evidence to go to the jury that he had accepted the goods. In the present case the question is not whether there was evidence on which a jury might find acceptance, but whether the judge was wrong in finding that there had not been an acceptance. I am not satisfied that there was an acceptance of these goods within any reasonable meaning of the word. I cannot think that the mere inspection of the goods by the defendant amounted to acceptance, even accompanied with such delay as there was in communicating with the vendors. No doubt you might have a case in which there was such an amount of delay after the goods had been placed in the custody directed by the purchaser as to prevent the purchaser from withdrawing, but here there has been no such lapse of time as can preclude the purchaser from denying that he has accepted the goods. The question then is, Has there been any such dealing with the goods as amounts to acceptance? I think that no case has gone quite so far as we should be going if we were to say that there was here evidence on which a jury might properly find acceptance. In Page *v.* Morgan the purchaser had some of the sacks taken into his mill; here the goods were only landed at Kenworthy's wharf, and the defendant gave no directions as to dealing with them. In Page *v.* Morgan, after some of the sacks had been taken into the defendant's mill, the defendant there opened them. In the present case all that appears is that the goods were at the carrier's wharf and the defendant there looked at them. I think that this mere looking at them cannot be held to amount to acceptance. If I could find that there was acceptance I should not be indisposed to do so, for one does not like the rights of parties to be defeated on technical grounds; but I think that great mischief would be done by reading a statute in a way in which no reasonable man would read it unless he was determined to get rid of its effect, and by introducing fine distinctions, which cause further litigation by giving rise to other fine distinctions. The appeal must be dismissed.

Appeal dismissed.[1]

VINCENT *v.* B. & J. GERMOND.

SUPREME COURT OF NEW YORK, AUGUST TERM, 1814.

[*Reported in* 11 *Johnson*, 283.]

THIS was an action of assumpsit for cattle, &c., sold and delivered, and was tried at the Dutchess circuit in November, 1813, before Mr. Justice Spencer.

It was proved at the trial that in June, 1812, B. Germond, one of the defendants, came to the plaintiff and asked him if he had any cattle to sell, and the plaintiff replying in the affirmative they went together into the field to look at them. B. Germond offered $280 for the cattle, four in number, which after some hesitation the plaintiff agreed to accept, if they were at B. G.'s risk, observing that he had had one or two cattle injured by the clover in the field where the cattle were feeding. B.

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[1] LINDLEY and KAY, L. JJ., delivered concurring opinions. The former in the course of his opinion said: "As regards acceptance — apart from Morton *v.* Tibbett, 15 Q. B. 428, as to which I only say that I recognize its authority — I should have thought it plain that there was no acceptance at all. If a man merely looks at goods, and then says he rejects them, how can it be said that he has accepted them? Morton *v.* Tibbett was a peculiar case, for the purchaser resold the goods before he saw them; that was a distinct dealing with the goods, and was held to be such an acceptance as to satisfy the statute, though not such an acceptance as to preclude him from rejecting them if, when he examined them, he found that they were not according to sample. Hence was developed the doctrine that there may be an acceptance within the statute, and yet not such an acceptance as to prevent the purchaser from repudiating the goods on the ground that they are not according to the contract. It appears from Page *v.* Morgan, 15 Q. B. D. 228, that the test is whether there has been such a dealing with the goods as amounts to a recognition of the contract. The jury there found that there had been acceptance, and the Court of Appeal refused to disturb the verdict. The Master of the Rolls said: 'I rely, for the purposes of my judgment in the present case, on the fact that the defendant examined the goods to see if they agreed with the sample. I do not see how it is possible to come to any other conclusion with regard to that fact than that it was a dealing with the goods involving an admission that there was a contract.' Whether I should have gone so far I need not say; but we know how difficult it is to upset the verdict of a jury when there is any evidence to support it. In the present case, if I had been the jury, I should have found that the defendant had not accepted the goods. He merely went and looked at them on two occasions, and, finding that they were not what he wanted, he rejected them. I think that there was no acceptance in any sense of the word."

Germond replied that he took them at his own risk, and the cattle must remain where they were; that he would call and take them away as soon as he had completed his drove. After the bargain was concluded the cattle so purchased continued in the same field with other cattle of the plaintiff; in a few days one of them died, being injured by the clover. On the 4th of July following, James Germond, the other defendant, came alone to the field and took away the three remaining cattle without saying anything to the plaintiff.

The defendants gave some evidence of a tender to the plaintiff in June, 1813, of the price of the three cattle left. It was agreed that $231 was a sufficient compensation for the three cattle.

The defendants' counsel objected to the parol evidence of the contract, which was admitted by the judge, reserving the question; and a verdict was taken for the plaintiff for $311.03, being the price of the four cattle with interest.

The case was submitted to the court without argument.

Per Curiam. No earnest money having been paid nor any writing made between the parties relative to the contract, the question is, whether there was such a delivery of the cattle as to take the case out of the Statute of Frauds. It was not made a question whether the defendants were partners so as to be bound by the acts of each other. It may be questioned whether what took place between B. Germond and the plaintiff, if standing alone, would amount to a delivery; but the subsequent conduct of the other defendant in taking away the three oxen, without any new contract, affords sufficient ground to infer a delivery. This was the exercise of an act of ownership over the property in confirmation of the bargain. The defendants dealt with the oxen as their own, and as if in their actual possession, without asking any permission from the plaintiff for so doing. This must have been done in virtue of the right acquired by the original contract and transfer of the property. Such exercise of ownership by selling part of the property was, in the case of Chaplin *v.* Rogers, 1 East, 192, held a sufficient delivery to take the case out of the statute. And the case of Elmore *v.* Stone, 1 Taunt. Rep. 457, is much stronger on this point. It was there held that an agreement between the parties that the vendor should keep the horses sold for the vendee at livery was sufficient to vest the property in the buyer without any written contract or earnest paid. The opinion of the court upon this point renders it unnecessary to notice the other question made in the case. The plaintiff must accordingly have judgment upon the verdict for $311.03.

Judgment for the plaintiff.[1]

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[1] See Phillips *v.* Ocmulgee Mills, 55 Ga. 633; Corbett *v.* Wolford, 84 Md. 426; Leonard *v.* Medford, 85 Md. 666; Atherton *v.* Newhall, 123 Mass. 141; Follett Wool Co. *v.* Utica Trust Co., 84 N. Y. App. Div. 151.

SHINDLER *v.* HOUSTON.

NEW YORK COURT OF APPEALS, APRIL TERM, 1848.

[*Reported in* 1 *Comstock*, 261.]

ON error from the Supreme Court. Houston sued Shindler in the Justices' Court of the city of Troy in *assumpsit* for the price of a quantity of lumber. The plaintiff having recovered, the defendant appealed to the Mayor's Court of that city, and on the trial in that court the case was this: The plaintiff was the owner of about 2,070 feet of curled maple plank and scantling, which he had brought to Troy in a boat, and which after being inspected and measured was piled on the dock apart from any other lumber. Soon after this the plaintiff and defendant met at the place where the lumber lay. The plaintiff said to the defendant, "What will you give for the plank?" The defendant said he would give three cents a foot. The plaintiff then asked, "What will you give for the scantling?" The defendant replied one and a half cents a foot. The plaintiff then said, "The lumber is yours." The defendant then told the plaintiff to get the inspector's bill of it and carry it to Mr. House, who would pay it. The next day the plaintiff having procured the inspector's bill presented it to House, who refused to pay it on the ground that the instructions he had received from the defendant did not correspond with the plaintiff's statement of the contract. There was no note or memorandum of the contract in writing, nor was there any evidence of a delivery or acceptance of the lumber except as above stated. At the prices agreed on the lumber came to $52.51, no part of which was ever paid. The Mayor's Court instructed the jury that if they were satisfied that it was the intention of the parties to consider the lumber delivered at the time of the bargain, and that nothing further was agreed or contemplated to be done in order to change the title in or possession of the lumber, the plaintiff was entitled to recover; that the sale was not within the Statute of Frauds, and did not require any note or memorandum in writing, provided they should find from the evidence that there was a delivery and acceptance of the lumber at the time of the bargain. The defendant excepted, and the jury found a verdict for the plaintiff, on which judgment was rendered in his favor. The Supreme Court, on writ of error to the Mayor's Court affirmed the judgment (see 1 Denio, 48), and the defendant brings error to this court.

N. Hill, Jr., for plaintiff in error.

J. A. Spencer and *D. Willard*, for defendant in error.

WRIGHT, J. There being no note or memorandum made in writing of the contract or earnest paid, this is a case within the Statute of Frauds, unless there was an acceptance and receipt of the whole or a part of the property by the buyer. 2 Rev. Sts. 136, § 3. If there was an acceptance shown sufficient to take the case out of the operation of the statute, it was of all the lumber, as it is not pretended that the entire property vested in the vendee by the acceptance and receipt of a part thereof. The question therefore for consideration upon the facts proved is, whether there was an acceptance and receipt of the lumber by Shindler the vendee within the intent and meaning of the statute.

It is to be regretted that the plain meaning of the statute should ever have been departed from, and that anything short of an actual delivery and acceptance should have been regarded as satisfying its requirements when the memorandum was omitted; but another rule of interpretation which admits of a constructive or symbolical delivery has become too firmly established now to be shaken. The uniform doctrine of the cases however has been that in order to satisfy the statute there must be something more than mere words; that the act of accepting and receiving required to dispense with a note in writing implies more than a simple act of the mind, unless the decision in Elmore *v.* Stone, 1 Taunt. 458, is an exception. This case however will be found upon examination to be in accordance with other cases, although the acts and circumstances relied upon to show a delivery and acceptance were extremely slight and equivocal; and hence the case was doubted in Howe *v.* Palmer, 3 Barn. & Ald. 324, and Proctor *v.* Jones, 2 Carr. & Payne, 534, and has been virtually overruled by subsequent decisions. Far as the doctrine of constructive delivery has been sometimes carried, I have been unable to find any case that comes up to dispensing with all acts of parties, and rests wholly upon the memory of witnesses as to the precise form of words to show a delivery and receipt of the goods. The learned author of the "Commentaries on American Law" cites from the Pandects the doctrine that the consent of the party upon the spot is sufficient possession of a column of granite, which by its weight and magnitude was not susceptible of any other delivery. But so far as this citation may be in opposition to the general current of decisions in the common-law courts of England and of this country, it is sufficient perhaps to observe that the Roman law has nothing in it analogous to our Statute of Frauds. In Elmore *v.* Stone expense was incurred by direction of the buyer, and the vendor at his suggestion removed the horses out of his sale stable into another, and kept them at livery for him. In Chaplin *v.* Rogers, 1 East, 192, to which we were referred on the argument, the buyer sold part of the hay, which the purchaser had taken away; thus dealing with it as if it were in his actual possession. In the case of Jewett *v.* Warren, 12 Mass. R. 300, to which we were also referred, no question of delivery under the Statute of Frauds arose. The sale was not an absolute one, but a pledge of the property. The cases of Elmore *v.* Stone and Chaplin *v.* Rogers are the most barren of acts indicating delivery, but these are not authority for the doctrine that words unaccompanied by acts of the parties are sufficient to satisfy the statute. Indeed if any case could be shown which proceeds to that extent, and this court should be inclined to follow it, for all beneficial purposes the law might as well be stricken from our statute-book; for it was this species of evidence, so vague and unsatisfactory, and so fruitful of frauds and perjuries, that the Legislature aimed to repudiate. So far as I have been able to look into the numerous cases that have arisen under the statute, the controlling principle to be deduced from them is, that when the memorandum is dispensed with the statute is not satisfied with anything but unequivocal acts of the parties; not mere words that are liable to be misunderstood and misconstrued, and dwell only in the imperfect memory of witnesses. The question has been, not whether the words used were sufficiently strong to express the intent of the parties, but whether the acts connected with them, both of seller and buyer, were equivocal or unequivocal. The best considered cases hold that there must be a vesting of the possession of the goods in the vendee as absolute owner, discharged of all lien for the price on the part of the vendor, and an ultimate acceptance and receiving of the property by the vendee, so unequivocal that he shall have precluded himself from taking any objection to the *quantum* or quality of the goods sold. Chitty on Contracts, 390, and cases cited; Hilliard on Sales, 135, and cases cited; 10 Bing. 102, 384. But will proof of words alone show a delivery and acceptance from which consequences like these may be reasonably inferred, — especially if those words relate not to the question of delivery and acceptance, but to the contract itself? A. and B. verbally contract for the sale of chattels for ready money; and without the payment of any part thereof A. says, "I deliver the property to you," or "It is yours," but there are no acts showing a change of possession or from which the fact may be inferred. B. refuses payment. Is the right of the vendor to retain possession as a lien for the price gone? Or in the event of a subsequent discovery of a defect in the *quantum* or quality of the goods, has B., in the absence of all acts on his part showing an ultimate acceptance of the possession, concluded himself from taking any objection? I think not. As Justice Cowen remarks in the case of Archer *v.* Zeh, 5 Hill, 205, "One object of the statute was to prevent perjury. The method taken was to have something done, not to rest everything on mere oral agreement." The acts of the parties must be of such a character as to unequivocally place the property within the power and under the exclusive dominion of the buyer. This is the doctrine of those cases that have carried the principle of constructive delivery to the utmost limit. Thus in Searle *v.* Keeves, 2 Esp. R. 598, a case which arose at a period when the English courts were more inclined than recently to allow of a constructive delivery and acceptance, where a written order was given by the seller of goods to the buyer, directing the person in whose care the goods were to deliver them, which order was presented by the buyer, it was held that there was sufficient delivery within the statute. So also in Hollingsworth *v.* Napier, 3 Caines R. 182, where the vendor delivered to his vendee a bill of parcels for goods lying in a public store, together with an order on the storekeeper for their delivery, and the vendee upon delivering the order demanded the goods, which were turned out to him, and he paid the amount of the storage, marked the bales with his initials, and returned them to the custody of the storekeeper, it was held that the statute was satisfied. But in cases like these it would seem now to be necessary that the party having the custody of the goods, and who is the agent of the vendor, should recognize the order given to the purchaser, and assent to retain the goods for him. A delivery to the vendee of the key of the warehouse in which the goods are lodged, or other *indicia* of property, where goods are ponderous and incapable of being handed over from one to another, was said by Lord Kenyon in Chaplin *v.* Rogers to be tantamount to an actual delivery. In Dodsley *v.* Varley, 12 Adol. & Ellis, 632, which was an action of *assumpsit* for wool bargained and sold, the court said: "We think that upon the evidence the place to which the wool was removed may be considered as the defendant's warehouse, and that he was in actual possession of it as soon as it was weighed and packed." In these cases, and in a large number of others that might be cited, the circumstances were unequivocal to show not merely a delivery to and acceptance of the property in the goods, but, what is always essential, a complete acceptance of the possession by the buyer. The facts were more or less strong in the several cases, but the acts of the parties can scarcely be reconciled with any other presumption.

On the other hand, where the acts of the buyer are equivocal, and do not lead irresistibly to the conclusion that there has been a transfer and acceptance of the possession, the cases qualify the inference to be drawn from them, and hold the contract to be within the statute. In Baldey *v.* Parker, 2 B. & C. 37, A. purchased of B., a trader, several articles amounting in the whole to £70. A. marked with a pencil some of the articles, saw others marked, and helped to cut off others. He then requested that a bill of the goods might be sent to him, which was done, together with the goods; but he declined to accept them. It was held that there was no delivery and acceptance to take the case out of the statute; and Lord C. J. Abbott, in speaking of the exception in the statute, justly remarked that it "would be difficult to find words more distinctly denoting an actual transfer of the article from the seller, and an actual taking possession of it by the buyer." In Carter *v.* Toussaint, 5 Barn. & Ald. 855, the circumstances were that a horse was sold by verbal contract, but no time fixed for the payment of the price. The horse was to remain with the vendor for twenty days without charge to the vendee. At the expiration of that time he was sent to grass by order of the vendee, and entered as one of the vendor's horses. The court held that there was no acceptance of the horse by the vendee within the meaning of the statute. In Tempest *v.* Fitzgerald, 3 Barn. & Ald. 680, A. agreed to purchase a horse from B. for cash, and take him away within a certain time. About the expiration of that time A. rode the horse and gave directions as to his treatment, &c., but requested that he might remain in the possession of B. for a further time, at the expiration of which time he promised to take and pay for the horse, to which B. assented. The horse died before A. paid the price or took it away. It was held that there was no sufficient acceptance of the horse to render the vendee liable for the price. In Howe *v.* Palmer, *supra*, a vendee publicly agreed at a public market, with the agent of the vendor, to purchase twelve bushels of tares (then in the vendor's possession, constituting part of a larger quantity in bulk) to remain in the vendor's possession until called for. The agent on his return home measured and set apart the twelve bushels. It was held that in this case there had been no acceptance, and the action would not lie. In Kent *v.* Huskinson, 3 B. & P. 233, A. verbally ordered from B. a bale of sponge, which was sent. The bale was opened and examined, and the sponge returned by A., who at the same time wrote a letter to B. stating that he disapproved thereof. It was held that A. had not accepted the goods. In Proctor *v.* Jones, *supra*, it was said that the marking of casks of wine sold by parol and lying at the London docks, with the initials of the purchaser at his request and in his presence, was not a sufficient acceptance within the statute, at least if the time of payment had not, when the casks were so marked, been fixed. In Bailey *v.* Ogden, 3 John. R. 399, an agreement with the vendor, on a parol contract for the sale of goods, about the storage of the goods, and the delivery by him of the export entry to the agent of the vendee, were held not to be sufficiently certain to amount to a constructive delivery or to afford an *indicium* of ownership. Other comparatively recent English and American cases might be cited, showing, as has been said by Mr. Justice Coleridge, that "the tenor of modern decisions is to give to the words of the statute their fullest effect, and not to allow, so far as it is possible, of any constructive deliveries and acceptances."

I think I may affirm with safety that the doctrine is now clearly settled that there must not only be a delivery by the seller, but an ultimate acceptance of the possession of the goods by the buyer, and that this delivery and acceptance can only be evinced by unequivocal acts independent of the proof of the contract. But if the principles to be deduced from the recent decisions were otherwise, I should not be disposed, in the face of the plain and obvious meaning of the statute, to follow them. The Statute of Frauds of 29 Car. 2 (and it is in substance re-enacted in this State) was justly pronounced nearly half a century since, by an eminent British judge, "one of the wisest laws in the statute-book." Its provisions apply with singular wisdom and beneficence "to the daily contracts and practical affairs of mankind," relieving them of vagueness and uncertainty, and checking to some extent "the restless and reckless spirit of litigation." Whilst this meritorious law is in the statute-book it is our business to enforce it in good faith, and according to its plain letter and spirit, without studying to fritter away its vitality in the attempt to uphold contracts which by its provisions are clearly void.

Judgment reversed.[1]

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[1] Two concurring opinions are omitted. Jewett, C. J., and Gray, J., dissented.

Gorman *v.* Brossard, 120 Mich. 611; Marsh *v.* Rouse, 44 N. Y. 647; Hallenback *v.* Cochran, 20 Hun, 416; Gerndt *v.* Conradt, 117 Wis. 15, *acc.* See also Hinchman *v.* Lincoln, 124 U. S. 38; Dehority *v.* Paxson, 97 Ind. 253; Edwards *v.* Grand Trunk Ry. Co., 54 Me. 105.

Calkins *v.* Lockwood, 17 Conn. 154; Devine *v.* Warner, 75 Conn. 375, 76 Conn. 229; Rodgers *v.* Jones, 129 Mass. 420, 422, *contra.*

WILLIAM M. RODGERS AND DILLER LUTHER, RESPONDENTS, *v.* LEWIS PHILLIPS AND FREDERICK C. OAKLEY, APPELLANTS.

NEW YORK COURT OF APPEALS, JUNE 14, 1869.

[*Reported in* 40 *New York Reports,* 519.]

THIS action was brought to recover the purchase-price of 188 tons of coal, amounting to the sum of $651.30. The coal was contracted to be sold by the plaintiffs to the defendants by an oral agreement entered into prior to the 26th day of June, 1858. By the terms of this agreement it was to be shipped on board a boat at Richmond in the State of Pennsylvania for the defendants, and to be carried from there to Twenty-eighth Street on the East River in the city of New York; the defendants paying the freight for the same. The coal was shipped by the plaintiffs on board the coal-boat I. K. Smith at Richmond, for the defendants, on Saturday the 26th day of June, 1858; and a bill of lading taken from the master, by which the coal was to be delivered at Twenty-eighth Street, on the East River side of the city of New York, to the defendants upon the payment of the freight by them. During the afternoon of the day when the coal was laden upon the boat, she commenced leaking, and finally sank on the morning of the following day. The boat and cargo remained in the water where they sank until they were finally removed by the public authorities as obstructions to navigation. On Monday, the 28th of June, 1858, the plaintiffs, who kept their office at the city of New York, received the bill of lading by mail; and on the same day they sent it with an invoice of the coal to the defendant's office. The invoice consisted of an unsubscribed bill of the coal. On Tuesday, the 29th, the defendant Oakley, together with Mr. Harriott, the secretary of the Brevoort Insurance Company, called at the plaintiff's office, and inquired of Mr. Rodgers, one of the plaintiffs, concerning the condition of the boat; how she had sunk, the cost of raising her, and what he could do it for. He answered that he could give no information in regard to the matter. Another witness, Hubbard, who was present at the same interview, stated that he understood from the conversation that Harriott was to go to Philadelphia to see about raising the vessel. The next day but one succeeding this interview, which was the 1st day of July, the defendants sent back the bill of lading to the plaintiffs; and they returned it to the defendants the same day in a letter, saying that they had nothing to do with it. Upon this evidence the defendants moved for a nonsuit on the ground that no valid sale was established under the Statute of Frauds. The motion was denied and the defendants excepted. In addition to proving the condition of the boat at the time the coal was placed on board of her, and the manner of her sinking, the defendants proved by the defendant Oakley that he was a director in the Brevoort Insurance Company, and that on the receipt of the bill of lading he went to the office of that company and tried to effect an insurance on the coal. The insurance was refused on the ground that the boat was rated on the company's books as twelve years old and notoriously rotten. After hearing of the sinking of the boat, Harriott, who went to the plaintiff's office with the defendant Oakley on Tuesday, went to Philadelphia and attended to the matter. What he did beyond inquiring into the condition of the boat was not made to appear. The proofs were thereupon closed; and the court refused to allow the defendant's counsel to go to the jury on the questions of fact involved in the case, on the ground that the defendants had failed to make out any defence to the action, and directed a verdict for the plaintiffs. The defendants excepted to the decision and direction of the court. Upon the hearing of the exceptions at the general term, judgment was directed for the plaintiffs; and when that was entered the defendants appealed to this court.

William H. Scott, for the appellants.

J. R. Whiting, for the respondent.

DANIELS, J. A large portion of the evidence contained in the case was given upon the trial for the purpose of showing that the plaintiffs had negligently misconducted themselves in lading the coal upon an unsafe and unseaworthy vessel; and that in consequence of that misconduct the coal had been lost. This defence was properly rejected by the court for the reason that it had not been set forth in the answer.

The disposition which should now be made of the controversy will therefore depend entirely upon the sufficiency of the evidence given upon the trial to establish the fact that the coal had been delivered to and accepted by the defendants. The contract for the sale of it was within the Statute of Frauds; and on that account, as it was not in writing and nothing had been paid upon it, by the direct terms of that statute it was void. Although the plaintiffs did perform all that would have been requisite to transfer the title to the coal to the purchasers under the well-established rule of the common law, it does not follow that what they did would be attended with the same result under the rule prescribed by the statute. Where a valid and subsisting contract for the sale of personal property may be shown to exist, and by its terms the property is to be shipped by the vendor to the vendee, then a delivery of it to a responsible carrier for the vendee, to be carried and delivered to him, will ordinarily transfer the title to the vendee and place the property at his risk. But this rule requires that the contract between the parties shall be at the time legal, valid, and subsisting. It does not include cases like the present one, where on account of a failure to comply with the positive rule prescribed by the statute the contract is void, and must remain so until some act has been performed that will have the effect of giving it legal validity. In cases like the present one it is the statute, and not the common law, that has provided the mode by which the previously void agreement could be rendered legal and binding upon the parties. And that mode must be pursued; otherwise the agreement must remain without any binding force upon either of the parties. Until that may be done the contract must remain entirely optional on the part of each of the parties. Even if the vendors elected to perform it, and deliver the property precisely as they had agreed to, it was still optional with the vendees whether they would receive it or not. And even if the former went so far as to actually deliver it, the vendees still had their election to either receive or refuse it.

This resulted from the unequivocal terms made use of in the statute. They required that the vendees, under such a contract as was shown upon the trial of this cause, should not only receive, but in addition to that accept part of the property contracted to be sold to them, in order to render the contract binding upon them in law. Where the contract or a note or memorandum of it has not been reduced to writing and subscribed by the parties to be charged by it, and no part of the purchase-price has been paid, then the statute declares it to be void where the price amounts to the sum of $50 or upwards, unless "the buyer shall accept and receive part of such goods." 3 Rev. Sts. (5th ed.) 222, subd. 2 of § 3. This statute is in substance the same as the previously existing English statute, and they have both been regarded as identical in the change they have produced in the common-law rule.

By the construction they have received, and which their language manifestly required, a mere delivery of the property contracted to be sold by the terms of the void contract has been held to be insufficient to vest the title to it in or place it at the risk of the vendee. But beyond that it became necessary, under the rule adopted by the statute, that some part of the property should not only be delivered and received by the vendee, but that it should also be accepted by him. This acceptance of it involved something more than the act of the vendor in the delivery. It required that the vendee should also act, and that his act should be of such a nature as to indicate that he received and accepted the goods delivered as his property. He must receive and retain the articles delivered, intending thereby to assume the title to them, to constitute the acceptance mentioned in the statute; when that has been done then for the first time the void contract becomes valid and obligatory upon the parties to it.

This rule of construction was adopted at an early day by the English courts. Tempest *v.* Fitzgerald, 3 Barn. & Ald. 680, 5 E. C. L. 419; Carter *v.* Toussaint, 5 Barn. & Ald. 855; Baldey *v.* Parker, 2 Barn. & C. 37, 9 E. C. L. 16, 17. And since then it has been approved and applied by this court to the statute existing upon this subject in this State. Shindler *v.* Houston, 1 Comst. 261. In the decision of that case Judge Gardiner stated the English rule as requiring that "there must be a delivery by the vendor, with an intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter with the intent of taking possession as owner." He then adds: "This I apprehend is the correct rule, and it is obvious that it can only be satisfied by something done subsequent to the sale unequivocally indicating the mutual intentions of the parties." *Id.* 265. Judge Wright said "that the acts of the parties must be of such a character as to unequivocally place the property within the power and under the exclusive dominion of the buyer." Where the acts of the buyer are equivocal, and do not lead irresistibly to the conclusion that there has been a transfer and acceptance of the possession, the cases qualify the inference to be drawn from them, and hold the contract to be within the statute. *Id.* 270, 271. And to this effect is the case of Denny *v.* Williams, 5 Allen, 1. This it will be perceived is very decided language, but no more so certainly than was used in the enactment of the statute to which it was applied. And it was afterwards followed and again applied in deciding the case of Brabin *v.* Hyde, 32 N. Y. 519.

The question in this case therefore is, whether such an acceptance of the coal by the defendants was shown as placed it at their risk at the time when it was lost by the sinking of the vessel it was laden upon. And, for the purpose of considering and deciding it, this case must be distinguished from those where the property contracted to be sold was delivered to a particular carrier designated and selected by the vendee for the purpose of receiving and accepting it. For in those cases the carrier by the act of the vendee became his agent, and bound him by the receipt and acceptance of the property. Dawes *v.* Peck, 8 Term, 330; Waldron *v.* Romaine, 22 N. Y. 368; Bushel *v.* Wheeler, 15 Ad. & Ellis, (N. S.) 442. This case differs from those in the circumstance that no such designation or selection was made by the defendants. The carrier to whom the property was delivered to be carried to the defendants was selected by the plaintiffs. The defendants in no manner authorized or participated in it beyond the void authority conferred by the terms of their void contract. Being void, as it was, the plaintiffs could not avail themselves of its terms for the purpose of binding or concluding the defendants by what they did under it. Whatever they did towards the performance of the contract they did for themselves, and at their own risk, until the defendants elected to change the risk, and did change it by the acceptance of the property mentioned in the statute; what the evidence showed was a selection of the carrier by the plaintiffs, and a delivery of the coal to him, not an acceptance of it by the defendants. That acceptance required some act on the part of the vendees to constitute it, performed after the coal had been separated from the mass, and placed in such a condition as rendered that particular quantity capable of being accepted by the defendants. The evidence not only failed to show the performance of any act of acceptance on the part of the defendants, but beyond that it appeared that they did not hear of its shipment until the vessel it was laden upon had sunk to the bottom of the Schuylkill. There was nothing therefore in the case from which the defendants could be deemed to have accepted the coal at that time. It consequently continued to be the plaintiff's property, remaining at their risk; and it was their loss when the vessel sunk after it had been laden on board of her. And if the carrier became liable for the loss, his liability was to the plaintiffs, not to the defendants. That a mere delivery of property to a carrier selected to receive and carry it by the vendors will in no legal sense constitute an acceptance of it by the vendee, and for that reason exclude the case from the operation of the statute, has been distinctly held in several adjudged and well-considered decisions. This point was directly presented in the case of Maxwell *v.* Brown, 39 Maine, 98; and after an examination and reference to English authorities the court held that the delivery to the carrier was insufficient to show an acceptance by the vendee. The same point arose, under slightly different circumstances, in the case of Frostburg Mining Company *v.* New England Glass Co., 9 Cush. 115; and it was disposed of in the same way. And a delivery to a carrier selected by the vendor for the transportation of the property, where that was done in conformity to the terms of the void contract, was held to be in no sense an acceptance by the vendee, in the cases of Hanson *v.* Armitage, 7 Eng. C. L. 191; Acebal *v.* Levy, 25 *id.* 170; Meredith *v.* Meigh, 75 *id.* 363; Coats *v.* Chaplin, 43 *id.* 831; Norman *v.* Phillips, 14 Mees. & Wels. 278; Farina *v.* Home, 16 *id.* 119; Coombs *v.* Bristol, &c., Railway Co., 3 Hurl. & Nor. 510; Hart *v.* Bush, Ellis, B. & Ellis, 494. And the cases of Howe *v.* Palmer, 5 Eng. C. L. 303; Bentall *v.* Burn, 10 *id.* 138; Hunt *v.* Hecht, 20 Eng. Law and Eq. 524; Holmes *v.* Haskins, 28 *id.* 564; and Castle *v.* Sworder, 5 Hurl. & Nor. 281, — though differing in their circumstances, are in substance to the same effect.

Up to the time when the coal was lost by the sinking of the vessel having it on board, no act was performed by the defendants from which it could be even colorably claimed that they had accepted the coal or become invested with the title to it. For it was not until the day afterwards that the invoice and bill of lading were delivered to them; and then the rights of the parties had become fixed by the loss of the property. The loss was then that of the plaintiffs, and nothing afterwards transpired warranting the conclusion that the defendants intended to shift it and impose it upon themselves.

Assuming, as it may properly be done, that the acceptance of the bill of lading by the defendants under ordinary circumstances would have been equivalent to the acceptance of the property mentioned in it, yet that could not be the effect of it where, as in this case, the property had been previously lost. Certainly not, unless the acceptance was made with knowledge of the circumstances affecting the propriety of it existing at the time it occurred.

But even if it could have produced that result, something more would have to be shown for the purpose of establishing the acceptance than was done upon the trial of this action. What transpired when the bill of lading was left at the defendants' office was not made to appear. All that was shown upon the subject of an acceptance of it was that one of the defendants after its receipt applied for an insurance upon the coal, and failed to procure it on account of the unseaworthy character of the vessel upon which the plaintiff had placed it. This was clearly insufficient for that purpose, because it did not show that the defendants had dealt with the property as their own, but merely that they had attempted to do so and failed. What they did in this respect was done before they had received any intelligence of the misfortune to the property. And even if prior to that time they had determined to accept the shipment by accepting the bill of lading upon the supposition and belief that the property was then afloat, they became at liberty to rescind their determination and refuse to receive it as soon as they discovered that it had been formed under a mistake of a material fact affecting it. When that fact was discovered an interview took place between one of the defendants and one of the plaintiffs, but nothing was settled by what then occurred. After that Mr. Harriott was sent to Philadelphia by the defendants, and he testified that he attended to the matter. But what he did beyond inquiring into the condition of the boat was neither stated by himself nor by any other witness. Neither of these circumstances, nor all of them combined, so far tended to prove an acceptance of the property as to justify the court in leaving that fact to the consideration and decision of the jury. When the additional circumstance is borne in mind that on Thursday of the same week the defendants sent back the bill of lading to the plaintiffs, it will be perceived that there was absolutely nothing from which an acceptance of the property shipped could be even plausibly maintained.

At the time the bill of lading was delivered to them they had a reasonable time, after ascertaining the circumstances, in which to determine whether they would accept or reject it, the same as they would have had upon an actual delivery of the property itself, for which the bill was merely a substitute. Within that time they rejected and returned it to the plaintiffs, which plainly left the transaction invalid as a sale under the direct prohibition of the statute. In this respect the case had no more foundation for its support than Norman *v.* Phillips, Farina *v.* Home, and Coats *v.* Chaplin, *supra*, and Bill *v.* Bament, 9 Mees. & W. 36, had, in which it was held that no acceptance of the property by the buyer could be inferred.

The court at the trial erred in refusing to nonsuit the plaintiffs and in directing a verdict against the defendants. The judgment should be reversed and a new trial ordered.

WOODRUFF, J. The question in this case, the decision of which is conclusive between the parties, is whether a delivery of goods to a general carrier, in pursuance of the order of a proposed purchaser, to be transported to him, is such a consummation of the contract of sale as dispenses with a writing and takes the transaction out of the operation of the Statute of Frauds.

The defendants in New York gave verbal orders for 175 to 200 tons of coal, and directed that it be delivered "on board at Richmond (near Philadelphia) in the customary manner," no particular boat or barge being designated.

The plaintiffs shipped 188 tons, lading it upon the coal barge I. K. Smith, received a bill of lading therefor, whereby the coal was made deliverable to the defendants, they paying freight, and forwarded the bill of lading to the defendants. Within a few hours after the coal was placed on board, and before leaving on her voyage, the barge sprung a leak and was sunk with the coal on board.

The defendants received the bill of lading on Monday, June 28, 1858: on receiving information of the sinking of the barge the defendants sent an agent to Richmond to learn the facts, and on Thursday returned the bill of lading, denying their liability to pay for the coal.

In accordance with the general rule, that where goods are purchased to be shipped or sent to the buyer a delivery to the carrier, whether he be a general carrier or one specially designated by the buyer, constitutes performance by the seller, is a sufficient delivery, vests the title to the goods in the buyer (subject to the right of stoppage *in transitu*), and places the goods at his risk, the Supreme Court held the plaintiffs entitled to recover.

This general rule is unquestionable; and the numerous cases cited by the counsel for the respondents, on the argument of this appeal, are full and conclusive. It is quite sufficient to mention Ludlow *v.* Browne *et al.*, 1 Johns. R. 15; The People *v.* Haynes, 14 Wend. 562; Hague *et al. v.* Porter, 3 Hill, 141; Waldron *v.* Romaine, 22 N. Y. 368: Dawes *v.* Peck, 8 T. R. 330; Dutton *v.* Solomonson, 3 Bos. & Pull. 584; and cases incidentally considered in Harris *v.* Hart, 6 Duer, 606; and Holbrook *et al. v.* Vose *et al.*, 6 Bosw. 104.

But the decision below overlooks the fact that the Statute of Frauds requires the acceptance and receipt of the goods as well as the delivery; and without these there is no binding contract of sale.

In the cases referred to and in the text-books, where the question is what constitutes performance by the vendor or delivery so as to vest title and place the goods at the risk of the buyer, an existing binding agreement or purchase is assumed. Here the inquiry is, whether there is a binding contract. A parol agreement of purchase the statute declares void "unless the buyer shall accept and receive part of such goods," &c. 2 Rev. Sts. p. 135, § 3, subd. 2.

The rule on this subject, stated by Story in his treatise on Sales as established by the authorities, is this: "The meaning to be attached to the terms 'accept and receive' is that the purchaser must finally appropriate to himself the whole or a part of the goods. To create such an appropriation as that contemplated in the statute, there must be not only such an actual delivery by the seller as to destroy all further claim of lien or of stoppage *in transitu* on his part, but also such an actual acceptance by the buyer as to disable him from objecting to the quantity or quality of the goods. . . . The delivery must be a complete and final delivery, and the acceptance an ultimate acceptance, so as to reduce the goods to the actual possession of the vendee. It follows therefore that no receipt of goods by a carrier or middleman on their way to the buyer is a sufficient acceptance, unless such carrier or middleman be the general agent of the vendee having authority finally to accept them." This broad and explicit exposition of the acceptance necessary to give validity to the contract, and stand in place of a writing, is founded upon numerous English cases on the construction of the statute in England, from which ours is copied. Baldey *v.* Parker, 2 Barn. & Cres. 44; Phillips *v.* Bistolli, *id.* 513; Smith *v.* Surman, 9 Barn. & Cres. 561; Carter *v.* Toussaint, 5 Barn. & Ald. 858; Kent *v.* Huskinson, 3 B. & P. 233; Hanson *v.* Armitage, 5 Barn. & Ald. 557; Astey *v.* Emery, 4 Maule & Selw. 264; Howe *v.* Palmer, 3 B. & A. 321; Johnson *v.* Dodgson, 2 Mees. & Wels. 656.

Obviously this rule is decisive of the question in this case. Indeed it is wholly unnecessary to go to so great length for the purposes of this case.

Addison, in his treatise on Contracts, though not in terms, yet in substance, gives the like exposition of the force and effect of these terms of the statute, superadded to the force of mere delivery where there is already a valid contract of sale. Add. on Cont. pp. 243, 244, 245.

It has sometimes been argued that delivery to a carrier designated by the buyer will suffice to satisfy the statute, although delivery to a general carrier will not; but this distinction cannot be sustained where the carrier has no other authority than to transport the goods. In Acebal *v.* Levy, 10 Bing. 376, the delivery was on board of a ship chartered by the buyer, and yet it was not held to constitute an acceptance within the statute; and see also Meredith *v.* Meigh *et al.*, 2 Ellis & B. 364.

In Shindler *v.* Houston, 1 Comst. 269, Wright, J., reviews the cases on the construction of these terms in the statute, and says: "The best considered cases hold that there must be a vesting of the possession of the goods in the vendee as absolute owner, discharged of all lien for the price on the part of the vendor, and an ultimate acceptance and receiving of the property by the vendee, so unequivocal that he shall have precluded himself from taking any objection to the *quantum* or quality of the goods sold." Chitty on Contracts, 390, and cases cited; Hilliard on Sales, 135, and cases cited.

The proposition thus stated is in unquestionable conformity to the English cases above referred to; but the Court of King's Bench in England in Morton *v.* Tibbett in 1850, 15 Ad. & El. (N. S.) 428, while they recognize the necessity of an acceptance to satisfy the statute, deny that an acceptance which will satisfy the statute necessarily precludes the rejection of the goods after examination and denying the fact of performance by the vendor.

Lord Campbell reviews the previous cases, and while he admits the repeated assertion of the rule as above stated he questions its soundness, and finds in other cases some warrant for his qualification of the rule.

But the rule, that there must be something more than such a delivery as would change the title and place the goods at the risk of the buyer if the contract was in writing, is not questioned. It is sufficient for the purposes of this case to say that a delivery to a general carrier not designated by the buyer, for the mere purpose of transportation to him, does not constitute an acceptance of the goods within the Statute of Frauds.

In Coombs *v.* Bristol and Exeter Railway Co., 3 Hurl. & Norm. 510, in 1858, the subject was considered at length in the English Court of Exchequer, and the rule reasserted. See also, on the meaning of the term "receive," Farina *v.* Home, 16 Mees. & Wels. 119; Hart *v.* Bush, 4 Jur. (N. S.) 633; Frostburg Mining Co. *v.* New England Glass Co., 9 Cush. 115.

The judgment is clearly erroneous. The defendants never accepted nor received the goods within the meaning of the statute, and the defendants' motion for a nonsuit should have been granted.

The judgment must be reversed.

Mason and James, JJ., concurred in Woodruff's opinion.

Grover, J., was for reversal. He was not however prepared to concur in the doctrine of Woodruff's opinion as to the case of a carrier designated by the vendee.

Hunt, C. J., concurred with Grover, J. He also was inclined to think that the fact of the property being put by the plaintiffs on board an unseaworthy vessel was a material circumstance in favor of the defendants.

Lott, J., *dubitante*, did not vote.

Judgment reversed and new trial ordered.

STONE *v.* BROWNING.

New York Commission of Appeals, September Term, 1872.

[*Reported in* 51 *New York*, 211.]

This action was brought to recover the balance of the purchase-money of a quantity of goods sold and delivered.

The defendants denied the allegation in the complaint in reference to the sale and delivery. They also set up, among other defences, that

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[1] Billin *v.* Henkel, 9 Col. 394; Lloyd *v.* Wright, 25 Ga. 216; Denmead *v.* Glass, 30 Ga. 637; Johnson *v.* Cuttle, 105 Mass. 447; Gatiss *v.* Cyr, 96 N. W. Rep. 26 (Mich.); Waite *v.* McKelvy, 71 Minn. 167; Salomon *v.* King, 63 N. J. L. 39; Hudson Furniture Co. *v.* Freed Furniture Co., 10 Utah, 31, *acc.* Strong *v.* Dodds, 47 Vt. 348 (*conf.* Agnew *v.* Dumas, 64 Vt. 147), *contra.* See also Bullock *v.* Tschergi, 13 Fed. Rep. 345; Standard Paper Co. *v.* Towns, 72 N. H. 324, 325.

the goods were sold by sample, with an express warranty that the goods exhibited were fair and correct samples of the whole, and also that the sale was within the Statute of Frauds and void.

A motion was made to dismiss the complaint on those, among other grounds, when the plaintiffs rested their case, and again at the close of the evidence. The motions were denied.

The defendants' counsel then requested the court to charge the jury upon several distinct propositions, one of which was in the following terms: —

"Ninth. If you find the defendants never intended to, and did not in fact, accept the goods delivered, then your verdict should be for the defendants," which request was refused. Exceptions were taken to the denial of the motions to dismiss the complaint, and to the refusal to charge in accordance with the above request.

The jury found a verdict in favor of the plaintiffs, and a judgment was entered thereon accordingly. Other facts appear in the opinion.

John K. Porter, for the appellants.

William Tracy, for the respondents.

EARL, C. Upon the trial the principal questions litigated were, whether the cloth was sold by sample with a warranty, and whether it corresponded with the sample. These questions were submitted to the jury, and were really the only questions submitted to them, and as to them the decision of the jury cannot be disturbed.

I am of opinion, however, that the contract of sale was void by the Statute of Frauds. There was no part payment of the purchase-money nor note or memorandum of the contract. Hence there was no compliance with the statute unless the defendants both accepted and received the cloth purchased, or some of it. It was not sufficient to answer the statute that the cloth was delivered to the defendants; they must also have accepted it. Cross *v.* O'Donnell, 44 N. Y. 661. A delivery of property to satisfy the requirements of the Statute of Frauds must be a delivery by the vendor with the intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter with the intent of taking possession as owner. Brand *v.* Focht, 3 Keyes, 409. Judge Wright, in Shindler *v.* Houston, 1 N. Y. 269, says: "The best considered cases hold that there must be a vesting of the possession of the goods in the vendee as absolute owner, discharged of all lien for the price on the part of the vendor, and an ultimate acceptance and receiving of the property by the vendee so unequivocal that he shall have precluded himself from taking any objection to the quantities or quality of the goods sold." In Bill *v.* Bament, 9 M. & W. 41, Parke, B., says: "To constitute delivery, the possession must have been parted with by the owner, so as to deprive him of the right of lien." In Phillips *v.* Bistolli, 2 B. & Cr. 511, it is said *per curiam:* "In order to satisfy the statute, there must be a delivery of the goods by the vendor with the intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter, with an intention of taking the possession as owner." In Kent *v.* Huskinson, 3 Bos. & Pul. 233, it was held that the acceptance must be an ultimate acceptance, and such as completely affirms the contract. In Smith *v.* Surman, 9 B. & Cr. 561, Parke, B., says: "The later cases have established that unless there has been such a dealing on the part of the purchaser as to deprive him of any right to object to the quantity or quality of the goods, or to deprive the seller of his right of lien, there cannot be any part acceptance." See also Howe *v.* Palmer, 3 B. & Ald. 321; Hanson *v.* Armitage, 5 B. & Ald. 557; Story on Sales, § 276.

Within the principles laid down in the above authorities, there was not in this case any ultimate or final acceptance of the cloth by the vendees. Upon this point there is no conflict in the evidence. There was not sufficient opportunity to examine the cloth while it was in the store of the plaintiffs, and hence it was arranged that it should be taken to the store of the defendants, and they were to examine it, and if they were satisfied as to the quantity and quality of the cloth, then they were to give their notes for the purchase-price. They did take the cloth and examine it, and after the examination refused to accept it. There is no evidence whatever that they ever accepted it or intended to accept it. Bliss, one of the plaintiffs, testified that Button, one of the defendants, at the time of the negotiation for the purchase of the cloth, stated that he could not examine the cloth where it was, and that it was the understanding that he should take the cloth and examine it all before the week was out, and then give defendants' notes for the same. Stone, another of the plaintiffs, testified the defendants were not ready to receive the goods then, but that the understanding was that they were to take them, and before Wednesday of the next week examine them, for the purpose of seeing whether they had the quantity and quality they bargained for, and were then to give their notes for them. Foy, also one of the plaintiffs, testified that he wrote at the bottom of the bill of sale which was sent to the defendants the words "to be examined by Wednesday or Thursday of next week." We thus have the testimony of all the plaintiffs concurring that the defendants received the goods only for examination, and the testimony on the part of the defendants on the same point is still stronger. They did not take possession of the goods as owners, and it was not the intention of the parties that the title to them should vest in the defendants before they examined them and gave their notes. In other words, it was not an executed sale. And such was the view taken of the case by the judge at the circuit in his charge to the jury. He charged the following propositions: —

"If you find that these goods were warranted, and that they did not conform to the representations made by the plaintiffs, you will find a verdict for the defendants."

"If you find that the plaintiffs warranted the balance of the goods to correspond as to quality with the four cases shown to the defendants on the sale, and that those delivered did not so correspond, then the defendants were not bound to accept them."

"If you find that the goods were sold by sample, and that the bulk did not correspond with the sample, and further, that the defendants were induced to keep the goods over the week, or to continue the examination of the goods longer than they would have done but for the acts of the plaintiffs, then the defendants had a right to return the goods, and your verdict should be for the defendants."

"Although the defendants agreed to examine these goods within one week, yet if the plaintiffs requested them during the week to continue to examine more of the goods, then defendants were entitled to a reasonable time to make such further examination, and if such examination took more than the balance of the week, the defendants were still entitled to return them, if at the close of the examination they proved to be inferior to the samples."

It will be seen that the judge treated this as an executory contract of sale, under which the defendants had the right to refuse to accept the goods if they did not conform to the warranty, in case the jury found one had been made. He assumed that the defendants had not accepted the goods, but he charged the jury in substance that if the defendants purchased without warranty, then they were bound to accept; and if they purchased with a warranty and the goods conformed to the warranty, then they were also bound to accept: and if there was a warranty and the goods did not conform to it, then the defendants were not bound to accept. It was plainly assumed by the judge, that upon some theory there was a valid executory contract of sale, not that there was an executed sale. Because if the defendants had accepted these goods, and the title had vested in them, and the sale had thus become executed, the defendants would have had no right to return them for a breach of warranty and escape entirely any recovery. In such case the defendants would have been obliged to have retained the goods, and could only have recouped or counterclaimed their damages for a breach of warranty. That I am right in these observations as to the charge appears more clearly by the refusal of the judge to charge the following request of the defendants' counsel: "If you find the defendants never intended to, and did not in fact, accept the goods delivered, then your verdict should be for the defendants." To the refusal to charge as thus requested there was an exception. This shows quite clearly that the judge tried the case upon the theory of an executory sale, valid and binding (unless there was a breach of warranty), without acceptance. In this refusal to charge there was manifest error, because without acceptance there was no valid contract of sale, and the defendants had the right to reject and return the goods without any liability whatever to the plaintiffs.

Another view of this case will also show that the Statute of Frauds was not complied with. There was at least no such delivery of these goods as deprived the plaintiffs of their lien for the purchase-price.

When the goods were returned to the plaintiffs they claimed a lien on them for the purchase-price, and refused to receive them except as lien holders, and they sold them to satisfy this lien, and they claim in this action to recover the balance of the purchase-price not satisfied by a sale of the property. It is unnecessary to inquire whether, upon the facts as they appeared upon the trial, the plaintiffs had this lien or not. They claimed it, acted upon it, and alleged it in their complaint. They cannot now be heard to deny it.

The authorities above cited show that a lien for the purchase-price is inconsistent with such a delivery and ultimate acceptance of goods as to satisfy the Statute of Frauds.

The judgment should therefore be reversed and a new trial granted, costs to abide event.

All concur. *Judgment reversed.*[1]

STONE v. BROWNING.

NEW YORK COURT OF APPEALS, JANUARY 29 — MARCH 20, 1877.

[*Reported in* 68 *New York*, 598.]

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department affirming a judgment in favor of plaintiffs, entered upon a verdict.

The case upon a former appeal is reported in 51 New York, 211.

The complaint in this action alleged the sale by plaintiffs to defendants of sixty-five cases containing about 55,110 yards of "sky-blue kerseys" at one dollar and twenty-five cents per yard, to be paid for by defendants' promissory notes at four months; that plaintiffs delivered the goods in pursuance of the contract of sale and demanded the notes, but defendants refused to give the notes and sent the goods back; that plaintiffs refused to receive them except as defendants' goods, and to secure the claim for the purchase-money, and gave notice that unless they were paid for they would sell them upon defendants' account, holding defendants for any balance; that plaintiffs sold the kerseys on account of their claim for the purchase-price and applied the proceeds, which left a deficiency, for which they asked judgment.

The contract of sale was verbal. The facts appearing in reference thereto are sufficiently set forth in the opinion.

At the close of the evidence defendants' counsel moved for a nonsuit upon the ground, among others, that the contract for the sale of the goods was void under the Statute of Frauds, and the evidence failed to show a delivery or acceptance. The motion was denied, and defendants' counsel duly excepted.

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[1] LOTT, Ch. C., delivered a concurring opinion.

Geo. F. Comstock, for the appellants.

Wm. M. Evarts, for the respondents.

RAPALLO, J. After a careful examination of the testimony in this case, we are satisfied that there was no evidence of an acceptance of the goods in controversy by the defendants, which would take this case out of the operation of the Statute of Frauds, and that the motion for a nonsuit made upon that ground should have been granted. It is conclusively established that by the terms of the verbal contract of sale, the goods were to be examined by the defendants before closing the transaction by giving their notes for the price, and that such examination was to be made at the store of the defendants. This was one of the conditions of the sale, and its consummation necessarily depended upon the result of such examination. The receipt of the goods by the defendants at their store under this arrangement was clearly not an acceptance of them. They received them for the express purpose of seeing whether they would accept them or not. Some further act on their part was necessary to constitute an acceptance which would give validity to the contract of purchase. It was requisite either that they should have made the examination and pronounced it satisfactory, or that they should have dealt with the goods, or done some unequivocal act evincing their intention to accept them unconditionally as their own property, in order to supply the place of a written contract of purchase. Not only is the case totally barren of any proof of such an acceptance, but the uncontroverted evidence is, that after proceeding with the examination the defendants refused to accept the goods and returned them to the plaintiffs.

Evidence was introduced to the effect that the goods were in fact such as represented, and that they corresponded with the samples exhibited at the time of the sale, and upon these points there was a conflict in the testimony. This evidence would have been material had there been a written contract of purchase, and the question had been whether the plaintiffs had performed their contract, and whether, consequently, the defendants ought to have accepted and paid for the goods. But it was not material upon the issue whether there had been in fact an acceptance which would supply the place of a written contract. Without such an actual acceptance, no valid contract was established. Performance by the plaintiffs of their part of the oral contract was not sufficient to give validity to it. All these points are covered by the decision of the Commission of Appeals when this case was before it on the former appeal (51 N. Y. 211), and are sustained in Caulkins *v.* Hellman (47 *id.* 449, and cases therein cited).

It is argued that it is unreasonable to suppose that the object of sending the goods to the defendants' store was merely to enable them to decide whether they would purchase them or not. It perhaps was not the intention of the plaintiffs that the defendants should have the option of rejecting the goods unless some just reason for so doing should be developed by the examination; but nevertheless, so long as the plaintiffs reposed upon a verbal contract, void under the statute, they exposed themselves even to an unjust refusal to accept. The only mode of securing themselves against such a result was to obtain a written memorandum of the purchase. The injustice of the refusal, if it were unjust, could not supply the place of an acceptance or of a written contract.

When goods are sold subject to examination, and there is no written contract, Blackburn, in his work on Sales (pages 22, 23), lays down the rule as follows: "So long as the buyer can, without self-contradiction, declare that the goods are not to be taken in fulfilment of the contract, he has not accepted them. And it is immaterial whether his refusal to take the goods be reasonable or not. If he refuse the goods, assigning grounds false or frivolous, or assigning no reasons at all, it is still clear that he does not accept the goods, and the question is not whether he ought to accept, but whether he has accepted them."

The point mainly relied upon in the prevailing opinion in the court below, and upon the argument here, is that, under the charge, the jury must be regarded as having found that the sale was absolute and not conditional, and was subject only to the right of reclamation, affecting the price to be paid, if, upon examination of the goods, there should be found a less number of yards than the invoice specified, or that proper allowance had not been made, according to the usages of trade, for holes that might be found in the cloths, and that they must also be deemed to have found that the cloths were both delivered to and accepted by the defendants, under such a form of contract, and that these findings obviate the objections founded upon the Statute of Frauds.

Without discussing the soundness of this conclusion, as to which there appears to have been a difference of opinion at the General Term, we are satisfied, after a full examination of the testimony, that the evidence was not such as to justify the submission to the jury of the several propositions of fact which they are thus supposed to have passed upon and found in favor of the plaintiffs. The facts, as testified to by the plaintiffs themselves, were that the sixty-five cases of kerseys in controversy were, at the time of the sale, in the basement of plaintiffs' store, nailed up, and in plaintiffs' warehouse, with the exception of three or four, which were upstairs and open. That the purchase was made by Mr. Button, one of the defendants, who made a partial examination of the goods in these open cases. They were exhibited to him by Mr. Bliss, one of the plaintiffs. There was some conversation as to the quality of the goods and the price. Button proposed to purchase them on a credit of four months; thereupon Bliss consulted his partner, Stone; after further conversation, Stone said to Button, I will sell to you on four months, provided you will examine the goods and give me your notes immediately. Button said he could not examine them before Wednesday of the following week. Then Mr. Stone said, "I want you to know what you are doing. If you buy this lot of goods, I want you to give them a thorough examination," and afterwards said that he did not want any after-claps about the sale; he wanted it to be a finality. Bliss proposed to Button to go downstairs and look at the goods, but he replied that he could not examine them there; that it was not a fit place. Fay, another of the plaintiffs, being present, said that looking at one case was as good as looking at forty. Bliss, being asked whether both parties acted on the belief that the sample fairly represented the goods, said: "I did not wish him to act upon that belief; I wished him, if he had any doubt about it, to go and examine them." "Q. Then the action taken was upon your statement that the balance corresponded with the sample? A. No, sir, that was the very point I wished to avoid." The plaintiffs agree substantially in this statement of the transaction, and do not claim that anything was said limiting the proposed examination to the mere purpose of a measurement of the goods. Mr. Stone testifies that he understood that the examination was to be at the store of the defendants, and assented to the goods being examined there, and also that the examination was to be for the purpose of determining the quantity of the goods and whether they came up to the representations. Fay confirms this, and the plaintiffs, in their letter to defendants, dated April 3, 1864, in reply to the defendants' letter of the same date, rejecting the goods, say: "We have only to repeat that unless you can show that the light blue kerseys sold to you on the 11th ult. are not as good as the four sample cases fairly exhibited, and examined by your Mr. Button, we must consider the sale binding on you," etc. This evidence, proceeding from the plaintiffs themselves, clearly establishes that the goods were sold subject to examination, and necessarily implies a right of rejection in case they should not prove to be of the quality represented, or indicated by the samples exhibited. This right was conceded by the plaintiffs by their letter of the third of April, and by the testimony of two of them on the trial, and there is no evidence in the case which would have warranted the submission to the jury of the question whether the sale and delivery were absolute and unconditional, and the examination merely related to measurement. It was attempted to prove by Mr. Bliss, one of the plaintiffs, a custom that when goods are delivered to be examined, the purpose of the examination is merely to correct the invoices in respect to measurement; but assuming the evidence to be admissible, it failed to establish any such custom, and the evidence of the other plaintiffs showed clearly that the purpose of the examination was not thus limited. Even Mr. Bliss, who gives his understanding of what the purpose of the examination was to be, does not testify that anything was said confining it to any special purpose. The controversy between the parties appears to have been, not as to the right of the defendants to reject the goods if really defective, but as to the fact whether they were so or not. This fact, as has already been shown, was not material to the determination of the question whether there was an actual acceptance. The fact that the goods were rejected and returned, is established beyond controversy.

Ordinarily the question of acceptance is one of fact. But when the uncontroverted facts are such as cannot afford any ground for finding an acceptance, or where, though the court might admit that there was a scintilla of evidence tending to show an acceptance, they would still feel bound to set aside a verdict finding an acceptance on that evidence, it is the duty of the court to withhold the case from the jury. Brown, Stat. Frauds, § 321; Denny *v.* Williams, 5 Allen, 5; Howard *v.* Borden, 13 *id.* 299. We think that this case falls within the rule.

The respondents, in their supplemental points, suggest that the letter of the defendants, dated April 3, 1863, was a sufficient memorandum of the contract to satisfy the statute. This letter, it is true, acknowledges the purchase of the goods, but it does not state the price or any of the terms of the contract. These deficiencies cannot be supplied by oral evidence. All the essential parts of the contract must be evidenced by the writing. This objection, without reference to others, is conclusive.

The judgment should be reversed and a new trial ordered, with costs to abide the event.

All concur; ALLEN, J., absent. *Judgment reversed.*

DORSEY *v.* PIKE.

NEW YORK SUPREME COURT, JANUARY TERM, 1889.

[*Reported in* 50 *Hun*, 534.]

BRADLEY, J. The action was brought to recover the price of an engine, boiler and pump, with appendages, alleged to have been sold and delivered by the plaintiff to the defendant and to have been purchased by her. The latter denied the sale and purchase. It appears that the defendant was the owner of a stone quarry, in which she was engaged in quarrying stone for market, and that early in July, 1886, James B. Pike, the husband of the defendant, rented of the plaintiff this apparatus to use in working the quarry, and it was put in use there for drilling and pumping. The plaintiff claimed, and gave evidence tending to prove, that in the forepart of the following August, an agreement was made between him and the husband, by which the plaintiff agreed to sell and he agreed to purchase, at the price of $250, the apparatus to use in the quarry. This is contradicted by evidence on the part of the defendant, and in her behalf further evidence was given tending to prove that the husband had no authority from the defendant to make such purchase on her account. The burden of proof was with the plaintiff to show that the sale was made, and that the husband was authorized to make the purchase for the defendant. In view of all the circumstances appearing by it, the evidence presented a question of fact upon the subject of the authority of the husband, and permitted the conclusion that he was the defendant's agent in the business of operating the quarry and marketing the stone taken from it; and, upon finding that fact, the jury were justified in the further conclusion that he had authority to purchase for her the machinery to be used in working the quarry. The alleged agreement of sale was evidenced by no writing, and no payment was made of any part of the purchase-price. It is, therefore, contended on the part of the defendant, that the agreement was within the Statute of Frauds and void. 2 R. S. 136, § 3. There was no act of delivery and acceptance at the time the alleged contract was made. But the property was then at the quarry under an arrangement with the husband by which the plaintiff had rented it for use there. And, assuming that the husband was such agent, and rented it for the defendant, the property was then in her possession as lessee. Upon the subject of delivery and acceptance, the trial court charged the jury that the husband then had the possession of the engine either in his own right or as agent of his wife; and that if it was then understood and agreed between the parties that there was or should be a sale, "that sale was a valid sale, and the only question remaining for you to determine is who the sale was made to;" and that "if he had the entire possession, of course he could not get any more possession, and there was no necessity of any writing, no necessity of any payment or necessity for any further delivery." The view of the court evidently was that no act further than the making of the oral agreement of sale and purchase was essential to its validity and to render the contract effectual, if the property was then in the possession of the party in whose behalf it was made as purchaser. The defendant's counsel took exception to the proposition so charged. The statute requires, to support such a contract, a subscribed memorandum of it in writing, unless the buyer shall accept the property, or some part of it, or at the time pay some part of the purchase-money. And its purpose was not to permit the validity of such an agreement to rest merely in words. The design of the statute was in contracts of this character, having the importance represented by the requisite price of the property, to guard against the misunderstanding of the parties, and perjury, by requiring, in the absence of any writing subscribed by the party to be charged, that a portion of the purchase-money should at the time be paid, or that then or thereafter the purchaser should by some act accept and receive some of the property. The opportunity and expressed purpose to accept it is not sufficient. (Shindler *v.* Houston, 1 N. Y. 261.) Assuming that the machine was in the possession of the defendant at the time the agreement to purchase was made, and that the husband, as her agent, made it, those facts alone were not sufficient to give validity to the contract. To hold otherwise would have the effect to render the mere words of the parties to such a contract effectual, and the purpose of the statute would be defeated. The then possession was in no manner produced by or derived from such contract, but was lawfully taken and held under another and independent arrangement between the parties; and until the purchase was evidenced by some act of acceptance under or in pursuance of the agreement to buy, no valid sale would be accomplished. This is clearly the expressed import and purpose of the statute; and such is the unbroken current of authority as to its effect. The mere fact that the property was in possession of the defendant at the time of making the contract furnished no evidence of acceptance in its support. Edan *v.* Dudfield, 1 Q. B. (1 Adol. & Ell. N. S.) 302; Lillywhite *v.* Devereux, 15 M. & W. 285; *In re* Hoover, 33 Hun, 553; Benjamin on Sales (Corbin), § 173. But there must be some act or conduct on the part of the buyer, in respect to the property, which manifests an intention to accept it pursuant to or in performance of the contract of sale and purchase, which the parties have sought to make; and when the evidence is such as to warrant that conclusion, the question is usually one of fact for the jury. Parker *v.* Wallis, 5 Ell. & Bl. 21; Caulkins *v.* Hellman, 47 N. Y. 449; Stone *v.* Browning, 51 *id.* 211; s. c., 68 *id.* 598. This case was not entirely without evidence upon the question. There was evidence tending to prove that some use was made of the machine at the quarry, not only after the alleged contract of sale was made, but after Mr. Pike had notified the plaintiff that it was subject to the order of the latter, and would be returned to him at such place in Rochester as he might designate. This notice was given two weeks after the alleged purchase, and apparently indicated a purpose to terminate the agreement under which the apparatus had been taken; and it in terms imported no intention to accept or retain it under the contract of sale; and whether any action on the part of the defendant's agent (assuming her husband was such) in the control and use of the machine after such verbal agreement was made, was characterized by his intent to accept it in observance and execution of such contract, was a question for the jury; and to enable them to reach such conclusion, and thus give validity to the contract as one of sale, the fact must fairly have the support of evidence. We do not here intend to express any view upon the weight of the evidence on that subject; but, so far as related to the use made of the apparatus after the plaintiff was so notified of the purpose to terminate the arrangement for its service and return the property to him, there was some evidence on the part of the defendant, to the effect that such use was applied to pumping water from a place mentioned, in order to remove a pipe connected with it, and with a view only to take out and remove the pump. This may have been consistent with no intent to accept the property as a purchaser; but, in view of all the evidence upon that subject, we think the question was one of fact for the jury.

The suggestion of the plaintiff's counsel, that the question raised by the exception before mentioned was obviated by other portions of the charge of the court, does not seem to be supported. The part of the charge in question is not qualified, necessarily or in fact, by any instruction given to the jury. So far as appears, they were permitted to understand that the fact of possession by the defendant of the property at the time of making the contract by her agent (if so made), was sufficient to render the contract of sale valid. While it is true that, in view of such possession, nothing further was required of the plaintiff by way of delivery of the property, the matter of acceptance requisite to the validity of the contract was dependent wholly upon the voluntary act of the other party to such contract. It is deemed unnecessary, for the purposes of another trial, to express consideration of any other question presented on this review.

The judgment and order should be reversed, and a new trial granted, costs to abide the event.

Barker, P. J., Haight and Dwight, JJ., concurred.

Judgment and order reversed, and new trial ordered, costs to abide event.

THE FROSTBURG MINING COMPANY *v.* THE NEW ENGLAND GLASS COMPANY.

Supreme Judicial Court of Massachusetts, November Term, 1851.

[*Reported in* 9 *Cushing*, 115.]

This was an action of assumpsit for goods sold and delivered, to which the defendants pleaded the general issue. It was tried in this court before Bigelow, J., and reported by him to the full court.

The facts are sufficiently stated in the judgment. If the court shall be of opinion that upon the facts stated there was a sufficient acceptance by the defendants of the coal to satisfy the Statute of Frauds, the case shall be referred to an assessor to determine the amount of damages; otherwise the plaintiffs shall become nonsuited.

I. J. Austin, for the plaintiffs.

E. Buttrick, for the defendants.

Fletcher, J. This is an action of assumpsit for goods sold and delivered. Upon the trial it appeared by the testimony of Mr. Addison Child that he was the agent of the plaintiffs, who did their business in Baltimore, Maryland; that about the 19th March, 1849, he received from the agent of the defendants, who do their business in Cambridge and Boston, a verbal order for a cargo of coal, to be shipped by the plaintiffs from Baltimore in a vessel drawing not more than ten feet of water, at a freight not over $2.25 a ton. This order the witness forwarded to the agent of the plaintiffs in Baltimore; and on the 14th April, 1849, the cargo was shipped on board a schooner which drew, when fully loaded, nine feet and nine inches only.

By the bill of lading the cargo was consigned to Mr. Child, the plaintiffs' agent, or his order, for the defendants. This bill of lading was forwarded by the plaintiffs to Mr. Child, and received by him in due course of mail on the 16th or 17th of April, and specified the freight to be $2.45 a ton. On the day it was received it was indorsed by Child, and together with a bill of the coal left by him in the counting-room of the defendants' agent, who was at that time absent. As soon as the defendants' agent returned, he sent back the bill of lading and refused to receive the coal.

The said bill for the coal reduced the price twenty cents a ton, so that the freight on the same, to be paid by the defendants, need not exceed their limits of $2.25 a ton.

On the passage from Baltimore to Boston the vessel in which the coal was shipped foundered. After being raised and repaired, she arrived in Boston, when the plaintiffs by their aforesaid agent tendered the coal to the defendants, who refused to receive it.

It was proved on the trial that, by the usage of the coal trade between Baltimore and Boston, when coal is ordered in Boston from Baltimore the delivery of it on board a vessel consigned to the person ordering it is a compliance with the order, and, the coal is thereafter at the risk of the party ordering it.

The defence is that, according to the provisions of the Statute of Frauds, this being a contract for the sale of goods, wares, and merchandise, for the price of fifty dollars or more, and there being no note or memorandum of the bargain in writing, the contract was not binding unless the purchaser shall accept and receive part of the goods, or give something in earnest to bind the bargain or in part payment.

There was nothing given in earnest or in part payment. The only question is, whether the defendants did accept and receive the goods or any part of them.

That there was no actual manual taking or occupation of the coal by the defendants, is quite clear.

As soon as the defendants' agent had knowledge that the bill of lading was left at his counting-room, he forthwith sent it back to the plaintiffs' agent, and expressly refused to receive the coal. When the coal arrived and was tendered to the defendants' agent he at once refused to receive it; so that the defendants have promptly repelled all attempts to make an actual delivery of the coal to them, and have promptly refused to accept and receive the coal or any part of it.

But the learned counsel for the plaintiffs maintains with much ability that it is not necessary that there should be an actual manual taking or occupation of the coal, but that there may be a constructive accepting and receiving, and that the receiving on board the vessel was a sufficient accepting and receiving by the defendants.

The proposition of the plaintiffs' counsel, that there may be a constructive accepting and receiving, or a receiving without the actual manual occupation by the purchaser, seems to be well sustained by the authorities. Therefore in many cases it is made a question to the jury, whether the purchaser by his mode of acting or forbearing to act, or by some acquiescence, has not accepted the goods, though there has been no actual manual taking and occupation of them by him.

The further proposition of the learned counsel for the plaintiffs, that the acceptance and receipt, to satisfy the Statute of Frauds, are not such as to preclude the purchaser from afterwards objecting to the quantity or quality of the goods, is certainly fully sustained by the case of Morton *v.* Tibbett, 15 Adol. & Ellis, N. S. 428.

This case in this particular differs from many previous cases, which are all carefully referred to and commented on by the Chief Justice of the Queen's Bench, in delivering the opinion of the court.

In Morton *v.* Tibbett the receipt of the goods is considered as a substitute for writing, leaving to the purchaser the same right to object that the contract has not been complied with which he would have if the contract had been in writing.

The other and most material proposition on behalf of the plaintiffs, that the coal when delivered on board the vessel was accepted and received by the defendants within the provision of the statute, remains to be considered.

That a delivery to a carrier is not sufficient to satisfy the statute, as a general proposition, is undoubtedly true, and is very properly admitted by the plaintiffs' counsel. But it is maintained that the master of the vessel, under the particular circumstances of the case, was an agent to accept to satisfy the statute, because in the first place he was a carrier nominated by the defendants. But the facts show that the verbal order of the defendants was merely to have the coal shipped by the plaintiffs from Baltimore in a vessel drawing not more than ten feet of water, at a freight not over $2.25 a ton. No reference was made to any particular vessel or master. Even this very general order was not complied with by the plaintiffs, as the freight was $2.45 a ton instead of $2.25 as was ordered.

This departure in the price of the freight would perhaps of itself be sufficient to exempt the defendants from the liability to take and pay for the coal. But it is not necessary to put the case on that ground, or attach any importance to that point.

The order as to a vessel was very general, referring to no particular vessel or master, specifying only the draught of water and price of freight.

The master was merely a carrier, and the taking by him would in no sense and upon no principle be regarded as a receipt by the vendee.

The case of Morton *v.* Tibbett was much stronger than the present. There the defendant himself sent a particular lighterman to receive the wheat. But the delivery to the lighterman was not considered to be a receipt by the vendee, though other acts of the vendee tending to show an acceptance by him were regarded as sufficient to justify a verdict for the plaintiff.

So also in Bushel and Others *v.* Wheeler, which is reported in connection with Morton *v.* Tibbett, the vendee ordered the goods to be forwarded by a particular sloop. Yet the delivery on board the sloop was not regarded as a receipt by the vendee within the statute, though the subsequent acts and forbearing to act on the part of the vendee were held to be sufficient to go to the jury, to find an actual receipt by the vendee.

It is therefore quite clear that a delivery on board the vessel in this case cannot be regarded as a receipt, within the provision of the statute, by the vendee, on the ground that the defendant ordered the coal to be forwarded in that way.

But it is further maintained for the plaintiff that the master of the vessel was an agent to accept within the statute, because the usage of trade made him such in the coal trade between Boston and Baltimore. The usage as shown was that when coal is ordered in Boston from Baltimore the delivery of it on board a vessel consigned to the person ordering it is in compliance with the order, and the coal is thereafter at the risk of the party ordering it.

It does not in terms appear whether or not this usage applies to mere verbal orders, which are invalid by the Statute of Frauds.

Nor is it shown upon what ground this usage can be set up and maintained against established provisions and principles of law. Upon general principles of mercantile law, when a person accepts a written order and delivers goods on board a vessel according to the order, consigned to the person ordering them in common form, they are then of course at the risk of the consignee.

When orders have been received and executed, and delivery has been made to the master of the ship, and bills of lading signed and forwarded, the seller is *functus officio* and can do nothing more, except so far as he may have a right of stoppage *in transitu.*

It is unnecessary to consider how far there could be any usage affecting the rights of the parties in this case, as it is quite clear that the case is not within the usage set up and relied upon. The usage is said to be that, when coal ordered is delivered on board a vessel consigned to the party ordering it, that is a compliance with the order, and the coal is thereafter at the risk of the party ordering it.

But in the present case the coal was not consigned to the party ordering it, but on the contrary was consigned to the plaintiffs' own agent. By the bill of lading the coal was to be delivered to Addison Child or his assigns. But the bill of lading expressed that it was to be delivered to Addison Child for the New England Glass Company; and when the bill of lading was received by the consignee he indorsed it and offered it to the defendants' agent, which it is said was a substantial compliance with the alleged custom. The supposed custom required the coal to be consigned to the defendants, but it was in fact consigned to the plaintiffs' agent. This, so far from being a substantial compliance with, was the widest possible departure from the custom.

The bill of lading gave the defendants no right to or control over the coal, and when indorsed and offered to the defendants' agent was promptly rejected.

There having therefore been no acceptance of the coal by the defendants to satisfy the Statute of Frauds, according to the provision of the report the plaintiffs must become nonsuit.

Plaintiffs nonsuit.

WARREN MARSH AND OTHERS *v.* LEONARD HYDE, JR.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH TERM, 1855.

[*Reported in* 3 *Gray*, 331.]

ACTION of contract on a verbal agreement for the sale by defendant to the plaintiffs of two mows of hay, stored in two separate barns, and containing about twenty tons, at the rate of fourteen dollars a ton. The case was referred by rule of court. At the hearing before the referee there was evidence to prove a verbal agreement for the sale of the hay at the price named, to be paid for as it was delivered; and that the defendant at different times, some days afterwards, delivered three loads of the hay, amounting in all to about two tons, and then refused to deliver the remainder. The defendant objected that the contract was within the Statute of Frauds; and the referee reported the facts so as to present this question to the court.

C. C. Nutter and *T. F. Nutter*, for the plaintiffs.

H. C. Hutchins, for the defendant.

BIGELOW, J. The report of the referee presents the question whether the contract was binding on the parties under the Statute of Frauds. Rev. Sts. c. 74, § 4. The defendant's objection is put on the ground that, there having been no delivery of any part of the hay at the time the agreement was entered into for its sale and purchase, the subsequent delivery of the three loads to [by?] the defendant will not avail to take the case out of the operation of the statute; and that the delivery of the hay under the circumstances proved only establishes three different and distinct contracts for each load; so that an action could have been maintained by the seller for each load as it was delivered.

But this position cannot be maintained upon any reasonable and just construction of the language of the statute; nor is it supported by a consideration of the purposes and objects which the statute was intended to accomplish. There is nothing in the statute which fixes or limits the time within which a purchaser is to accept and receive part of the goods sold, or give something in earnest to bind the bargain or in part payment. It would fully satisfy its terms if the delivery or part payment were made in pursuance of a contract previously entered into. In New York it is expressly provided that the part payment under the contract shall be made "at the time." Rev. Sts. of N. Y. pt. 2, c. 7, tit. 2, § 3.

But no such language is found in any part of our statute. Nor can we see any good reason for implying that any such limitation was intended by its provisions.

The great purpose of the enactments commonly known as the Statute of Frauds is to guard against the commission of perjury in the proof of certain contracts. This is effected by providing that mere parol proof of such contracts shall be insufficient to establish them in a court of justice. In regard to contracts for sales of goods, one mode of proof which the statute adopts to secure this object is the delivery of part of the goods sold. But this provision does not effectually prevent the commission of perjury; it only renders it less probable by rendering proof in support of the contract more difficult. So in regard to other provisions of the same statute; perjury is not entirely prevented by them; the handwriting of a party to be charged, or the agency of the person acting in his behalf, may still be proved by the testimony of witnesses who swear falsely. Absolute prevention of perjury is not possible. In carrying this great purpose of the statute into practical operation, it can add no security against the danger of perjury that the act, proof of which is necessary to render a contract operative, is not [*sic*] contemporaneous with the verbal agreement. A memorandum in writing will be as effectual against perjury, although signed subsequently to the making of a verbal contract, as if it had been executed at the moment when the parties consummated their agreement by word of mouth. So proof of the delivery of goods in pursuance of an agreement for their sale previously made, will be as efficacious to secure parties against false swearing as if the delivery had accompanied the verbal contract. It is the fact of delivery under and in pursuance of an agreement of sale, not the time when the delivery is made, that the statute renders essential to the proof of a valid contract. It is to be borne in mind that in all cases where there is no memorandum or note in writing of the bargain, the verbal agreement of the parties must be proved. The statute does not prohibit verbal contracts. On the contrary, it presupposes that the terms of the contract rest in parol proof, and only requires, in addition to the proof of such verbal agreement, evidence of a delivery or part payment under it. It does not therefore change the nature of the evidence to be offered in support of the contract. It merely renders it necessary for the party claiming under it to show an additional fact in order to make it "good and valid."

The fallacy of the argument pressed by the counsel for the defendant seems to us to consist in assuming that the contract takes its legal force and effect from the time when its terms are verbally agreed upon; and that therefore, being void when made, it cannot become valid by any subsequent act of the parties. It would be more correct to say that, until the formalities required by the statute are complied with, there is no legal and valid contract entered into. The terms verbally agreed upon between the parties amount to little else than a proposition for a contract; and it is not until delivery of part of the goods takes place, or part payment is made, that it assumes the qualities of a legal contract; in the same manner as the written memorandum of the previous verbal agreement of the parties becomes in law the binding agreement between them. It is not therefore the subsequent delivery of goods which gives vitality and force to a contract previously void. Until the delivery is made no binding contract exists; and when it takes place the act of the parties unites with their previous verbal understanding to create a full, complete, and obligatory agreement. In all cases like the present a single inquiry operates as a test by which to ascertain whether a contract is binding upon the parties under the Statute of Frauds. It is whether the delivery and acceptance, whenever they took place, were in pursuance of a previous agreement. If the verbal contract is proved, and a delivery in pursuance of it is shown, the requisites of the statute are fulfilled. Such was the proof in the present case. The plaintiffs, if they had proved only a delivery of three loads of hay, would not have made out their case against the defendant. But having also proved a previous contract of sale for the whole of the hay, as well as a delivery under that contract, they had established by competent proof a valid agreement, binding on the parties, for breach of which the plaintiffs might well maintain an action for damages. Elliott *v.* Thomas, 3 M. & W. 170; Scott *v.* Eastern Counties Railway, 12 M. & W. 33; Vincent *v.* Germond, 11 Johns. 283; Davis *v.* Moore, 13 Maine, 424; Damon *v.* Osborn, 1 Pick. 476; Thompson *v.* Alger, 12 Met. 435. The case of Seymour *v.* Davis, 2 Sandf. 239, cited by the defendant, has been substantially overruled by the later case in the Court of Appeals of New York of McKnight *v.* Dunlop, 1 Seld. 537.

It is true, as the counsel for the defendant suggests, that an action would lie against the plaintiffs to recover the price of each separate load of hay as it was delivered; but this does not show that there was not an entire contract for the sale and delivery of all the hay stored in the two barns. The defendant could maintain an action to recover the price of each load, because such were the terms of payment agreed upon. So too he could recover damages for a breach of the contract, if the plaintiffs had refused to accept and receive the residue of the hay after the delivery of the three loads. *Judgment for the plaintiffs.*

ATHERTON *v.* NEWHALL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH 13 — SEPTEMBER 7, 1877.

[*Reported in* 123 *Massachusetts*, 141.]

CONTRACT to recover the price of 660 sides of sole leather. At the trial in the Superior Court, before Gardner, J., it appeared that the plaintiffs were dealers in leather in Boston, and that the defendants were manufacturers of boots and shoes in Lynn. One of the plaintiffs testified that the defendant Newhall called at their store on Saturday, November 9, 1872, examined some leather, and said he would take "what leather was adapted to his purpose," being leather "light weight" in thickness, out of a certain lot of about 800 sides which were piled up in the store; and that, after Newhall had gone, he assisted in sorting out the leather intended for the defendants, which was then rolled up into 44 rolls, containing 660 sides, weighed, marked with the defendants' names, and placed near the front door of the store, ready for delivery. It was also in evidence that in the afternoon of the same day an expressman, who was in the habit of calling at the plaintiffs' store for goods for Lynn, called and took six rolls of the leather, containing 90 sides, which was all his wagon could carry, with the goods then on it, but did not deliver them until the Monday following to the defendants, who were regular customers of his; but in this case no order had been given to him by either party. The plaintiffs' store, with its contents, including the remaining 570 sides of leather, was burned in the great fire of November 9, 1872. On Monday, November 11, 1872, the defendant Newhall called on the plaintiffs and produced the bill, which he had received from the plaintiffs, for the 660 sides, and requested their book-keeper to correct the bill so as to correspond with the amount of leather actually received by him, and the book-keeper thereupon deducted the 570 sides from the bill. On March 20, 1873, he tendered to the plaintiff $394, the amount due for the 90 sides, which they declined to receive.

Upon this evidence, the judge ruled that there was no evidence of any delivery to or acceptance by the defendants of the 570 sides of leather, directed the jury to return a verdict for the price of the 90 sides, and reported the case for the consideration of this court. If the action could be maintained for the whole 660 sides, the verdict was to be set aside; otherwise, judgment was to be entered on the verdict.

E. Avery and *G. M. Hobbs*, for the plaintiffs.

R. M. Morse, Jr., for the defendants.

GRAY, C. J. It is unnecessary to consider whether there was a sufficient delivery to complete the sale, because it is quite clear, upon the authorities, that there was no such acceptance and receipt of part of the goods as would satisfy the Statute of Frauds. Gen. Sts. c. 105, § 5. Such acceptance must be by the buyer himself, or by some one authorized to accept in his behalf. The acts of the buyer on Saturday did not constitute such an acceptance, because, according to the seller's own testimony, the buyer merely agreed to take all the sides of leather of a certain thickness, which were not then set apart by themselves, but formed part of a large pile from which they were afterwards to be selected by the seller. Knight *v.* Mann, 118 Mass. 143. The receipt of part of the leather by the expressman did not constitute such an acceptance, because he was not authorized to accept so as to bind the buyer. Johnson *v.* Cuttle. 105 Mass. 447. The acceptance by the buyer on Monday, of the part brought by the expressman, was not a sufficient acceptance to take the sale of the whole out of the statute, because it appears that it was not with an intention to perform the whole contract and to assert the buyer's ownership under it, but, on the contrary, that he immediately informed the seller's clerk that he would be responsible only for the part received. Townsend *v.* Hargraves, 118 Mass. 325, 333; Remick *v.* Sandford, 120 Mass. 309.

Judgment on the verdict.

RODGERS *v.* JONES.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, NOVEMBER 18, 1878—SEPTEMBER 14, 1880.

[*Reported in* 129 *Massachusetts*, 420.]

GRAY, C. J. This is an action of contract to recover the price of a lot of rough calfskins, alleged to have been sold and delivered by the plaintiffs to the defendants.

The testimony introduced by the plaintiffs at the trial was to the following effect: On Wednesday, November 6, 1872, the lot of calfskins in question was piled, apart from other goods, in the plaintiffs' warehouse, when Frederick Jones, one of the defendants, came in with one Kuebler (a currier, who was to curry the skins when the defendants bought them), and made an oral agreement with John L. Rodgers, one of the plaintiffs, to purchase the entire lot, at a certain price per pound for the merchantable skins, and two-thirds that price for the "culls" or damaged skins; and then said to Kuebler, "I have bought this lot of skins, and I want you to stay and see them put up; but I don't wish you to take them away before Friday or Saturday, because in the mean time I want to ascertain in regard to my insurance." Kuebler answered that he would send his team and take the skins on Saturday. Jones then left the warehouse, and Kuebler remained and assorted about half the skins, throwing them over and separating the merchantable from the damaged skins, and then went away, and the plaintiffs assorted the rest of the lot.

The expression "putting up the skins" means assorting, bundling, and weighing. The skins are first assorted by putting the merchantable skins in one pile, and the damaged ones in another. They are then put in bundles, taking out every twentieth merchantable skin as a test, and weighed. The test skins are then weighed by themselves, spread to dry for at least twenty-four hours, and then reweighed, and the amount of shrinking on the whole lot is ascertained by a calculation based upon the shrinking of the test skins.

The plaintiffs put up this lot of skins in the usual way. The test skins were spread to dry from Thursday night to Saturday morning, and then reweighed, and the weights entered on the plaintiffs' books, and the plaintiffs set the whole lot of skins apart by itself in bundles marked with the defendants' initials. On Saturday, November 9, Kuebler came into the plaintiffs' warehouse, was told that the skins were ready for him to take, and was asked whether his team would be there soon, and he answered that it would not. Nothing further took place, and during the following night the skins were destroyed by fire.

The plaintiffs offered evidence that on Wednesday, after Jones had left their warehouse, and after Kuebler had ceased assorting the skins and before he went away, the following conversation took place between him and Rodgers: Kuebler said, "There is no need of my staying here any longer. This is a good lot of skins. There is no chance for any question as to quality of the skins, and you go ahead and put them up." Rodgers answered, "No, Mr. Jones left you to see them weighed up. It won't take you a great while to go over the rest of them; you do it." But Kuebler said, "No, I can't waste my time. I know you well enough. I'll take the risk of your doing it all right. You go ahead and put up the skins." This evidence was objected to by the defendants, and excluded by the judge, on the ground that there was nothing to show that Kuebler had authority to bind the defendants by anything he did say.

The judge, at the request of the defendants, ruled that there was no such evidence of acceptance and delivery of the skins as would entitle the plaintiffs to recover in this action, and ordered a verdict for the defendants; and the case comes before us on the plaintiffs' exceptions.

It is evident that the learned judge used the word "delivery" to denote what is necessary to pass the title as between seller and buyer; and that the effect of his ruling was that the plaintiffs had failed to prove either of two facts, both of which must be proved in order to maintain the action: 1st. The passing of the title between the parties, at common law. 2d. An acceptance and receipt, within the meaning of the Statute of Frauds. Gen. Sts. c. 105, § 5.

It is unnecessary to decide whether, under the peculiar circumstances of this case, the jury would have been warranted in finding that the title in the goods passed to the defendants when they had been assorted and set apart by the plaintiffs in the absence of the defendants and their agent. In order to constitute an acceptance and receipt under the Statute of Frauds, it is not enough that the title in the goods has vested in the buyer; but he must have assumed the legal possession of them, either by taking them into the custody or control of himself or of his authorized agent, or by making the seller or a third person his bailee to hold them for him, so as to terminate the seller's possession of the goods and lien for their price. Allowing the utmost effect to the testimony introduced and offered by the plaintiffs, yet, so long as the goods had not been delivered to the defendants or their agent, but remained in the plaintiffs' warehouse, the plaintiffs, even if they could be held to have parted with the title, had not parted with their possession as sellers, or with the lien incident to such possession; and therefore there has been no such acceptance and receipt as to satisfy the Statute of Frauds. Safford *v.* McDonough, 120 Mass. 290; Atherton *v.* Newhall, 123 Mass. 141. If Kuebler had authority to receive the goods in behalf of the defendants, there is no evidence that he exercised that authority.

Exceptions overruled.

S. B. Ives, Jr., and *G. L. Huntress*, for the plaintiffs.

E. D. Sohier (*F. C. Welch* with him), for the defendants.

SECTION VI.

"GIVE SOMETHING IN EARNEST TO BIND THE BARGAIN OR IN PART OF PAYMENT."[1]

WALKER *v.* NUSSEY.

IN THE EXCHEQUER, JANUARY 18, 1847.

[*Reported in* 16 *Meeson & Welsby*, 302.]

DEBT for goods sold and delivered, and on an account stated. Plea, — 1st, never indebted; 2d, a set-off for goods sold and delivered, and on an account stated. Issue thereon. At the trial before the under-sheriff of Yorkshire it appeared that, the defendant having sold goods to the plaintiff to the amount of £4 14*s.* 11*d.*, the defendant on a subsequent occasion bought of him a lot of leather, of two sorts, by sample. It was then verbally agreed between them that the £4 14*s.* 11*d.* due to the defendant should go in part payment by him to the plaintiff for the leather. Next day the plaintiff sent in the goods to the defendant with this invoice: —

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[1] "In any view we can take of the matter we perceive no sufficient reason for supposing that the payment, in the contemplation of the framers of this statute, was restricted to a payment made at the precise period of making the verbal agreement. It is doubtless true that, until such payment of part of the purchase-money, the contract would be of no validity, and it would be entirely competent for either party to repudiate it. Neither party would be bound by its terms; the vendee would be under no obligation to make a payment, and the vendor under no obligation to receive one. But when actually made and accepted with the full concurrence of both parties, then the contract takes effect; then a part payment of the purchase-money has been made; and then the parties have made a valid contract. This would seem to be a very reasonable construction of the statute if it was necessary to decide the abstract question of the effect of payment of a part of the purchase-money after the time of entering into a verbal contract." *Per* Dewey, J., Thompson *v.* Alger, 12 Met. 428, 436.

See to the same point, Davis *v.* Moore, 13 Me. 424; Dallavo *v.* Richardson, 96 N. W. Rep. 20 (Mich.); Gault *v.* Brown, 48 N. H. 189. Where, however, as in New York, the statute expressly requires payment at the time of the contract, it is necessary that there should be at least a "restatement or recognition of the essential terms of the contract" when payment is made. See Bissell *v.* Balcom, 39 N. Y. 275; Hawley *v.* Keeler, 53 N. Y. 114; Hunter *v.* Wetsell, 84 N. Y. 549; Crosby Co. *v.* Trester, 90 Wis. 412.

Halifax, Oct. 14, 1846.

Mr. William Nussey

Bought of Thomas Walker

Dressed hide bellies, 287 at 9*d.*	£10 15*s.* 3*d.*
Insole, 376 at 6½	10 3 8
	£20 18*s.* 11*d.*
By your account against me	4 14 11

The defendant returned the goods within two days as inferior to sample, and wrote to the plaintiff to pay him the £4 14*s.* 11*d.* The plaintiff refused to receive the goods and brought this action.

The under-sheriff ruled that there was nothing to show that the £4 14*s.* 11*d.* had been given by the defendant in earnest or part of payment, directing the jury to find for him if they thought he returned the goods in a reasonable time without taking to them. The jury found a verdict for the defendant on both issues.

Pollock, C. B. I think no rule ought to be granted. The plaintiff sues for goods sold and delivered by him to the defendant above £10 in value; and it was admitted that the defendant had previously sold him goods for £4 14*s.* 11*d.* On the new dealing between them the agreement was, that that sum should be taken as part payment by the defendant, and that he should only pay the plaintiff the difference between that sum and the amount of the goods bought from him. This contract was verbal; but it is argued that the £4 14*s.* 11*d.* was a part payment by the defendant so as to take the case out of the Statute of Frauds. But I think it was not. Here there was nothing but one contract; whereas the statute requires a contract and, if it be not in writing, something besides. The question here is, whether what took place amounted to a giving of earnest or in part of payment at the time of the bargain, the goods bought by the defendant not having been then delivered to him by the plaintiff. Nothing turns on the effect of their subsequent delivery. Had these parties positively agreed to extinguish the debt of £4 odd, and receive the plaintiff's goods *pro tanto* instead of it, the law might have been satisfied without the ceremony of paying it to the defendant and repaying it by him.[1] But the actual contract did not amount to that, and there has been no part payment within the statute.

Parke, B. I am of the same opinion, and think the ruling at the trial was right. The facts seem to be these: The plaintiff owed the defendant a sum of £4 14*s.* 11*d.* The parties then verbally agreed that the plaintiff should sell to the defendant goods above £10 in value, according to a given sample, the plaintiff's debt to go in part payment, and the residue to be paid by the defendant. No evidence was given of the actual payment or discharge of the debt due from the plaintiff, so that all rested in the agreement merely. If Mr. Addison could have shown the contract to have been that the parties were to be put in the same situation at that time as if the plaintiff's debt to the defendant had then been paid, or as if it had been paid to the defendant and repaid by him to the plaintiff as earnest, the statute might have been satisfied without any money having passed in fact; but the agreement was in fact that the goods should be delivered by the plaintiff by way of satisfaction of the debt previously due from him to the defendant, and that the defendant should pay for the rest. Then the buyer did not "give something in earnest to bind the bargain or in part of payment." The "part payment" mentioned in the statute must take place either at or subsequent to the time when the bargain was made. Had there been a bargain to sell the leather at a certain price, and subsequently an agreement that the sum due from the plaintiff was to be wiped off from the amount of that price, or that the goods delivered should be taken in satisfaction of the debt due from the plaintiff, either might have been an equivalent to part payment, as an agreement to set off one item against another is equivalent to payment of money. But as the stipulation respecting the plaintiff's debt was merely a portion of the contemporaneous contract, it was not a giving something to the plaintiff by way of earnest or in part of payment, then or subsequently.

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[1] But see Norton *v.* Davison, [1899] 1 Q. B. 401; Galbraith *v.* Holmes, 15 Ind. App. 34; Gorman *v.* Brossard, 120 Mich. 611; Matthiessen &c. Co. *v.* McMahon, 38 N. J. L. 536; Artcher *v.* Zeh, 5 Hill, 200; Walrath *v.* Richie, 5 Lans. 362; Brabin *v.* Hyde, 32 N. Y. 519. Actual surrender of a note is sufficient, Sharp *v.* Carroll, 66 Wis. 62; or indorsement upon a note, Dieckman *v.* Young, 87 Mo. App. 530; or entering a credit on books of account, Norwegian Plow Co. *v.* Hanthorn, 71 Wis. 529.

Rule refused.[1]

ARTCHER *v.* ZEH.

SUPREME COURT OF NEW YORK, MAY TERM, 1843

[*Reported in* 5 *Hill,* 200.]

ERROR to the Mayor's Court of the city of Albany, where Zeh sued Artcher in assumpsit for money had and received. The facts upon which the plaintiff relied were proved by Angus McDuffe, and were substantially as follows: Artcher agreed to sell certain land to McDuffe, but in consequence of the latter's inability to pay the purchase-money it was agreed between them that, if McDuffe would find another purchaser, Artcher would convey to him and account to McDuffe for whatever the land brought over $1,403.19. In pursuance of this arrangement Artcher conveyed to Wright and Wells on the 30th of October, 1839, for the sum of $1,640.87, taking their mortgage for the amount payable in two equal instalments on the 1st of June and 1st of December, 1840. Zeh held a note against McDuffe for more than the difference between $1,403.19 and the sum for which the land sold, and the latter agreed to transfer his interest in such difference to Zeh, who remarked that if Artcher would assent to the transfer he (Zeh) would credit or indorse the amount on the note. McDuffe accordingly called on Artcher and obtained from him a promise to pay over the sum claimed by the former when the mortgage should be paid. This was immediately after the mortgage was given. The mortgage was paid to Artcher about the time it fell due; but he refused to fulfil his engagement by paying any part of the money to Zeh, who thereupon commenced this action in the court below. At the close of McDuffe's examination he was objected to by the defendant's counsel as an incompetent witness for the plaintiff, and a motion was thereupon made to have his testimony stricken out of the case. The motion was denied, and the defendant's counsel excepted. It was not shown that any of the transactions or agreements testified to by McDuffe, except the deed and mortgage, were reduced to writing; nor did it appear that Zeh had actually credited McDuffe with the claim against Artcher, indorsed it on the note, or given a receipt for it in satisfaction or in any other form.

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[1] ALDERSON and PLATT, BB., delivered brief concurring opinions.

The defendant's counsel moved for a non-suit on the ground, 1. That inasmuch as the assignment from McDuffe to Zeh was not in writing, nor the note extinguished thereby, the assignment was void by the Statute of Frauds; 2. That Artcher was shown to be a trustee of McDuffe's interest in the mortgage moneys, that such trust was void under the Revised Statutes, and that the agreement between Artcher, McDuffe, and Zeh was therefore also void; and 3. That Artcher's promise to pay the money to Zeh was not to be performed within a year, and was for that reason void by the Statute of Frauds. The court below denied the motion, and the defendant's counsel excepted. Verdict and judgment for the plaintiff. The defendant sued out a writ of error.

R. W. Peckham, for the plaintiff in error.

H. G. Wheaton, for the defendant in error.

By the Court, Cowen, J. . . . The first objection taken on the motion for a non-suit should have been allowed. By the 2 Rev. Sts. 70 (2d ed.), § 3, in order to pass the interest in a chose in action where the price exceeds $50 there must be a writing, or the evidences of the debt or some of them must be delivered, or some part of the purchase-money be paid; otherwise the transfer is void. It is supposed that here was something equivalent to part payment of the money, because the terms of the agreement were such as to extinguish *pro tanto* the debt due from McDuffe to Zeh; in other words, that the transfer was accepted as a payment, and *per se* worked a satisfaction. McDuffe agreed with Zeh that Artcher should pay him, and Zeh stipulated that if Artcher would agree to pay him he would give McDuffe credit for the sum, or would indorse it on the note. But it never was credited, indorsed, or receipted in any form; at least nothing of the kind was shown. It need not be denied that a promise to indorse or credit Artcher's agreement to pay, in satisfaction or payment of so much as the sum amounted to, would operate as an extinguishment; or in other words, that an agreement to give an absolute credit would have that effect. But the agreement leaves it equal whether the indorsement or credit was not to be the usual conditional one, to become absolute on the assigned claim proving available. Such is the legal construction of an arrangement to take a claim against a third person, to be applied upon a precedent debt; and the law will not hold it to be an absolute payment unless there be an express agreement to take it as *per se* a satisfaction. In the absence of such an agreement the law will not compel the creditor to apply it in discharge till the money be actually received. Here are no such words as "absolute payment," "absolute satisfaction," "absolute discharge," or the like, to indicate that the credit was to differ from the one usual in such cases. Even the transfer of a negotiable note against a third person would not have been a satisfaction on the terms here used. But we are not left to implication. If this plaintiff really intended to work an extinguishment of his claim against McDuffe, why did he not indorse Artcher's promise as so much money paid on the note, or credit or give a receipt for it as such? Down to the very time of the trial he had done neither. He left his note to speak the same language as it did before the arrangement was made; at least we are to intend that he did, for his counsel do not pretend that he had applied the demand said to have been transferred, in any form, absolute or conditional. In refusing to apply it absolutely I admit he acted according to the legal inference of what was intended; but the omission strengthens that inference. It took away all doubt of what the parties intended, and left no question for the jury. Suppose this action had been against McDuffe, and it had appeared that the money had never been paid by the mortgagors and was never like to be, or that Zeh had failed to collect of Artcher for any cause not imputable to Zeh: clearly the mere arrangement between him and McDuffe could not be allowed as a bar.

Since the revised Statute of Frauds putting equitable transfers of choses in action on a footing similar to that on which sales of goods stand, if there be no writing and no delivery the assignee must pay something, at least part with something of value. The statute requires that he should pay some part of the purchase-money. No doubt it must be taken in its spirit to mean anything or part of anything, given by way of consideration, which is money or money's worth. But the object was to have something pass between the parties beside mere words, some symbol like earnest money. 2 Black. Com. 448. Here everything lies in parol; and even if there had been the express agreement which is set up, — an agreement for absolute credit, — I should doubt whether the statute would be satisfied without something more; at least some absolute indorsement or written credit at the time. One object of the statute was to prevent perjury. The method taken was to have something done, not to rest everything upon mere oral agreement. Here even the agreement is not direct, but rather sought to be raised by way of construction on an equivocal conversation.

Taken in any view, therefore, I think the assignment was void within the intent, as it is clearly within the words of the Statute of Frauds.

The judgment must be reversed; a *venire de novo* to go from the court below; the costs to abide the event. *Ordered accordingly.*

SHELDON EDGERTON *v.* J. H. C. HODGE.

SUPREME COURT OF VERMONT, JANUARY TERM, 1869.

[*Reported in* 41 *Vermont Reports*, 676.]

ASSUMPSIT, which was referred to a referee, who reported: —

"That on the 30th of June, 1864, the parties made an agreement by parol by which the defendant agreed to sell to the plaintiff what new-milk cheese he then had on hand and unsold, amounting to 975 pounds, and the new-milk cheese he should make thereafter during the season; and the plaintiff agreed to pay the defendant therefor at the rate of 15½ cents per pound, and every twenty days thereafter agreed to call at the defendant's house in Dorset, select such cheese as would be fit for market, attend its weight there, and pay the defendant for the cheese so selected and weighed, and then the defendant was to deliver the same to the plaintiff at the railroad depot in Manchester. The day after the above agreement was made the defendant by his son Albert Hodge wrote and sent by mail a letter to the plaintiff (a copy of which is annexed, dated July 1, 1864), depositing the same at the post-office in East Rupert, directed to the plaintiff at Pawlet and received by him by mail on the same day. The next day, after the return mail from Pawlet to East Rupert had gone out, it being on Saturday, the plaintiff enclosed in a letter directed to the defendant at East Rupert, and left it in the post-office at Pawlet to be carried by mail to the defendant, the sum of $50. (A copy of the plaintiff's letter is hereunto annexed, and the envelope enclosing the $50 is postmarked "Pawlet, July 4.") This letter of the plaintiff was, on the 8th of July, 1864, handed to the said Albert Hodge by the postmaster of East Rupert, and it was on the same day carried by him to the defendant, opened by the said Albert, the $50 refused to be received by the defendant, and the letter of the plaintiff, with the $50 and the envelope enclosing them, were by mail returned to the plaintiff with no communication accompanying them from the defendant. The plaintiff received the so enclosed wrapper, money and letter, on the 9th of July, 1864, and kept the same $50 for six months thereafter. A daily mail is carried between the post-offices of Pawlet and East Rupert, a distance of six miles. On the

20th of July, 1864, the plaintiff sent word to the defendant to deliver what cheese he had fit for market to the depot in Manchester. The defendant replied to the messenger that he had no cheese for the plaintiff. No other communication ever took place between the parties in regard to the cheese after the return of the money as above stated until this suit was brought. The defendant sold all his cheese to other parties, making his first sale on the 26th of July, 1864.

"If the court shall be of opinion that from the foregoing facts the plaintiff is entitled to recover, and that the rule of damages should be the New York market price for cheese for the season of 1864, deducting freight and commission, then I find due the plaintiff $411.01. If the current price in the country, paid by purchasers and sent by them to market, is to be the rule, then I find due the plaintiff the sum of $306.32.

DORSET, July 1, 1864.

MR. EDGERTON.

SIR, — According to our talk yesterday you bought my cheese for the season. I shall stand to it, but shall want you to pay me $50 to bind it. I s'pose there is nothing holding unless there is money paid. I do not wish you to think I wish to fly from letting you have it, so that it is sure. I will pay you interest on the money until the cheese is delivered.

Yours in haste, J. H. C. HODGE,
Per A. H.

PAWLET, July 2, 1864.

MR. HODGE.

DEAR SIR, — I enclose you $50 to apply on your dairy of cheese as you proposed. Yours truly,

S. EDGERTON.

The court at the March term, 1868, Pierpoint, C. J., presiding, rendered judgment on the report that the plaintiff recover of the defendant the smaller sum reported by the referee, and for his costs, to which the defendant excepted.

Edgerton & Nicholson and *J. B. Bromley*, for the defendant.

Fayette Potter, for the plaintiff.

The opinion of the court was delivered by

WILSON, J. The parol agreement entered into by the parties June 30th, being for the sale of goods, wares, and merchandise, for the price of $40 and more, is within the Statute of Frauds, and inoperative unless taken out of the statute by the subsequent acts of the parties. It is claimed by the plaintiff that the defendant's letter under date of July 1st, and the depositing of the plaintiff's letter with the $50 in the post-office on the 2d of that month, constitute a payment of part of the purchase-money within the meaning of the statute. It will be observed that when those letters were written no binding agreement had been concluded. The defendant in his letter of July 1st says: "According to our talk yesterday, you bought my cheese for the season. I shall stand to it, but shall want $50 to bind it." By that letter the plaintiff was notified that he could make the bargain binding upon himself as well as the defendant by paying to the defendant the sum demanded for that purpose. The plaintiff on the 2d of July enclosed $50 in a letter directed to the defendant, and deposited it in the post-office, which letter was delivered to the defendant on the 8th of that month. He did not accept the money, but returned it to the plaintiff. It is clear that the act of depositing the letter and the money in the post-office was not a payment to the defendant. His letter did not direct the money to be sent by mail: it contains nothing that would indicate that the defendant expected the plaintiff would reply by letter, or accept the proposition by depositing the money in the post-office: and the fact that the defendant by letter offered to allow the plaintiff to perfect the agreement by paying part of the purchase-money did not authorize or invite the plaintiff to send the money by mail or make the mail the defendant's carrier of the money. The language of the defendant's letter is, "I shall want you to pay me $50 to bind it;" that is, to make it a valid contract.

The money when deposited in the post-office belonged to the plaintiff; it belonged to the plaintiff while being carried by mail to the defendant, and it would continue the property of the plaintiff unless accepted by the defendant. The plaintiff took the risk not only of the safe conveyance of the money to the defendant, but also as to the willingness of the defendant to accept it. The defendant's letter, not constituting such a note or memorandum of the agreement as the statute required, left it optional with the defendant to accept or refuse part payment when offered to him, the same as if the defendant had sent to the plaintiff a verbal communication of the same import as the defendant's letter. A point is made by counsel as to whether the money was conveyed and delivered or offered to the defendant within a reasonable time after his letter was received by the plaintiff, but it seems to us that the time the money was offered is not material. We think, even if the plaintiff had gone immediately after receiving the defendant's letter and offered and tendered to him the $50, the defendant would have been under no legal obligation to accept it. The mere offer of the defendant to receive the money would not estop him from refusing to accept it; but in order to take the case out of the operation of the statute it required the agreement or consent of both parties as to payment by the plaintiff and acceptance of it by the defendant. Upon the facts of this case we think the rights of the parties rest upon and are to be determined by the verbal agreement entered into by them on the 30th of June, and that their subsequent attempts to make that agreement a valid contract cannot aid the plaintiff. The statute provides that "no contract for the sale of any goods, wares, or merchandise, for the price of $10 or more, shall be valid unless the purchaser shall accept and receive part of the goods so sold, or shall give something in earnest to bind the bargain or in part payment, or unless some note or memorandum of the bargain be made in writing and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized."

The very language of the statute above quoted implies that, in whichever way the parties verbally agree or propose that a contract for the sale of goods, wares, or merchandise, for the price of $40 or more, shall be made exempt from the Statute of Frauds, whether it be by the purchaser accepting and receiving part of the goods so sold, by giving something in earnest to bind the bargain or in part payment, or by making a note or memorandum of the bargain, it must be done, if done at all, by the consent of both parties. It is obvious that it would require the consent of the purchaser to accept and receive part of the goods, and he could not receive them unless by consent of the seller; the purchaser could not give something in earnest to bind the bargain or in part payment, unless the seller accept and receive it; nor could a note or memorandum of the bargain be made and signed, unless by the consent of the party to be charged thereby. A valid contract is an agreement or covenant between two or more persons, in which each party binds himself to do or forbear some act; and each acquires a right to what the other promises; but if the parties in making a contract like the present one omit to do what the statute requires to be done to make a valid contract, it would require the consent of both parties to supply the thing omitted. Suppose it had been one stipulation of the verbal agreement on the 30th of June that the plaintiff should give and the defendant receive something in earnest to bind the bargain, and in pursuance of such stipulation the plaintiff had then offered to give or pay the amount so stipulated, and the defendant had refused to receive it, saying that he preferred not to receive any money until he had delivered the whole or part of the property, or had refused to accept the money so offered, or do any other act to bind the bargain, without giving any reason for such refusal, it would be evident that he did not intend to make a binding contract. But the fact that he had made such verbal agreement to receive something or to do some other act to bind the bargain, and that the plaintiff was ready and offered to comply on his part, would not take the agreement out of the statute. A verbal stipulation to give and to receive something in earnest to bind the bargain or in part payment, or a verbal promise to make a note or memorandum in writing necessary to exempt the agreement from the operation of the statute, is as much within the Statute of Frauds as is the agreement of contract taken as a whole; and a note or memorandum in relation to giving something in earnest to bind the bargain or in part payment, which is insufficient of itself to take the contract out of the statute, is also insufficient to make the contract binding upon either party.

The judgment of the county court is reversed, and judgment for the defendant for his costs.

SECTION VII.

"OR THAT SOME NOTE OR MEMORANDUM IN WRITING OF THE SAID BARGAIN BE MADE AND SIGNED BY THE PARTIES TO BE CHARGED BY SUCH CONTRACT, OR THEIR AGENTS THEREUNTO LAWFULLY AUTHORIZED."

SIMON *v.* METIVIER OR MOTIVOS.

IN THE KING'S BENCH, TRINITY TERM, 1766.

[*Reported in* 1 *William Blackstone*, 599.]

CASE for not taking away certain drugs to the value of £110, which were bought by the defendant at an auction; and having since sunk in their value he refused to take them, and they were re-sold at an under price; and this action was brought to recover the difference. It appeared on evidence that, by the terms of the sale, if 6*d*. was not tendered by the buyer the goods might be put up again and re-sold; that no 6*d*. was paid; but that the auctioneer took down the price and buyer's name in writing; and that after the day of bidding and before the day of payment the goods were weighed off to a servant of the defendant.

The jury found a verdict for the plaintiff.

Stowe and *Davenport* moved for a new trial.

Norton and *Wallace* showed cause.

LORD MANSFIELD, C. J. The question is singly upon the Statute of Frauds: whether the contract is void by the provisions of that positive law. The object of the Legislature in that statute was a wise one; and what the Legislature meant is the rule both at law and equity; for in this case they are both the same. The key to the construction of the act is the intent of the Legislature; and therefore many cases, though seemingly within the letter, have been let out of it. More instances have indeed occurred in courts of equity than of law, but the rule is in both the same. For instance, where a man admits the contract to have been made it is out of the statute; for here there can be no perjury. Again, no advantage shall be taken of this statute to protect the fraud of another. Therefore if the contract is executed, it is never set aside. And there are many other general rules by way of exception to the statute.

There are two lights in which the present case may be considered.

1st, Whether sales by auction are within the statute. They certainly existed in England, and in all other countries, at the date of this statute. The auctioneer is a third person who is to many intents the agent of both parties. The solemnity of that kind of sale precludes all perjury as to the fact itself of sale. The contract is executed when the hammer is knocked down. I remember a case where some sugars were bought at an auction, and afterwards consumed by fire in the auction warehouse; and the loss fell upon the buyer. The circumstance of weighing off is similar to this, and very material in the present case. And according to the inclination of my present opinion auctions in general are not within the statute. But this is not necessary to be now determined; for if they are within it,

2d, The requisites of the statute are well complied with. Every bidding is an accession to the conditions of sale. The name is put down by the buyer's authority.[1] No latitude is left to fraud and perjury from the loose memory of witnesses.

WILMOT, J. It may be a great question whether sales by auction are within the statute. They were certainly not meant by the act, which was to extend only to the mischiefs created by private and clandestine sales. Had the Statute of Frauds been always carried into execution according to the letter, it would have done ten times more mischief than it has done good, by protecting rather than by preventing frauds. I therefore incline to think sales by auction openly transacted before five hundred people are not within the statute. But the present agreement is strictly within the restrictions of the act. As to the objection for want of mutuality; that power of re-selling was optional in the seller, if he pleased to require the earnest, and it was denied. And the meaning clearly was, that upon refusal goods may be instantly put up again. Not being asked, the contract clearly bound the seller without it; and therefore shall bind the buyer. The weighing it afterwards is a very corroborating circumstance. I remember the case of the sale of some balsam, which was weighed and put into a pot of the seller instead of a pitcher which the buyer had brought and left at the seller's shop. This was held a sufficient delivery to bind the contract.

YATES, J. I much doubt whether the contract was within the Statute of Frauds. If it was, I am clear that the requisites of the statute were duly observed. Where Sir Thomas Osborne bespoke a chariot, that being in its nature not deliverable immediately, it was held not within the statute; because not capable of all the requisites of the statute. I look upon this contract as executory in its nature, and being to be executed within a year, is so far not within the statute.

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[1] Emmerson *v.* Heelis, 2 Taunt. 38; White *v.* Proctor, 4 Taunt. 209; Bird *v.* Boulter, 4 B. & Ad. 443; Mews *v.* Carr, 1 H. & N. 484; White *v.* Farley, 81 Ala. 563; Craig *v.* Godfroy, 1 Cal. 415; Ansley *v.* Green, 82 Ga. 181; Doty *v.* Wilder, 15 Ill. 407; Jones *v.* Kokomo Assoc., 77 Ind. 340; Thomas *v.* Kerr, 3 Bush, 619; Garth *v.* Davis, 85 S. W. Rep. 692 (Ky.); O'Donnell *v.* Leeman, 43 Me. 158, 160; Ijams *v.* Hoffman, 1 Md. 423; Bent *v.* Cobb, 9 Gray, 397; Springer *v.* Kleinsorge, 83 Mo. 152; Johnson *v.* Buck, 35 N. J. L. 338; McComb *v.* Wright, 4 Johns. Ch. 659; Pugh *v.* Chesseldine, 11 Ohio, 109; Meadows *v.* Meadows, 3 McCord, 458; Harvey *v.* Stevens, 43 Vt. 653; Walker *v.* Herring, 21 Gratt. 678; Atkinson *v.* Washington & Jefferson College, 54 W. Va. 32, 39, *acc.* But see Dunham *v.* Hartman, 153 Mo. 625; Adams *v.* Scales, 1 Baxt. 337.

If the auctioneer is himself interested as a seller, he cannot by his signature bind the buyer. Bent *v.* Cobb, 9 Gray, 397; Tull *v.* David, 45 Mo. 444; Johnson *v.* Buck, 35 N. J. L. 338.

The signature by the auctioneer must be made immediately after the sale, or it will not be binding. Smith *v.* Arnold, 5 Mason, 414, 419; Craig *v.* Godfroy, 1 Cal. 415; Horton *v.* McCarty, 53 Me. 394, 398; Gill *v.* Bucknell, 2 Cush. 355, 358; Quinzel *v.* Schmidt, 56 N. J. Eq. 792; Hicks *v.* Whitmore, 12 Wend. 548. And between the fall of the hammer and the writing of the memorandum, the bidder has a *locus penitentiae* and may withdraw his bid. Pike *v.* Balch, 38 Me. 302, 311; Dunham *v.* Hartman, 153 Mo. 625; Gwathney *v* Cason, 74 N. C. 5.

Aston, J. I think the terms of the sale and the requisites of the statute were fully complied with by giving in his name as a purchaser; which is better than the sixpence earnest.

Rule nisi for a new trial discharged.

SAUNDERSON *v.* JACKSON AND ANOTHER.

In the Common Pleas, June 28, 1800.

[*Reported in* 2 *Bosanquet & Puller*, 238.]

This was an action on the case against the defendants for not delivering 1000 gallons of gin to the plaintiff within a certain time according to a bargain entered into between them. There was a second count for not delivering within a reasonable time.

The cause was tried before Lord Eldon, C. J., at the Guildhall sittings after last Easter term, when the contract for the delivery of the gin having been proved on the part of the plaintiff, the defendants insisted that the case was within the Statute of Frauds, inasmuch as there was no note or memorandum in writing of the bargain. The circumstances were as follows: At the time the order for the gin was given by the plaintiff to the defendants a bill of parcels was delivered to the former, the printed part of which was "London. Bought of Jackson and Hankin, distillers, No. 8 Oxford Street," and then followed in writing, "1000 gallons of gin, 1 in 5 gin, 7*s.* £350." About a month after the above period the defendants also wrote the following letter to the plaintiff: "Sir, we wish to know what time we shall send you a part of your order, and shall be obliged for a little time in delivery of the remainder; must request you to return our pipes. We are your humble servants, Jackson and Hankin."

On this evidence his Lordship directed the jury to find a verdict for the plaintiff, reserving the point made for the consideration of the court.

Lens, Serjt., in support of his rule.

Shepherd, Serjt., contra.

Lord Eldon, C. J. This bill of parcels, though not the contract itself, may amount to a note or memorandum of the contract within the meaning of the statute. The single question therefore is, Whether if a man be in the habit of printing instead of writing his name he may not be said to sign by his printed name as well as his written name? At all events, connecting this bill of parcels with the subsequent letter of the defendants, I think the case is clearly taken out of the Statute of Frauds. For although it be admitted that the letter which does not state the terms of the agreement would not alone have been sufficient, yet as the jury have connected it with something which does, and the letter is signed by the defendants, there is then a written note or memorandum of the order which was originally given by the plaintiff signed by the defendants. It has been decided that, if a man draw up an agreement in his own handwriting, beginning, "I A. B. agree," &c., and leave a place for a signature at the bottom, but never sign it, it may be considered as a note or memorandum in writing within the statute. And yet it is impossible not to see that the insertion of the name at the beginning was not intended to be a signature, and that the paper was meant to be incomplete until it was further signed. This last case is stronger than the one now before us, and affords an answer to the argument that this bill of parcels was not delivered as a note or memorandum of the contract.

PER CURIAM, *Rule discharged.*

SCHNEIDER AND ANOTHER *v.* NORRIS.

IN THE KING'S BENCH, JANUARY 25, 1814.

[*Reported in* 2 *Maule & Selwyn*, 286.]

CASE for the non-delivery of cotton yarn pursuant to agreement. Plea, general issue.

At the trial before Lord Ellenborough, C. J., at the last London sittings, it appeared that the plaintiffs on the 24th of October, 1812, purchased of the defendant, who was employed to sell on commission, a quantity of cotton yarn, of which a bill of parcels was sent by the defendant to the plaintiffs, not however at the time of the contract, and at what precise time did not appear. The bill of parcels was headed thus: "London, 24th October, 1812. Messrs. John Schneider & Co. bought of Thomas Norris & Co., agents. Cotton yarn and piece goods. No. 3, Freeman's Court, Cornhill," — the whole of which was printed, except the words "Messrs. John Schneider & Co." which were in the handwriting of the defendant. Then followed a list of the articles sold, with the particulars and quantity, and the prices annexed. On the 23d December the plaintiffs demanded the yarn from the defendant, who refused to deliver it, alleging that his principal had declined performing the contract. It was objected upon this evidence that there was not any note or memorandum in writing of the bargain as required by the Statute of Frauds; in answer to which the case of Saunderson *v.* Jackson, 2 B. & P. 238 (see 1 N. R. 254, per Shepherd, Serjt., *arguendo*), was relied on. His Lordship overruled the objection, and thereupon the plaintiffs obtained a verdict.

LORD ELLENBOROUGH, C. J. I cannot but think that a construction which went the length of holding that in no case a printing or any other form of signature could be substituted in lieu of writing would be going a great way, considering how many instances may occur in which the parties contracting are unable to sign. If indeed this case had rested merely on the printed name, unrecognized by and not brought home to the party as having been printed by him or by his authority, so that the printed name had been unappropriated to the particular contract, it might have afforded some doubt whether it would not be intrenching upon the statute to have admitted it. But here there is a signing by the party to be charged by words recognizing the printed name as much as if he had subscribed his mark to it, which is strictly the meaning of signing, and by that the party has incorporated and avowed the thing printed to be his; and it is the same in substance as if he had written Norris & Co., with his own hand. He has by his handwriting in effect said, I acknowledge what I have written to be for the purpose of exhibiting my recognition of the within contract. I entertained the same opinion at the trial, and cannot say that it has been changed by the argument. It appears to me therefore that the printed name thus recognized is a signature sufficient to take this case out of the statute.

LE BLANC, J. Suppose the defendant had stamped the bill of parcels with his own name, would not that have been sufficient? Such a stamping as it seems to me, if required to be done by the party himself or by his authority, would afford the same protection as signing.

BAYLEY, J. This case is entirely out of the mischief of the statute, the object of which was to protect parties from being bound by contracts unless it could be seen that the terms on which they contracted were under their signature. Here the terms of this contract are recognized by the defendant, who is the party to be charged, by his signing the name of Schneider & Co., which is a sufficient signing by him to recognize that they had bought and he had sold.

DAMPIER, J. In Saunderson *v.* Jackson it did not appear that there was any signature to the bill of parcels: it was only by connecting the letter with the bill of parcels that the case was taken out of the statute. Here there is the handwriting of the party to be charged to the bill of parcels, which authenticates it as a memorandum of the bargain. The defendant has ratified the sale to Schneider & Co. by inserting their name as buyer to a paper in which he recognizes himself as seller. That is sufficient to satisfy the object of the statute.

Rule refused.

JOHNSON AND OTHERS *v.* DODGSON.

IN THE EXCHEQUER, TRINITY TERM, 1837.

[*Reported in* 2 *Meeson & Welsby*, 653.]

ASSUMPSIT for goods sold and delivered, and on an account stated. Plea, *non assumpsit.* At the trial before Lord Abinger, C. B., at the London sittings after last Hilary term, it appeared that the action was brought to recover the sum of £246 19*s.* 9*d.*, being the price of thirty-one pockets of Sussex hops sold by the plaintiffs, hop merchants in London, to the defendant, a hop merchant in Leeds, under the following circumstances: —

The plaintiffs' traveller, one Morse, called on the defendant at Leeds with some samples of hops, and agreed with him for the sale of the hops in question. The defendant then wrote the following memorandum in a sample-book of his own, which he retained in his own possession: —

LEEDS, 19th October, 1836.

Sold John Dodgson
27 pockets Playsted, 1836, Sussex, @ 103*s.*
The bulk to answer the sample.
4 pockets Selme, Beckley's, @ 95*s.*
Samples and invoice to be sent *per* Rockingham coach.
Payment in bankers' at two months.
Signed for Johnson, Johnson, & Co.
D. MORSE.

The signature was added at the defendant's request by Morse. On the same evening the defendant wrote to the plaintiffs the following letter: —

LEEDS, Wednesday evening, 19th October, 1836.

GENTLEMEN, — Please to deliver the 27 pockets Playsted, and the 4 pockets Selmes, 1836, Sussex, to Mr. Robert Pearson or bearer, to be carted to Stanton's wharf: 20 pockets of Playsted to be forwarded *per* first ship, and the remaining 11 pockets *per* the second ship, and you will oblige, gentlemen,

Your most obedient, JOHN DODGSON.

Bulk samples were sent pursuant to the contract by the Rockingham coach, and reached Leeds on the 24th of October, but were returned by the defendant as not answering the samples by which he bought from Morse. There was much conflicting evidence as to whether there had or had not been a substitution of inferior samples in lieu of the genuine ones: that question was left to the jury, who found it in favor of the plaintiffs. For the defendant it was objected that there was no sufficient memorandum of the contract in writing to satisfy the Statute of Frauds; the entry in the defendant's book not being signed by him, and his subsequent letter not referring, as it was contended, in sufficiently express terms to that entry as that it might be connected with it. This point was reserved, and accordingly in Easter term

Cresswell obtained a rule *nisi* for entering a nonsuit; against which *Thesiger* (with whom were *Erle* and *Evans*) now showed cause.

Cresswell and *Wightman*, in support of the rule.

Lord Abinger, C. B. I think this is a very clear case. If it rested upon the question as to the recognition of the contract by the letter there might have been some doubt, although even upon that I should have thought the reference to the only contract proved in the case sufficient. But on the other point it really seems to me one of the strongest cases that have occurred. The Statute of Frauds requires that there should be a note or memorandum of the contract in writing signed by the party to be charged. And the cases have decided that, although the signature be in the beginning or middle of the instrument, it is as binding as if at the foot of it; the question being always open to the jury whether the party not having signed it regularly at the foot meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it. But when it is ascertained that he meant to be bound by it as a complete contract, the statute is satisfied, there being a note in writing showing the terms of the contract and recognized by him. I think in this case the requisitions of the statute are fully complied with. The written memorandum contains all the terms of the contract: it is in the defendant's own handwriting, containing his name; and it is signed by the plaintiffs through their agent.

Parke, B. I am of the same opinion, and think this was a sufficient memorandum in writing. The defendant's name was contained in it in his own handwriting, and it was signed by the plaintiffs. The point is in effect decided by the cases of Saunderson *v.* Jackson and Schneider *v.* Norris. There the bills of parcels were held to be a sufficient memorandum in writing, it being proved that they were recognized by being handed over to the other party. Here the entry was written by the defendant himself, and required by him to be signed by the plaintiffs' agent. That is amply sufficient to show that he meant it to be a memorandum of contract between the parties.[1] If the question turned on the recognition by the subsequent letter, I own I should have had very considerable doubt whether it referred sufficiently to the contract: it refers to the subject-matter, but not to the specific contract. But it is unnecessary to give any opinion upon that, because on the former point I think there is a sufficient note in writing.

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[1] It has been held in a number of cases, most of which related to real estate, that a document retained wholly unpublished in the possession of the writer cannot be used as a memorandum. Remington *v.* Linthicum, 14 Pet. 84, 93; Steel *v.* Fife, 48 Ia. 99; Newburger *v.* Adams, 92 Ky. 26 (but see McBrayer *v.* Cohen, 92 Ky. 479); Callanan *v.* Chapin,

BOLLAND, B. I am of the same opinion, — that the entry made by the defendant was a sufficient memorandum in writing; and if it were necessary to decide the other point, I should also be inclined to think the letter sufficiently connected with the contract.

Rule discharged.

EVANS *v.* HOARE AND ANOTHER.

IN THE QUEEN'S BENCH DIVISION, MARCH 14, 15, 1892.

[*Reported in* (1892) 1 *Queen's Bench*, 593.]

DENMAN, J. This was an action for wrongful dismissal. The plaintiff entered the defendants' service as a ledger clerk at 80*l.* a year; the salary was twice raised 10*l.* a year until it reached 100*l.* On February 19, 1890, the plaintiff signed an agreement as follows: —

"5, Campbell Terrace, Cannhill Road, Leytonstone,
"Feb. 19, 1890.

"Messrs. Hoare, Marr & Co., 26, 29, Budge Row,
"London, E.C.

"Gentlemen, — In consideration of your advancing my salary to the sum of 130*l.* per annum, I hereby agree to continue my engagement in your office for three years, from and commencing January 1, 1890, at a salary at the rate of 130*l.* per annum aforesaid, payable monthly as hitherto.

"Yours obediently,
"GEORGE E. EVANS."

158 Mass. 113; Dickinson *v.* Wright, 56 Mich. 42; Chesebrough *v.* Pingree, 72 Mich. 438; Johnson *v.* Brook, 31 Miss. 17; Montauk Assoc. *v.* Daly, 62 N. Y. App. Div. 101, affd. without opinion, 171 N. Y. 659; Grant *v.* Levan, 4 Pa. St. 393. But see *contra*, Alford *v.* Wilson, 95 Ky. 506; Drury *v.* Young, 58 Md. 546; Johnson *v.* McCue, 34 Pa. 180. See also Witman *v.* Reading, 191 Pa. 134. Accordingly an undelivered deed has been held insufficient. Freeland *v.* Charnley, 80 Ind. 132, 134; Steel *v.* Fife, 48 Ia. 99; Logsdon *v.* Newton, 54 Ia. 448; Morrow *v.* Moore, 98 Me. 373; Merriam *v.* Leonard, 6 Cush. 151; Parker *v.* Parker, 1 Gray, 409; Ducett *v.* Wolf, 81 Mich. 311; Kroll *v.* Diamond Match Co., 113 Mich. 196; Comer *v.* Baldwin, 16 Minn. 172; Johnson *v.* Brook, 31 Miss. 17; Wier *v.* Batdorf, 24 Neb. 83; Soward *v.* Moss, 59 Neb. 71; Schneider *v.* Vogler, 97 N. W. Rep. 1018 (Neb.); Brown *v.* Brown, 33 N. J. Eq. 650; Cagger *v.* Lansing, 43 N. Y. 550; Allebach *v.* Godshalk, 116 Pa. 329. See also Henderson *v.* Beard, 51 Ark. 483; Swain *v.* Burnette, 89 Cal. 564; Sullivan *v.* O'Neal, 66 Tex. 433. But see *contra*, Jenkins *v.* Harrison, 66 Ala. 345; Johnston *v.* Jones, 85 Ala. 286; Griel *v.* Lomax, 89 Ala. 420; Hart *v.* Carroll, 85 Pa. 508; Bowles *v.* Woodson, 6 Gratt. 78; Parrill *v.* McKinley, 9 Gratt. 1. See also Kopp *v.* Reiter, 146 Ill. 437; Thayer *v.* Luce, 22 Ohio St. 62; Cooper *v.* Thomason, 30 Oreg. 161, 174; Campbell *v.* Thomas, 42 Wis. 437; Popp *v.* Swanke, 68 Wis. 364. It should be noticed that in a number of these cases the local statute required a "contract" in writing.

If this agreement was within s. 4 of the Statute of Frauds, the judgment was justified. The learned judge gave judgment for the defendants on the ground that the document was not signed within that section. This decision would be right unless the words "Messrs. Hoare, Marr & Co.," at the commencement, can, under the circumstances, be held to be "a signature by a person authorized thereunto by the defendants." In fact, the document was drawn up by one Harding, who was authorized by the defendants to draw it up and take it, in its present shape in all other respects, for the plaintiff's signature. It appears to me that the case falls within the principle of the decisions cited in favour of the plaintiff, especially Schneider *v.* Norris (1), and Jones *v.* Victoria Graving Dock Co. (2); see also the case of Bleakley *v.* Smith (3). In the present case it is impossible to doubt that the word "your," twice used in the written document, refers to the defendants, whose name and address is given in full at the head of the document. Nor can I doubt that both Harding and the defendants intended that this document, when signed by Evans, should be the final memorandum of the contract binding upon the defendants as well as the plaintiff. Mr. Witt contended that the cases relied upon were all cases where the document was sent out by the person charged. I do not think that this is necessary, if by the expression "sent out" is meant more than submitted for signature to the other party. If the party sued has authorized an agent to lay before the party suing a document *containing his name in full* as that of the party with whom the contract is to be made, so as to announce to the other party that they are offering him certain terms if he will agree to them in writing, and he thereupon signs, I think that there is a sufficient "agreement or memorandum thereof, signed by a party authorized thereunto" within s. 4 of the Statute of Frauds. That appears to me to be the case here. I therefore think that the plaintiff is entitled to judgment for the amount of the verdict.[1]

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[1] See also John Griffiths Corp. *v.* Humber, [1899] 2 Q. B. 414, 418. *Conf.* Hucklesby *v.* Hook, 82 L. T. Rep. 117.

MERRITT AND MERRITT *v.* CLASON.

SUPREME COURT OF NEW YORK, JANUARY TERM, 1815.

[*Reported in* 12 *Johnson*, 102.]

THIS was an action of assumpsit tried at the New York sittings in April last before Mr. Justice Yates.

John Townsend, a witness for the plaintiffs, testified that he was a broker, and was employed by the defendant to purchase rye. On the 18th of February, 1812, he applied to Isaac Wright & Son, the agents of the plaintiffs in New York, and agreed to purchase of them 10,000 bushels of rye at $1 per bushel, and they autnorized him to sell the same to the defendant on the terms agreed on; the witness informed the defendant of the terms of sale, and was directed by him to make the purchase accordingly. The witness then went to Wright & Son and closed the bargain with them as agents of the plaintiffs, and in their presence wrote in his memorandum book with a lead-pencil as follows: "February 18th, bought of Daniel & Isaac Merritt (the plaintiffs), by Isaac Wright & Son, 10,000 bushels of good merchantable rye at $1 per bushel, deliverable in the last ten or twelve days of April next alongside any vessel or wharf the purchaser may direct, for Isaac Clason of New York, payable on delivery." All the other memoranda in the same book were written with a lead-pencil. Soon after the purchase was thus completed the witness informed the defendant of it, but did not give him a copy of the memorandum.

The plaintiffs repeatedly tendered the rye to the defendant according to the terms of the agreement, particularly on the 14th and 30th days of April, and the defendant refused to accept and pay for it. On the 1st of May the plaintiffs addressed a letter to the defendant, giving him notice that, unless he received and paid them for the rye according to the contract, they should, on Tuesday (the 4th of May) at noon, cause the same to be sold at public auction at the Tontine coffee-house, and hold him accountable for the deficiency, if it should sell for less than the price mentioned in the contract, and the expenses. The defendant continuing to refuse to receive the rye or to pay for it, it was according to the notice sold at public auction, and the present suit was brought to recover the difference between the net proceeds of such sale and the contract price.

A verdict was taken for the plaintiffs, subject to the opinion of the court on a case containing the facts above stated, and which either party was to be at liberty to turn into a special verdict.

PLATT, J., delivered the opinion of the court. The only point is whether the memorandum made by John Townsend was a sufficient memorandum of the contract within the Statute of Frauds to bind the defendant.

It is objected by the defendant's counsel, —

1. That the memorandum is not "in writing," being made with a lead-pencil only;

2. That it is not "signed" by the defendant nor by his agent;

3. That it is not binding on the defendant, because his agent did not furnish him with a copy of it.

I have no doubt that the memorandum required by the statute may as well be written with a lead-pencil as with a pen and ink; and it is observable that in most of the reported cases on this head the memoranda were written with a lead-pencil, and no counsel until now has ever raised that objection.[1]

I think it clear also from the authorities that this memorandum was signed according to the statute.

It is not disputed that the authorization of the agent for such purpose need not be in writing. In the body of this memorandum the name of Isaac Clason the defendant is written by his agent, whom he had expressly authorized to make this contract. The memorandum therefore is equally binding on the defendant as if he had written it with his own hand; and if he had used his own hand instead of the hand of his agent, the law is well settled that it is immaterial in such a case whether the name is written at the top or in the body or at the bottom of the memorandum. It is equally a signing within the statute. Saunderson *v.* Jackson and Another, 2 Bos. & Pull. 238; 1 Esp. 199; 1 P. Wms. 770, note 1.[2]

The third objection is absurd. If the defendant's agent neglected his duty in not furnishing his employer with a copy of this memorandum, it certainly cannot affect the rights of the plaintiff, under that agreement.

The memorandum states with reasonable certainty every essential part of the agreement. The court are of opinion that the plaintiffs are entitled to judgment. *Judgment for the plaintiffs.*[3]

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[1] Clason *v.* Bailey, 14 Johns. 484; Draper *v.* Pattina, 2 Speers, 292, *acc.*

[2] Barry *v.* Coombe, 1 Pet. 650; Nichols *v.* Johnson, 10 Conn. 192; McConnell *v.* Brillhart, 17 Ill. 354; Drury *v.* Young, 58 Md. 546; Penniman *v.* Hartshorn, 13 Mass. 87; Hawkins *v.* Chace, 19 Pick. 502; Traylor *v.* Cabanné, 8 Mo. App. 131; Hall *v.* Misenheimer, 49 S. E. Rep. 104 (N. C.); Tingley *v.* Bellingham Bay Boom Co., 5 Wash. 644; Anderson *v.* Wallace Lumber Co., 30 Wash. 147, *acc.* But under the New York statute as subsequently amended, requiring the memorandum to be "subscribed," the signature must be at the end. Davis *v.* Shields, 26 Wend. 341; James *v.* Patten, 6 N. Y. 9; Doughty *v.* Manhattan Brass Co., 101 N. Y. 644. See also Coon *v.* Rigden, 4 Col. 275; Ferguson *v.* Trovaten, 102 N. W. Rep. 373 (Minn.). Signature by a mark is sufficient: Selby *v.* Selby, 3 Meriv. 2, 6; Dyas *v.* Stafford, 9 L. R. Ir. 520; or by a stamp, if used by an authorized person with intent to sign: Deep River Bank's Appeal, 73 Conn. 341; Boardman *v.* Spooner, 13 Allen, 353. A printed signature may be adopted: Grieb *v.* Cole, 60 Mich. 397.

[3] In Clason *v.* Bailey, 14 Johns. 541, the facts were substantially the same as in Merritt *v.* Clason, and the additional objection was made that the memorandum was not signed by the plaintiff as well as the defendant. The objection was overruled. This decision was followed in Justice *v.* Lang, 42 N. Y. 493, and it expresses the generally received doctrine in the United States, as well as in England. Browne on the Statute of Frauds, §§ 365, 366; Cavanaugh *v.* Casselman, 88 Cal. 543; Easton *v.* Montgomery, 90 Cal. 307; Hodges *v.* Kowing, 58 Conn. 12; Burke *v.* Mead, 159 Ind. 252; Engler *v.* Garrett, 59 At. Rep. 648 (Md.); Cunningham *v.* Williams, 43 Mo. App. 629; Dyer *v.* Winston, 77 S. W. Rep. 227 (Tex. Civ. App.). But a contrary decision has been made in Michigan, Wilkinson *v.* Heavenrich, 58 Mich. 574. See also Egerton *v.* Mathews and note, *infra.*

MACLEAN *v.* DUNN AND WATKINS, WHO SURVIVED AUSTIN.

IN THE COMMON PLEAS, MAY 19, 1828.

[*Reported in* 4 *Bingham,* 722.]

THIS was a special action of assumpsit for not accepting and paying for a quantity of Russian and German wool. At the trial before Best, C. J., London sittings after Michaelmas term, 1826, the facts of the case, as far as they are material to the questions here noticed, were as follows: —

The defendants were carrying on business in London as druggists and dry-salters, when Ebsworth, a London wool-broker, met Watkins at Manchester, near which place Watkins lived, and on the part of the plaintiff agreed to sell the defendants 165 bags of Russian and German wool, to be paid for partly by 145 bags of Spanish wool, which on the part of the defendants he agreed to sell to the plaintiff, and partly by acceptances or cash, on certain terms specified in the following bought and sold note which he delivered to the plaintiff's clerk: —

MANCHESTER, 28th March, 1825.

D. MACLEAN, ESQ.

SIR, — We have sold for your account to Messrs. Dunn, Austin, Watkins, & Co., 166 bags of Russian and German wool, viz. [here followed a specification of the wools as in the note made out for the defendants, amounting to 165 bags only, the insertion of 166 having been admitted on the trial to have arisen by mistake in the casting], after deducting the amount of 145 bags of Spanish wool sold you, the balance to be paid for by an acceptance at four months with 2½ per cent. discount, or in cash with 5 per cent. discount, at your option. Commission for selling, 1 per cent.

EBSWORTH & BADHAM.

MANCHESTER, 28th March, 1825.

D. MACLEAN, ESQ.

SIR, — We have bought for your account of Messrs. Dunn, Austin, Watkins, & Co., 145 bags of Spanish wool, viz. [here followed a specification of 145 bags of wool], the amount of 145 bags to be deducted from the 165 bags of Russian and German wool bought of you this day, and the balance to be paid for by an acceptance at four months at 2½ per cent. discount, or in cash with 5 per cent. discount on the 1st July, at your option. Commission for purchasing, ½ per cent.

EBSWORTH & BADHAM.

This bought and sold note was written on one sheet of paper.

Corresponding bought and sold notes, *mutatis mutandis*, were made out by Ebsworth for the defendants. In these notes the 1st of July was specified as the day for cash with discount, at the end of the sold note as well as at the end of the bought note. They were never delivered to either of the defendants. Ebsworth however made out a memorandum of the contract in his broker's book, called a contract book, which was not signed by him, and showed this memorandum to Watkins on the day it was entered, March 28, 1825.

Watkins assented to the contract provided Dunn's consent could be obtained. Ebsworth had had no previous communication with Dunn, but saw him about the beginning of the next month, when as Ebsworth swore at the trial, Dunn assented to the bargain, and said he was perfectly satisfied with what was done. On the 19th of that month Dunn told Ebsworth he would have nothing to do with the contract, which Ebsworth communicated to the plaintiff.

Plaintiff nevertheless in May addressed the defendants collectively on the subject of the delivery of the wool, when Watkins wrote and referred him to Ebsworth, who afterwards, with the assent of Watkins and in the name of the defendants collectively, sold and delivered 68 bags of the German wool to Williamson and Jones.

In July the plaintiff transmitted the invoice of the 165 bags of wool to Manchester, addressed to the defendants, and requested payment of what was due to him.

In September he requested them to receive and pay for the remainder of the wools undelivered, and gave notice that, unless the account between him and the defendants were liquidated by the 1st of November, the wool remaining undelivered would be put up to public sale on that day, and the defendants held responsible for any loss.

The defendants having declined to receive them they were sold at a loss. Whereupon the present action was commenced.

It was objected at the trial, on behalf of the defendants, that there was no valid contract between the parties, the broker's book not having been signed, and the bought and sold notes not having been delivered to each party; that Ebsworth, having no authority from Dunn at the time of the bargain, was not an agent authorized within the meaning of the Statute of Frauds; that the bought and sold note given to the plaintiff varied from that made out for the defendants, the latter specifying the 1st of July as the day for cash with discount at the end of the sold as well as of the bought note, the former specifying that day only at the end of the bought note; and that the plaintiff had rescinded the contract by the delivery of part of the wool to Ebsworth, and the sale of the remainder.

A verdict was taken for the plaintiff, with leave for the defendants to move the court upon these points.

Taddy, Serjt., accordingly obtained a rule *nisi* to enter a nonsuit or have a new trial on these and sundry other questions of law and fact.

With respect to the alleged variance the court held that, as the plaintiff's bought and sold note was all written on the same sheet of paper, the 1st of July specified at the end of the bought note must be taken to apply equally to the contract in the sold note, and that therefore the instrument corresponded sufficiently with the bought and sold note made out for the defendants.

If the subsequent ratification by Dunn constituted Ebsworth by relation an agent duly authorized within the meaning of the Statute of Frauds at the time of the contract, a bought and sold note having been made out and signed by him on the part of the defendants, his delivering it to them and his signing the contract book would not be essential to the validity of the contract.

It is only necessary therefore to report what was said on the points, whether a person who makes a contract for another without due authority becomes, on the ratification of the contract by the party to be charged, a sufficient agent to bind him within the meaning of the Statute of Frauds; and whether the disposal by the vendor of goods sold, with a view to prevent further loss upon the vendee's refusing to receive them, be a rescinding of the contract.

Wilde and *Russell*, Serjts., for the plaintiff.

Taddy and *Spankie*, Serjts., contra.

Best, C. J. It has been argued that the subsequent adoption of the contract by Dunn will not take this case out of the operation of the Statute of Frauds; and it has been insisted that the agent should have his authority at the time the contract is entered into. If such had been the intention of the Legislature, it would have been expressed more clearly; but the statute only requires some note or memorandum in writing to be signed by the party to be charged or his agent thereunto lawfully authorized, leaving us to the rules of common law as to the mode in which the agent is to receive his authority. Now in all other cases a subsequent sanction is considered the same thing in effect as assent at the time. "Omnis ratihabitio retrotrahitur et mandato æquiparatur;" and in my opinion the subsequent sanction of a contract signed by an agent takes it out of the operation of the statute more satisfactorily than an authority given beforehand. Where the authority is given beforehand, the party must trust to his agent; if it be given subsequently to the contract, the party knows that all has been done according to his wishes. But in Kinnitz *v.* Surry, where the broker, who signed the broker's note upon a sale of corn, was the seller's agent, Lord Ellenborough held that if the buyer acted upon the note, that was such an adoption of his agency as made his note sufficient within the Statute of Frauds; and in Soames *v.* Spencer, 1 Dow. & Ry. 32, where, A. and B., being jointly interested in a quantity of oil, A. entered into a contract for the sale of it without the authority or knowledge of B., who upon receiving information of the circumstance refused to be bound, but afterwards assented by parol, and samples were delivered to the vendees, it was held, in an action against the vendees, that B.'s subsequent ratification of the contract rendered it binding, and that it was to be considered as a contract in writing within the Statute of Frauds. That is an express decision on the point that under the Statute of Frauds the ratification of the principal relates back to the time when the agent made the contract.

Then with regard to the resale, it seems clear to me that it did not rescind the contract. It is admitted that perishable articles may be resold. It is difficult to say what may be esteemed perishable articles and what not; but if articles are not perishable, price is, and may alter in a few days or a few hours. In that respect there is no difference between one commodity and another. It is a practice therefore founded on good sense to make a resale of a disputed article, and to hold the original contractor responsible for the difference. The practice itself affords some evidence of the law, and we ought not to oppose it except on the authority of decided cases. Those which have been cited do not apply. Where a man, in an action for goods sold and delivered, insists on having from the vendee the price at which he contracted to dispose of his goods, he cannot perhaps consistently with such a demand dispose of them to another; but if he sues for damages in consequence of the vendee's refusing to complete his contract, it is not necessary that he should retain dominion over the goods: he merely alleges that a contract was entered into for the purchase of certain articles, that it has not been fulfilled, and that he has sustained damage in consequence. There is nothing in this which requires that the property should be in his hands when he commences the suit; and it is required neither by justice nor by the practice of the mercantile world.

In actions on the warranty of a horse it is the constant practice to sell the horse, and to sue to recover the difference. The usage in every branch of trade is equally against the objection which has been raised on the part of the defendants. It is urged indeed that in contracts entered into by the East India Company the power of resale is expressly provided for in case the vendee should refuse to perform his contract. That is only *ex abundanti cautela,* and it has never been decided that a resale of the goods is a bar to an action for damages for non-performance of a contract to purchase them: the contrary has been held at *nisi prius.* But without referring to a *nisi prius* case as authority, we are anxious to confirm a rule consistent with convenience and law. It is most convenient that when a party refuses to take goods he has purchased, they should be resold, and that he should be liable to the loss, if any upon the resale. The goods may become worse the longer they are kept; and at all events there is the risk of the price becoming lower.

Rule discharged.[1]

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[1] Butman *v.* Butman, 213 Ill. 104; Hankins *v.* Baker, 46 N. Y. 666, *acc.* *Conf.* Baldwin *v.* Schiappacasse, 109 Mich. 170.

WRIGHT *v.* DANNAH.

AT GUILDHALL, CORAM LORD ELLENBOROUGH, JULY 4, 1809.

[*Reported in* 2 *Campbell*, 203.]

GOODS bargained and sold. Plea, the general issue.

The action was brought for the value of four sacks of clover-seed. The parties, having met on the Corn Exchange in London, entered into a negotiation for the sale of this seed; and after they had agreed on the price, the plaintiff wrote the following memorandum of the contract: —

Robert Dannah, Windley, near Derby.
4 sacks clover-seed, at £6 18*s*.
Per Fly Boat.

After the plaintiff had written this memorandum, the defendant, who overlooked him while he wrote it, desired him to alter the figures 18 to 16, — £6 16*s*. being the price agreed on. This the plaintiff accordingly did. They then parted, the memorandum being left with the defendant.

Park objected that this was not a sufficient memorandum within the Statute of Frauds, not being signed by the party to be charged by it or his authorized agent.

Garrow and *Puller*, contra.

LORD ELLENBOROUGH said the agent must be some third person, and could not be the other contracting party.

Plaintiff nonsuited.[1]

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[1] Farebrother *v.* Simmons, 5 B. & Ald. 333; Sharman *v.* Brandt, L. R. 6 Q. B. 720; Bent *v.* Cobb, 9 Gray, 397; Boardman *v.* Spooner, 13 Allen, 353; Tull *v.* David, 45 Mo. 444; Dunham *v.* Hartman, 153 Mo. 625; Johnson *v.* Buck, 35 N. J. L. 338; Adams *v.* Scales, 1 Baxt. 337, *acc.* *Conf.* Bird *v.* Boulter, 4 B. & Ad. 443; Murphy *v.* Boese, L. R. 10 Ex. 126; Snyder *v.* Wolford, 33 Minn. 175; Brent *v.* Green, 6 Leigh, 16.

BAILEY AND ANOTHER *v.* SWEETING.

IN THE COMMON PLEAS, JANUARY 12 AND 17, 1861.

[*Reported in* 30 *Law Journal Reports, Common Pleas*, 150.]

THIS was an action brought to recover £76 14*s.* 3*d.* for goods bargained and sold. The defendant paid into court £38 3*s.* 9*d.*, and pleaded never indebted to the rest of the claim. The cause was tried before Erle, C. J., at the London sittings after Easter term, 1860. The defendant, a furniture dealer at Cheltenham, being at the plaintiffs' manufactory in London in July, 1859, bought of the plaintiffs four old gilt chimney-glasses at £28 10*s.*, and a walnut chimney-glass at £6 6*s.*, to be paid for by a check on delivery; and also on the same occasion bought of the plaintiffs various other articles (some of which were not then ready, but had to be made) on certain credit terms. The chimney-glasses formed the first parcel of such goods which were sent to the defendant at Cheltenham. The carrier, however, to whom this parcel was delivered so damaged it during its carriage that the defendant refused to receive it when it arrived, and the plaintiffs were at once informed of such refusal. The other goods which had been bought were afterwards sent in different parcels to the defendant, and were duly received by him; and it was admitted at the trial that the value of these was covered by the amount which had been paid into court, and the only question was as to the defendant's liability in respect of the first parcel, the price of which, with the cases in which it was packed, amounted to £38 10*s.* 6*d.* With reference to the Statute of Frauds, the plaintiffs contended that the sale of all the articles had been under one contract, and that there had been therefore a part acceptance; and they also relied on the following letter from the defendant, written in answer to one from the plaintiffs applying for payment, as a memorandum satisfying the statute: —

CHELTENHAM, December 3, 1859.

GENTLEMEN, — In reply to your letter of the 1st instant, I beg to say that the only parcel of goods selected for ready money was the chimney-glasses, amounting to £38 10*s.* 6*d.*, which goods I have never received, and have long since declined to have for reasons made known to you at the time; with regard to the other items, viz., £11 4*s.* 9*d.*, £14 13*s.*, and £13 13*s.*, for goods had subsequently (less cases returned), those goods are, I believe, subject to the usual discount of £5 per cent, and I am quite ready to remit you cash for these parcels at once, and on receipt of your reply to this letter will instruct a friend to call on you and settle accordingly. I am yours, &c.,

GEO. SWEETING.

The jury, being of opinion that the chimney-glasses were sold under a separate contract from that under which the other articles were sold, found a verdict for the defendant; leave being reserved to the plaintiffs to move to set the same aside, and to enter a verdict for them for £38 10*s.* 6*d.*, if the court should be of opinion that the defendant's letter of the 3d of December was sufficient to satisfy the Statute of Frauds.

In Trinity term last Hawkins obtained a rule *nisi* accordingly to set the verdict aside, and to enter it for the plaintiffs for £38 10*s.* 6*d.* pursuant to the leave reserved, or for a new trial on the ground of the verdict being against evidence.

Henry James and *T. E. Chitty* now showed cause.

Hawkins and *Kemplay*, in support of the rule.

ERLE, C. J. This was an action for goods bargained and sold, and the question was whether there had been a sale. The defendant relies on the Statute of Frauds, and says that there was no note or memorandum to satisfy the statute. There was a letter, however, written by the defendant, which in effect says this to the plaintiffs: "I made a bargain with you for the purchase of chimney-glasses at the sum of £38 10*s.* 6*d.*, but I declined to have them because the carrier broke them." Now, the first part of that letter is unquestionably a note or memorandum of the bargain: it contains the price and all the substance of the contract; and there could be no dispute that, if it had stopped there, it would have been a good memorandum of the contract within the meaning of the statute. I think that what had passed in the first instance orally between the parties on the subject of the purchase was in the nature of an inchoate contract, and which, when construed with the letter afterwards written, is a good and binding contract. Then the latter part of the letter in effect says that "the goods to which the contract I had made relates were refused by me because the carrier broke them;" and it has been contended by the defendant that the letter is not a memorandum of the contract within the statute, because it repudiates the bargain; and the defendant has relied on the passage cited from Mr. Justice Blackburn's book on Contracts, in support of the proposition that the acknowledgment of the bargain is not within the statute if it is accompanied by a repudiation of it; and reference has been made to the case of Rondeau *v.* Wyatt where there was a bill of discovery, and it was held that the answer thereto in chancery was not a sufficient memorandum within the Statute of Frauds. Although I have thus adverted to these authorities, there is in fact no decided authority on the point, and we are, therefore, referred back to the original Statute of Frauds; and I, for one, am of opinion that the letter of the defendant is a good memorandum of the bargain within the meaning of that statute. The object of the act was to prevent fraud and perjury. That is sufficiently obviated by the letter in question, because the defendant says therein, "I made the contract for the goods." The goods and the price are both referred to, and the defendant does not in such letter rely on the Statute of Frauds as making the contract invalid, but he rests his repudiation on the ground of the goods having been broken. That may, I think, distinguish the present case from cases where the party admitting the contract has relied on the statute as a defence. But if there be no such distinction, then, with every respect for that clear-headed and learned judge, my brother Blackburn, I cannot assent to the proposition contained in his work on Contracts to the extent contended for.

WILLIAMS, J. I am of the same opinion. It cannot be controverted that in point of fact there was a good and lawful contract for the sale of the goods, the price of which is sought to be recovered. It is clear, however, that as the price is greater than £10 the contract, though good, would not be actionable unless the requisites of the Statute of Frauds have been complied with. [His Lordship here read the 17th section of that statute.] The effect of that section is that, though there is a valid verbal contract, it is not actionable unless something of several things has happened, one of which is the existence of a note or memorandum in writing of the bargain signed by the party to be charged. As soon as that occurs, the contract, though not previously actionable, becomes actionable; and the question therefore is, whether in the present case there exists such a memorandum as the statute refers to. It appears to me that there does. The letter of the defendant refers to all the essential terms of the bargain; and the only question is, whether it is less sufficient because it is accompanied by a statement that the defendant does not consider himself liable for the loss arising from the default of the carrier. I do not consider that it is so. It is said that there is a difficulty in maintaining such a doctrine from the inconvenience which may arise from the property not passing until the contract becomes an actionable contract. That may be so; but the same objection would apply to the case of part payment or part acceptance, and no one doubts that the verbal contract might be set up where these have afterwards occurred. I agree with my Lord in thinking that the reasons given in my brother Blackburn's book are not sufficient. I do not think that the question whether the party writing the letter had a right to put an end to the contract could affect the question whether there was or was not a good contract. The intention of such party to abandon or not the contract can have nothing to do with the question whether there is a sufficient memorandum or not of the contract.

WILLES, J. I am of the same opinion. Assuming there to be a valid contract, the defendant would be bound to pay for these goods; and not having done so, there would be good cause of action. Now, at common law it is clear there would exist in this case a good cause of action; but it is said that the defendant is not liable by reason of the Statute of Frauds. I think, however, that the defendant is liable, and I found my opinion on the 17th section of that statute. It appears that there is no authority on the subject in favor of either party, with the exception of the *dictum* of my brother Blackburn, and that must be taken in connection with the statute itself. Now, it is necessary to look at the words of the statute; they are, that the contract shall not be good unless, amongst other things, "some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract." It follows, therefore, from these words that, if there be any note or memorandum in writing of the bargain signed by the party to be charged, the contract is to be allowed as at common law. Then is there in the present case a memorandum in writing containing the terms of the bargain? I think that on the true construction of the defendant's letter of the 3d of December there is such a memorandum within the meaning of the statute. It has been argued that there is not, because the statement in the letter is accompanied by a repudiation of the bargain; but I think that to hold that such letter is not on that account a note or memorandum of the bargain would be to disregard the word "some" in the statute. There is here a note in writing of the bargain; and the statute does not say that where there is such, the statute is not to be satisfied if there exist also other circumstances.

Keating, J. There is no doubt a valid contract for the goods in question if it be sufficiently evidenced by some writing in order to satisfy the statute. There is such evidence here of the contract in the defendant's letter up to a particular portion of it. Then does it cease to be evidence because the defendant goes on afterwards in the letter to say that he ought not to be bound by it? I think it does not, and I should have had no doubt about it but for the opinion of my brother Blackburn in his work on Contracts.

Rule absolute to enter verdict for the plaintiffs for £38 10*s.* 6*d.*

GIBSON AND ANOTHER *v.* HOLLAND.

IN THE COMMON PLEAS, NOVEMBER 9, 1865.

[*Reported in Law Reports,* 1 *Common Pleas,* 1.]

This was an action to recover the price of a horse bargained and sold by the plaintiffs to the defendant.

Plea, never indebted.

The cause was tried before Willes, J., at the Devonshire summer assizes. The plaintiffs, Gibson and Luke, are horse dealers at Exeter. The defendant is a gentleman who occasionally deals in horses.

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[1] Wilkinson *v.* Evans, L. R. 1 C. P. 407; Buxton *v.* Rust, L. R. 7 Ex. 279; Elliott *v.* Dean, Cab. & E. 283; Drury *v.* Young, 58 Md. 546; Heideman *v.* Wolfstein, 12 Mo. App. 366; Cash *v.* Clark, 61 Mo. App. 636; Louisville Varnish Co. *v.* Lovick, 29 S. C. 533; Martin *v.* Haubner, 26 Can. S. C. 141, *acc.* See Westmoreland *v.* Carson, 76 Tex. 619. Some statutes, however, especially in regard to land, require the "contract" to be in writing. See Montauk Assoc. *v.* Daly, 62 N. Y. App. Div. 101; Sowards *v.* Moss, 58 Neb. 119, 59 Neb. 71.

Having heard from one Rookes, a horse dealer of Exeter, that the plaintiffs had a mare which was likely to suit him, and having seen and approved of her, the defendant authorized Rookes to buy her for him, if he could, for forty guineas. Rookes accordingly made the purchase at that price, and communicated that fact to the defendant in a letter, as follows: —

15TH MAY, 1865.

I have heard from Mr. Gibson and seen Tom Luke this morning respecting the bay mare, and have bought her for forty guineas. Will you therefore forward me your cheque, with instructions how she is to be sent?
WM. ROOKES.

Receiving no reply, Rookes addressed the following letters on the 20th and 23d of May, 1865, respectively, to the defendant: —

I wrote you on Monday last to say I had, in accordance with your request, purchased Mr. Gibson's bay mare for you at forty guineas, requesting you would send me a cheque, with instructions how to forward her. Not having received any reply, I fear you must have been absent. Please send me cheque at once, with necessary instructions.
WM. ROOKES.

I cannot but express my surprise at not having received any reply to my letters of the 15th and 20th. In the first I informed you that I had purchased Mr. Gibson's bay mare; and in the second I asked you to send a cheque for the same, viz., £42, in order that I may settle with him. Mr. Luke has called again this morning; and it makes me look very foolish, as of course they look to me to fulfil my contract; and I hope that you will on the receipt of this send me the cheque, with the necessary instructions how the mare is to be forwarded.

WM. ROOKES.

On the 25th of May, 1865, the defendant wrote to Rookes, as follows: —

I only returned home yesterday evening, or I should have at once answered your first letter, and sent you a cheque for the mare which you were kind enough to buy for me. I am glad to say I have sold her to Mr. Toynbee. When I told him of her, he said he knew her well, and would buy her from me, which he did; and you will receive a cheque for her from me by this evening's post.

C. HOLLAND.

On the 26th of May, Rookes wrote in reply to the last letter: —

Mr. Toynbee has never seen the mare that you have purchased. The one he alludes to I sold Mr. Gibson for Sir L. P., and she is not for sale at any price. You will therefor please to rectify this mistake, and send me your cheque, as it is a fortnight to-morrow since I bought her for you, and she has been standing at livery ever since.

WM. ROOKES.

On the 10th of June, Rookes wrote again to the defendant: —

Mr. Gibson and Mr. Luke called here this afternoon; and as they have both failed in seeing you in London, they now call upon me to complete my contract for the sale of the mare. You are fully aware that you commissioned me to buy the mare for you; and had I thought there would have been any trouble or annoyance, I should have had nothing to do with it; but, simply acting as your agent, I must request that you will at once remit me your cheque for £42, cost price, together with half the keep, two guineas, as it is a month ago next Monday that I bought her for you, and she has been standing at livery ever since, and they have a perfect right to claim the whole of the keep.

WM. ROOKES.

On the 16th of June, Rookes again wrote to the defendant: —

Messrs. Gibson & Luke have been and seen me again to-day respecting the bay mare which you told me to purchase from them for you; and they have threatened me with an action, &c.

Rookes, having on the 17th of June received a letter from the plaintiffs' attorneys, demanding payment from him of £46 alleged to be due from him for a brown mare sold by them to him, and her keep, sent it to the defendant, writing, —

This morning's post brought me the enclosed from Messrs. Gibson & Luke's solicitors; I really do hope that you will not allow me to be put to any further trouble or annoyance in this most unpleasant matter, but at once remit your cheque either to me. [*Sic.*] If they sue me, I have no alternative but to sue them or you.

On the part of the defendant it was objected that there was no contract in writing to satisfy the 17th section of the Statute of Frauds. For the plaintiffs it was insisted that the correspondence amounted to a contract, or at all events to a sufficient memorandum of a contract to charge the defendant.

Under the direction of the learned judge a verdict was found for the plaintiffs for the sum claimed, reserving to the defendant leave to move.

Karslake, Q. C., moved to enter a nonsuit.

ERLE, C. J. I am of opinion that there should be no rule. The contract for the purchase of the mare in question was made by Rookes. If Rookes was the agent of both parties, there was nothing to reserve; therefore I place no reliance on that. But I am of opinion that the letters put in, taken together, do amount to a sufficient note or memorandum of the contract within the 17th section of the Statute of Frauds. Apart from the statute, it is beyond doubt that Rookes made a contract on behalf of the defendant to buy the plaintiffs' mare. The defendant relies upon the 17th section, which enacts that no contract for the sale of any goods, &c., for the price of £10 or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest or part payment, or unless "some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized." The defendant's letters amount to a clear admission that Rookes did make on his behalf the contract which is described in that correspondence. But the objection relied on is that the note or memorandum of that contract was a note passing between the defendant, the party sought to be charged, and his own agent, and not between the one contracting party and the other. The object of the Statute of Frauds was the prevention of perjury in the setting up of contracts by parol evidence, which is easily fabricated. With this view it requires the contract to be proved by the production of some note or memorandum in writing. Now a note or memorandum is equally corroborative, whether it passes between the parties to the contract themselves or between one of them and his own agent. Indeed one would incline to think that a statement made by the party to his own agent would be the more satisfactory evidence of the two. Then how stand the authorities on the subject? In Leroux *v.* Brown, 12 C. B. 818, 22 L. J. (C. P.) 1, in support of the position that a letter addressed by the defendant to a third person, containing an admission of a contract with the plaintiff, will be enough to charge the former, Sir G. Honyman refers to Sugden's V. & P. (11th ed.) 122, where it is said that "a note or letter written by the vendor to any third person, containing directions to carry the agreement into execution, will be a sufficient agreement to take a case out of the statute;" and for this the learned author vouches Lord Hardwicke, who in Welford *v.* Beazely, 3 Atk. 503, says: "The meaning of the statute is to reduce contracts to a certainty, in order to avoid perjury on the one hand and fraud on the other; and therefore, both in this court and the courts of common law, where an agreement has been reduced to such a certainty, and the substance of the statute has been complied with in the material part, the forms have never been insisted on. Hawkins *v.* Holmes, 1 P. Wms. 770. There have been cases where a letter written to a man's own agent, and setting forth the terms of an agreement as concluded by him, has been deemed to be a signing within the statute, and agreeable to the provisions of it." See Clerk *v.* Wright, 1 Atk. 12. Sir E. Sugden goes on to say that "the point was expressly determined in the year 1719 in the Court of Exchequer. Upon an agreement for an assignment of a lease, the owner sent a letter specifying the agreement to a scrivener, with directions to draw an assignment pursuant to the agreement; and Chief Baron Bury, Baron Price, and Baron Page were of opinion that the letter was a writing within the Statute of Frauds." Smith *v.* Watson, Bunb. 55. These cases, it is true, arose upon the 4th section of the statute, but the analogy holds equally good as to the 17th section. In the case referred to by my brother Willes, of Bailey *v.* Sweeting, 9 C. B. (N. S.) 843, 30 L. J. (C. P.) 150, this court went very fully into the general doctrine, and came to the conclusion that a letter which contained an admission of the bargain, and of all the substantial terms of it, was a sufficient note or memorandum of the contract to satisfy the 17th section, notwithstanding the writer repudiated his liability. To satisfy the statute, you must have the oral statement of the contract corroborated by an acceptance of part of the goods or a part payment of the price, or you must have some note or memorandum in writing of the bargain. If so, the danger of perjury, which the statute was designed to exclude, is abundantly guarded against if there be a written statement of the terms of the contract, signed by the party to be charged, made to an agent. For these reasons I feel bound to hold that the requirements of the statute have been complied with in this case, and consequently that there should be no rule.

WILLES, J. I agree. The statute in § 17 imposes it as a condition to the validity of a contract for the sale of goods for the price of £10 and upwards, either that there shall be an acceptance of part of them, or that something shall be given as earnest or in part payment of the price, or that there shall be some note or memorandum in writing of the bargain, signed by the party to be charged or by his lawfully authorized agent. Whether Rookes was the agent of the plaintiffs as well as of the defendant, I do not stop to inquire. But I think the series of letters, read together, contains a statement of the bargain, and an admission by the defendant that Rookes bought the mare of the plaintiffs on behalf of the defendant and for the price mentioned therein. The parties are named in a writing signed by the person who is sought to be charged; and the subject-matter of the contract and the price are both mentioned. Nothing is wanting to make a complete memorandum of the bargain, unless it be necessary that the document should be addressed to the person who is to take advantage of it. I apprehend the 17th section imposes no such condition. Both the 4th and the 17th sections seem to be framed for the purpose of absolving contracting parties from liability, unless under § 4 the agreement upon which the action is brought, or some memorandum or note thereof, shall be in writing and signed, &c., or under § 17 unless there be acceptance or part payment, or some note or memorandum in writing of the bargain made and signed by the party to be charged thereby, — the words of the latter clause not bearing quite so comprehensive a meaning as those of the former. Taking the 17th section, which stands upon a different footing from the 4th in the particulars which called for the interference of the Legislature in the recent Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, and on which our judgment must proceed, there is a total absence of any indication of intention that the note or memorandum must be addressed or delivered to the person who is to have a remedy upon it: all the section requires is that there shall be written evidence of the contract. Provided you have in writing an admission by the party to be charged of the bargain having been made, the requirement of the statute is satisfied, though the memorandum does not show a contract in the sense of its being a complete agreement, and intended to be the exclusive evidence of the right on one side and of the liability on the other, as the final written agreement between the parties would be. This section uses a word which seems to afford a key to its construction; it requires that there shall be, not any particular kind of memorandum, but "*some* note or memorandum of the bargain." There is a note or memorandum of the bargain in this case. I cannot help thinking that Bailey *v.* Sweeting, 9 C. B. (N. S.) 843, 30 L. J. (C. P.) 150, disposes of this case, because, though the memorandum there did not show a contract in the sense of an agreement, inasmuch as the defendant in terms repudiated his liability, yet as the letter contained evidence of the terms upon which he had once contracted to be bound it was properly held to be a sufficient memorandum to satisfy the statute. Great difficulty has arisen as to the construction of this section, as being applied to evidence only; and I have on former occasions expressed the inability I felt to understand the case of Leroux *v.* Brown, 12 C. B. 801, 22 L. J. (C. P.) 1, though of course we are bound by it. It affords however a remarkable confirmation of the correctness of the construction we now put upon the statute, however questionable some persons may have thought the decision to be. There is another difficulty. It has been held that the memorandum must exist before the action is brought. Bill *v.* Bament, 9 M. & W. 36. This would seem to show that the memorandum is in some way to stand in the place of a contract. But I cannot help thinking that the courts in deciding cases of that description considered the intention of the Legislature to be of a mixed character, — that it was intended to protect persons from actions being brought against them to enforce contracts of which there was no evidence in writing, and that the written evidence should be existing at the time when the action is instituted. It is too late however now to object to those cases. I come round to the section itself. There is no authority which compels us to accede to the construction which Mr. Karslake asks us to put upon it. There is no reason for it; and I think it would be doing violence to the language used. I think the letters in question do constitute a sufficient memorandum of the contract to answer all the requirements of the statute.

Byles, J., who had not heard the whole of the argument, expressed no opinion.

Keating, J., concurred. *Rule refused.*

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[1] Moore *v.* Hart, 1 Vern. 110; Ayliffe *v.* Tracy, 2 P. Wms. 65; Owen *v.* Thomas, 3 Myl. & K. 353; Moss *v.* Atkinson, 44 Cal. 3; Spangler *v.* Danforth, 65 Ill. 152; Wood *v.* Davis, 82 Ill. 311; Gaines *v.* McAdam, 79 Ill. App. 201; Fugate *v.* Hansford's Ex., 3 Litt. 262; Kleeman *v.* Collins, 9 Bush, 460; Moore *v.* Mountcastle, 61 Mo. 424; Cunningham *v.* Williams, 43 Mo. App. 629; Cash *v.* Clark, 61 Mo. App. 636; Mizell *v.* Burnett, 4 Jones L. 249; Lee *v.* Cherry, 85 Tenn. 707, *acc.*

First Bank *v.* Sowles, 46 Fed. Rep. 731; Steel *v.* Fife, 48 Ia. 99; Morrow *v.* Moore, 98 Me. 373; Kinloch *v.* Savage, Speers Eq. 464; Buck *v.* Pickwell, 27 Vt. 157, 167, *contra.*

EGERTON *v.* MATHEWS AND ANOTHER.

In the King's Bench, February 12, 1805.

[*Reported in* 6 *East*, 307.]

This was an action on the case against the defendants for not accepting and paying for certain goods which they had contracted to purchase by the following memorandum in writing: "We agree to give Mr. Egerton 19*d.* per lb. for 30 bales of Smyrna cotton, customary allowance, cash 3 per cent., as soon as our certificate is complete." Signed, Mathews and Turnbull, and dated 2d Sept., 1803. The defendants had before become bankrupts, and their certificate was then waiting for the Lord Chancellor's allowance, and after it was allowed they signed the memorandum again. On the opening of the case at the trial after last term at Guildhall it was objected, on the authority of Wain *v.* Warlters, 5 East, 10, that, the contract being altogether executory, and no consideration appearing on the face of the writing for the promise, nor any mutuality in the engagement, it was void by the Statute of Frauds, 29 Car. 2, c. 3. And it not being at that time adverted to that the case cited turned upon the meaning of the word "agreement" (*i. e.*, to pay the debt of another) in the 4th clause of the statute, and that this case was governed altogether by the 17th clause, the object and wording of which is different, and which has not the word "agreement," the plaintiff was nonsuited. But on a motion for setting aside the nonsuit, when the attention of the court was called to the difference of the two clauses, Lord Ellenborough, C. J., on granting a rule *nisi* expressed his assent to the distinction between the two cases, and said that the nonsuit had proceeded upon a mistake at the trial in supposing that they were the same. And on this day when

The *Solicitor-General* and *Marryat* were to have shown cause against the rule (after suggesting that the words "contract" and "bargain" in the 17th section implied mutuality and consideration as much as the word "agreement" in the 4th clause, and therefore brought the case within the principle of the former decision), finding that the whole court were decidedly of opinion that the action was sustainable upon the 17th section of the statute, they relinquished any further opposition to the rule; and

Lord Ellenborough, C. J., observed that the words of the statute were satisfied if there were "some note or memorandum in writing of the bargain, signed by the parties to be charged by such contract." And this was a memorandum of the bargain, or at least of so much of it as was sufficient to bind the parties to be charged therewith, and whose signatures to it is all that the statute requires.

Lawrence, J. The case of Wain *v.* Warlters proceeded on this, that in order to charge one man with the debt of another the agreement must be in writing; which word "agreement" we considered as properly including the consideration moving to, as well as the promise by, the party to be so charged; and that the statute meant to require that the whole agreement, including both, should be in writing.

The other judges concurring. *Rule absolute.*[1]

STEWART & SON *v.* COOK.

GEORGIA SUPREME COURT, JULY 13–AUGUST 13, 1903.

[*Reported in* 118 *Georgia*, 541.]

LAMAR, J. The written contract of sale refers to square and round bales, but is silent as to the weight of either form, or as to the customary meaning of the term. If nothing more appeared, it might be that evidence could have been introduced to show what was the standard weight and trade meaning of square bale and round bale. Pol. Code, § 1 (4); Civil Code, § 3675 (2). But the petition shows that the parties themselves agreed that the bales should be of a particular weight. It therefore appears that there was a parol agreement, when the law requires that the contract of sale shall be in writing (Civil Code, § 2693, par. 7); by which it of course means the entire contract, with all stipulations and provisions which have been assented to by the parties at the time of the sale. Where some of the terms are in writing and others in parol, the requirements of the statute are not met; and the court rightly sustained the demurrer. See Turner *v.* Lorillard Co., 100 Ga. 645.

Judgment affirmed. By five Justices.

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[1] "A written offer accepted by parol is a sufficient memorandum to satisfy the Statute of Frauds." Lydig *v.* Braman, 177 Mass. 212, 218; Hoadly *v.* M'Laine, 10 Bing. 482; Reuss *v.* Picksley, L. R. 1 Ex. 342; Stewart *v.* Eddowes, L. R. 9 C. P. 311; Gradle *v.* Warner, 140 Ill. 123; Doherty *v.* Hill, 144 Mass. 465; Howe *v.* Watson, 179 Mass. 30; Austrian *v.* Springer, 94 Mich. 343; Kessler *v.* Smith, 42 Minn. 494; Waul *v.* Kirkman, 27 Miss. 823; Lash *v.* Parlin, 78 Mo. 391; Argus Co. v. Albany, 55 N. Y. 495; Mason *v.* Decker, 72 N. Y. 595; Raubitchek *v.* Blank, 80 N. Y. 478; Bristol *v.* Mente, 79 N. Y. App. Div. 67; Thayer *v.* Luce, 22 Ohio St. 62; Himrod Co. *v.* Cleveland Co., 22 Ohio St. 451; Lee *v.* Cherry, 85 Tenn. 707; Lowber *v.* Connit, 36 Wis. 176; Hawkinson *v.* Harmon, 69 Wis. 551, *acc.* Banks *v.* Harris Mfg. Co., 20 Fed. Rep. 667; Haw *v.* American Nail Co., 89 Ia. 745; American Leather Co. *v.* Porter, 94 Ia. 117; Newlin *v.* Hoyt, 91 Minn. 409; Kingman *v.* Davis, 63 Neb. 578; Spence *v.* Apley, 94 N. W. Rep. 109 (Neb.); Montauk Assoc. *v.* Daly, 62 N. Y. App. Div. 101, aff'd without opinion, 171 N. Y. 659, *contra.* The statutes under which these cases last cited arose required the "contract" to be in writing, except in Banks *v.* Harris Mfg. Co.

HANSON *v.* MARSH.

MINNESOTA SUPREME COURT, DECEMBER 27, 1888.

[*Reported in* 40 *Minnesota,* 1.]

DICKINSON, J. The principal ground of recovery, as set forth in the complaint, and as presented in the case, is the breach of an alleged contract for the sale to the plaintiff, by the defendant, of a threshing-machine, consisting of a separator and engine. The plaintiff had a verdict for damages. It will only be necessary, upon this appeal from an order denying a new trial, to decide as to the validity of the alleged contract with regard to the Statute of Frauds. The following written instrument, signed by the defendant, is relied upon as a sufficient memorandum of the contract to answer the requirements of the statute: "Glencoe, 20th May, 1887. I, John Marsh, having this day sold to Hans Hanson, of the town of Helen, county of McLeod, a certain threshing-machine (of the Agitator Separator manufacture, and a twelve-horse Minnesota Giant engine), and do by this writing agree to run with said Hans Hanson (assisting him in the running of this machine) for the term of one month, at the rate of two dollars per day. And I further bind myself not to purchase another machine for the term of two years, or to have anything to do with the running of any other machine. John Marsh." It is alleged in the complaint, and further appears from the evidence in the case, that the price or consideration to be paid by the plaintiff, in performance of his part of the agreement, was $1,100. This may be taken to have been an entire price or consideration, both for the sale of the property and for the further obligation of the defendant, as expressed in the above written instrument. The plaintiff, however, alleges in his complaint that the value of the property agreed to be sold was $1,400, and that the value of the defendant's good-will and assistance in the business was $200. Deducting the latter sum from the whole contract price, it seems that, according to the estimate of the plaintiff, the sum which could be ascribed as the price of the property agreed to be sold was not less than $900. The evidence, too, goes to show that the sale of the property was the principal subject of the transaction, to which the further agreement expressed in the memorandum was merely incident; and upon the whole case it cannot be doubted that of the whole stipulated price, $1,100, the greater part represented, in the contemplation of both parties, the price of the property agreed to be sold. Such being the case, the agreement involved a contract for the sale of chattels "for the price of fifty dollars or more," within the meaning of the statute, which requires a note or memorandum of such contract to be made in writing. Such a contract is within the statute; although it also embraces some other agreement to which the statute is not applicable. Harman *v.* Reeve, 18 C. B. 587; Irvine *v.* Stone, 6 Cush.

508. And see Hodgson *v.* Johnson, El. Bl. & El. 685, and Rand *v.* Mather, 11 Cush. 1.

While it appears, both from the pleadings and from the evidence, that there was a definite stipulated price to be paid by the plaintiff, it will be observed that the memorandum contains no statement of or allusion to it. The price is an essential element in a contract of sale, and a memorandum which does not state the price — unless, perhaps, in cases where, no price being stipulated, it is left to be measured by the rule of reasonable or market value — is insufficient to satisfy the statute, and the contract is, by the terms of the statute, void. Elmore *v.* Kingscote, 5 Barn. & C. 583; Acebal *v.* Levy, 10 Bing. 376; Goodman *v.* Griffiths, 1 Hurl. & N. 574; Ide *v.* Stanton, 15 Vt. 685; Waterman *v.* Meigs, 4 Cush. 497; Ashcroft *v.* Butterworth, 136 Mass. 511; Stone *v.* Browning, 68 N. Y. 598, 604; James *v.* Muir, 33 Mich. 223; Browne, St. Frauds, § 376; 1 Benj. Sales, p. 271, § 251; 2 Schoulers, Pers. Prop. § 492. The order denying a new trial is reversed.[1]

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[1] It seems generally admitted that the price must be stated if a price was agreed upon, Browne on the Statute of Frauds, §§ 376, 377; and in jurisdictions where it is also held that the consideration for the contract must appear in a memorandum, no doubt can arise on this point. But in some jurisdictions of the United States it is held that the consideration need not be stated; and this has been enacted by statute in Illinois, Indiana, Kentucky, Maine, Massachusetts, Michigan, Nebraska, New Jersey, and Virginia.

In Hayes *v.* Jackson, 159 Mass. 451, an action upon a contract for the sale of land, the only memorandum of the sale stated the sale to be "for the sum of $14,140, subject to a mortgage of 8,000 dollars." It was agreed by both parties at the trial that the assumption of the mortgage was part of the consideration and went to make up the sum of $14,140. A majority of the court held the contract enforceable, holding that Pub. Stats. c. 78, § 2, making any statement of the consideration unnecessary, made an erroneous statement unimportant. Holmes, J., delivering the opinion of the majority, said: "Of course it may be said that, in a bilateral contract like the present, the contemporaneous payment of the price is a condition of the promise, and therefore that the promise cannot be set forth truly unless the consideration is stated. But the language of the section is general, and should be read as no doubt it was meant. The only effect is that a promise set forth as absolute may be subject to an implied condition of performance on the other side. When such an implied condition exists it will be construed into the writing, and knowledge of the law gives notice of its possible existence. In some cases it has been held unnecessary to state the consideration, even when there is no provision like our § 2, although the consideration was executory. Thornburg *v.* Masten, 88 N. C. 293; Miller *v.* Irvine, 1 Dev. & Bat. 103; Ellis *v.* Bray, 79 Mo. 227; Violett *v.* Patton, 5 Cranch, 142; Camp *v.* Moreman, 84 Ky. 635. In How *v.* Walker, 4 Gray, 318, Thomas, J., plainly indicated the opinion that § 2 of the statute applies in all cases, pointing out that this does not mean that when the parties are reversed the oral agreement will be sufficient to sustain an action." Field, C. J., with whom Knowlton, J., concurred, wrote an elaborate dissenting opinion, saying in part: "I do not know whether the majority of the court intend to make a distinction between contracts of sale described in the first section of Pub. Stats. c. 78 [land], and contracts of sale described in the fifth section [goods, wares, and merchandise]. . . . When the whole contract or promise of the defendant is to do a certain thing, and this is an absolute promise, resting upon a consideration which has been executed, there is some reason in saying that the memorandum signed by the

CHAMPION AND ANOTHER *v.* PLUMMER.

IN THE COMMON PLEAS, MAY 13, 1805.

[*Reported in* 1 *New Reports*, 252.]

THIS was an action against the defendant for not delivering to the plaintiffs 20 puncheons of treacle bought of him by the plaintiffs at 37*s.* per cwt., to be delivered on the 10th of December; 20 puncheons at 36*s.* 6*d.* per cwt., to be delivered on the 31st of October; and 10 puncheons at 37*s.* per cwt., to be delivered on the 1st of November.

At the trial before Sir James Mansfield, C. J., at the Guildhall sittings after last Hilary Term, it was proved that a bargain for the treacle in question was made between the plaintiffs' clerk and the defendant, as stated in the declaration, and that the following note was made by the plaintiffs' clerk in a common memorandum book and signed by the defendant as under: —

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defendant need not contain the consideration or inducement of the contract or promise. But in a contract executory on both sides, where the promises are mutual, and each is the consideration of the other, the promises are conditional, and one party agrees to perform his part of the contract only on condition that the other will perform his part, and it cannot be known what the promise of the one is without knowing the express or implied promise of the other. A promise to convey land because the promisee has actually received $1,000 is not the same as a promise to convey land if the promisor will pay $1,000 on receiving the conveyance, and a promise to convey land for $1,000 to be paid on the delivery of the deed is not the same as a promise to convey land for $10,000 to be paid on the delivery of the deed. The conditions on which the vendor agrees to convey are often many and complicated, and involve the assumption of mortgages and the performance of other acts. If a mere acknowledgment in writing by the vendor that he has agreed to convey specific land to the vendee on terms which are not expressed is sufficient to satisfy the Statute of Frauds, then it is open to the vendee to prove by oral testimony the price to be paid, and all the other terms of the contract to be performed by him, and the statute will no longer prevent frauds and perjuries. If it is a condition of the promise of the vendor that it is not to be performed unless at the time of the performance the vendee pays money and gives or assumes mortgages, the condition qualifies the promise and is a part of it, and the writing should contain all that is essential to show what the promise or contract on the part of the vendor in fact was. The decision of the court seems to me in great part to nullify the statute." Compare Reid *v.* Diamond Glass Co., 85 Fed. Rep. 193 (C. C. A.); Ruzicka *v.* Hotovy, 101 N. W. Rep. 328 (Neb.); Drake *v.* Seaman, 97 N. Y. 230; Barney *v.* Forbes, 118 N. Y. 580, 585; Dyer *v.* Winston, 77 S. W. Rep. 227 (Tex. Civ. App.).

It should be noticed that in the Massachusetts statute of frauds, and in the corresponding statutes of most other States in which it is provided that the consideration need not be stated, the provision does not necessarily apply to the section in regard to the sale of goods, wares, and merchandise; but in New Jersey the provision is clearly applicable to that section, and in Reid *v.* Diamond Glass Co., 85 Fed. Rep. 193 (C. C. A.), it was so held in a case arising under the Michigan statute.

Left leaf of the book.

Bought of W. Plummer
20 puncheons of treacle
37/0.
to be delivered by 10 Dec.
(Signed) Wm. Plummer.

20 puncheons treacle 36/6.
say 37/0.
1 Nov.
31 Oct. Wm. Plummer.

Right leaf of the book.

10 puncheons @ 37.

On the part of the defendant it was objected that this did not amount to a sufficient note or memorandum of the contract within the Statute of Frauds, 29 Car. 2, c. 3, § 17, as it was not signed by the purchaser; and his Lordship being of this opinion nonsuited the plaintiff.

A rule having been obtained calling on the defendant to show cause why the nonsuit should not be set aside and a new trial had,

Shepherd, Serjt., showed cause.

Best, Serjt., contra.

Sir James Mansfield, C. J. How can that be said to be a contract, or memorandum of a contract, which does not state who are the contracting parties? By this note it does not at all appear to whom the goods were sold. It would prove a sale to any other person as well as to the plaintiffs: there cannot be a contract without two parties, and it is customary in the course of business to state the name of the purchaser as well as of the seller in every bill of parcels. This note does not appear to me to amount to any memorandum in writing of a bargain.

The rest of the court concurring, *Rule discharged.*

VANDENBERGH *v.* SPOONER.

In the Exchequer, June 12, 1866.

[*Reported in Law Reports*, 1 *Exchequer*, 316.]

This was an action for goods bargained and sold, tried before Bramwell, B., at the sittings at Westminster in last Hilary term. The plaintiff had purchased at a sale of wreck a quantity of marble: this the defendant agreed to buy, but afterwards repudiated his bargain and refused payment. The value of the goods was above £10, and the only note or memorandum of the contract in writing signed by the defendant was as follows: "D. Spooner agrees to buy the whole of the lots of marble purchased by Mr. Vandenbergh, now lying at the Lyme Cobb, at 1*s.* per foot. (Signed) D. Spooner."

Evidence was also given to the effect that, after the defendant had signed this document, he wrote out what he alleged to be a copy of it, which at his request the plaintiff, supposing it to be a genuine copy, signed. This was in the following words: "Mr. J. Vandenbergh agrees to sell to W. D. Spooner the several lots of marble purchased by him, now lying at Lyme, at 1*s.* the cubic foot, and a bill at one month. (Signed) Julius Vandenbergh." The jury however were of opinion that the first document stated the contract actually made, and found a verdict for the plaintiff for £35, leave being reserved to the defendant to move to enter a nonsuit on the ground (amongst others) that there was no sufficient note or memorandum of the contract within the Statute of Frauds.

Huddleston, Q. C., and *Hannen*, showed cause.

Karslake, Q. C., and *Kingdon*, in support of the rule.

Cur. adv. vult.

The judgment of the court (Pollock, C. B., Martin, Bramwell, and Channell, BB.) was delivered by

Bramwell, B. The question we have had to consider in this case is whether the document relied on by the plaintiff was a sufficient note or memorandum in writing to bind the defendant under § 17 of the Statute of Frauds. The document was signed by the defendant, and was in the following terms: "D. Spooner agrees to buy the whole of the lots of marble purchased by Mr. Vandenbergh, now lying at the Lyme Cobb, at 1*s.* per foot." Can the essentials of the contract be collected from this document by means of a fair construction or reasonable intendment? We have come to the conclusion that they cannot, inasmuch as the seller's name as seller is not mentioned in it, but occurs only as part of the description of the goods.

Martin, B. I am not well satisfied as to what is the real meaning of the document, but I am not prepared to differ from the rest of the court. *Rule absolute.*

NEWELL *v.* RADFORD.

In the Common Pleas, November 5, 1867.

[*Reported in Law Reports*, 3 *Common Pleas*, 52.]

Declaration for non-delivery of 32 sacks of flour.

Plea, *non assumpsit.*

The case was tried before Kelly, C. B., at Merionetshire summer assizes, when it was proved that the plaintiff was a baker, and the defendant a flour dealer; and that John Williams, a duly authorized agent of the defendant, had called on the plaintiff and solicited orders, and had made the following entry in one of the plaintiff's books: —

> Mr. Newell, 32 sacks culasses at 39*s.*, 280 lbs., to wait orders.
> June 8. John Williams.

The plaintiff subsequently gave orders for the delivery of part of the flour; but the defendant refused to deliver it. A correspondence was put in, which had taken place subsequently to the purchase between the plaintiff and defendant respecting the delivery of the flour.

A verdict was found for the plaintiff for £20, and leave was reserved to the defendant to move to enter a nonsuit or a verdict on the ground that there was no sufficient memorandum of the contract to satisfy the Statute of Frauds.

Bovill, C. J. In this case it is not disputed that the signature of the agent Williams would be sufficient to bind the defendant, but it is contended that the written memorandum does not sufficiently show which of the parties was the buyer. At first sight this indeed might not appear quite clear, except to a man in the trade; but it has always been held that you may prove what the parties would have understood to be the meaning of the words used in the memorandum, and that for this purpose parol evidence of the surrounding circumstances is admissible; and the cases of Macdonald *v.* Longbottom, 1 E. & E. 977, 28 L. J. (Q. B.) 293, and Spicer *v.* Cooper, 1 Q. B. 424, are authorities to that effect. In this case it was shown that the plaintiff was a baker, and that the defendant was a dealer in flour which the plaintiff would require for his trade; and looking at the nature of the entry in relation to those facts, I think there can be no reasonable doubt that it was a sale from the defendant to the plaintiff. If however there were any doubt, looking at the entry alone, it is set at rest by the two letters which passed between the plaintiff and defendant, which sufficiently identify the contract, and in which the relative positions of the parties as buyer and seller is distinctly stated.

Willes, J. I am of the same opinion. If the case of Vandenbergh *v.* Spooner, Law Rep. 1 Ex. 316, had been in point, we should have granted a rule, and perhaps made it absolute, leaving the parties to take the opinion of the Court of Exchequer Chamber. I think however that case is distinguishable. I own I have considerable difficulty in understanding that case; but if I do so rightly, it amounts to this, that a written agreement, "A. agrees to buy B.'s horse for £10," is not sufficient to satisfy the Statute of Frauds, because it cannot be inferred by reasonable intendment that B. is the seller. I cannot help observing that that seems to be an extreme case. The present however does not come within its authority, because there was a regular entry by the defendant's agent in the plaintiff's book describing what was to be sold, and the defendant was proved to be a person who sold such goods, and the plaintiff a person who would require to purchase such goods for the purpose of his trade. Taking therefore the entry in connection with those circumstances, I think it sufficiently appears from it who was the buyer and who the seller of the goods. There was moreover a correspondence which seems to be sufficiently connected with the entry to be available if necessary, and from which the relation of the parties as buyer and seller clearly appears.

BYLES, J. I am of the same opinion. Mr. Russell has assumed that the words "Mr. Newell" are in the nominative case, but that would not make sense I think it would be reasonably clear that they were in the oblique case, even if the memorandum had been on a loose slip of paper; but all doubt is removed by the fact that it is an entry in the plaintiff's book. But, further, evidence of surrounding facts is admissible to explain the memorandum, as evidence has been held admissible to settle the meaning of the price or of the quantity of goods sold mentioned in a memorandum (Macdonald *v.* Longbottom, *supra*), and even to add a new party as principal; and the evidence in this case shows that the occupations of the parties were respectively such as to be consistent only with the plaintiff being the buyer of the goods. There is this distinction from the case of Vandenbergh *v.* Spooner, *supra*: the parol evidence which was there tendered was not to show the surrounding circumstances or the position of the plaintiff as a dealer in marbles, but that the parties had expressed the contract also in other words, and so to vary the terms of the contract itself. I entirely concur in the observations of the Lord Chief Justice and my brother Willes.

KEATING, J. I am of the same opinion. I think it is impossible to look at the entry without seeing that it is a contract between Newell and Williams with relation to the flour. Then it is said that it cannot be ascertained from the memorandum which is the buyer and which the seller; but we may look at the surrounding circumstances, and it appears that the entry is in the plaintiff's book, and that he is a baker, and that Williams was the agent of the defendant, who is a flour merchant. I think therefore it is clear, even without the correspondence, what was the relation of the parties to each other; and if that be referred to, it leaves no doubt whatever on the case.

Rule refused.

THE SALMON FALLS MANUFACTURING COMPANY, PLAINTIFF IN ERROR, v. WILLIAM W. GODDARD.

SUPREME COURT OF THE UNITED STATES, DECEMBER TERM, 1852.

[*Reported in* 20 *Curtis*, 276; 14 *Howard*, 446.]

THE case is stated in the opinion of the court.

C. B. Goodrich, for the plaintiffs.

Johnson and *George T. Davis*, contra.

NELSON, J., delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the District of Massachusetts.

The suit was brought by the plaintiffs in the court below to recover the price of 300 bales of brown and of 100 cases of blue drills, which they had previously sold to the defendant.

The contract for the purchase was made with the house of Mason & Lawrence, agents of the plaintiffs in Boston, on the 19th September, 1850, and a memorandum of the same signed by the parties. A bill of parcels was made out under date of 30th September, stating the purchase of the goods by the defendant, carrying out prices and footing up the amount at $18,[illegible]; also the terms of payment, — note at twelve months, payable to the treasurer of the plaintiffs. This was forwarded to the defendant on the 11th October, and in pursuance of an order from him the 300 bales were sent from their establishment at Salmon Falls by the railroad, and arrived at the depot in Boston on the 30th October, of which notice was given to the defendant on the same day, and a delivery tendered. He requested that the goods should not be sent to his warehouse or place of delivery, for the reason, as subsequently stated by his clerk, there was no room for storage. The agents of the plaintiffs the next day renewed the tender of delivery by letter, adding that the goods remained at the depot at his risk and subject to storage, to which no answer was returned. On the night of the 4th November the railroad depot was consumed by fire, and with it the 300 bales of the goods in question. The price was to be paid by a note at twelve months, which the defendant refused to give; upon which refusal this action was brought.

The court below at the trial held that the written memorandum, made at the time of entering into the contract between the agents of the plaintiffs and the defendant, was not sufficient to take the case out of the Statute of Frauds, and as there was no acceptance of the goods the plaintiffs could not recover.

As we differ with the learned judge who tried the cause as to the sufficiency of the written memorandum, the question upon the statute is the only one that it will be material to notice. The memorandum is as follows: —

Sept. 19. — W. W. Goddard, 12 mos.
300 bales S. F. drills . . . . $7\frac{1}{4}$
100 cases blue do. . . . . $8\frac{3}{4}$
Credit to commence when ship sails; not after Decr. 1 — delivered free of charge for truckage.
The blues, if color satisfactory to purchasers.
R. M. M.
W. W. G.

The statute of Massachusetts on this subject is substantially the same as that of 29 Car. 2, c. 3, § 17, and declares that no contract for the sale of goods, &c., shall be valid, &c., "unless some note or memorandum in writing of the bargain be made and signed by the party to be charged thereby or by some person thereunto by him lawfully authorized."

The word "bargain" in the statute means the terms upon which the respective parties contract; and in the sale of goods the terms of the bargain must be specified in the note or memorandum, and stated with reasonable certainty, so that they can be understood from the writing itself without having recourse to parol proof; for unless the essential terms of the sale can be ascertained from the writing itself or by a reference contained in it to something else, the memorandum is not a compliance with the statute.

This brief note of the contract however, like all other mercantile contracts, is subject to explanation by reference to the usage and custom of the trade, with a view to get at the true meaning of the parties as each is presumed to have contracted in reference to them. And although specific and express provisions will control the usage and exclude any such explanation, yet, if the terms are technical, or equivocal on the face of the instrument, or made so by reference to extraneous circumstances, parol evidence of the usage and practice in the trade is admissible to explain the meaning. 2 Kent, C. 556, and note 3; *id.* 260, and note; Long on Sales, 197 (ed. 1839); 1 Gale & Davis, 52.

Extraneous evidence is also admissible to show that a person whose name is affixed to the contract acted only as an agent, thereby enabling the principal either to sue or be sued in his own name; and this, though it purported on its face to have been made by the agent himself, and the principal not named. Higgins *v.* Senior, 8 M. & Wels. 834; Trueman *v.* Loder, 11 Ad. & Ell. 589.[1] Lord Denman observed in the latter case "that parol evidence is always necessary to show that the party sued is the party making the contract, and bound by it; whether he does so in his own name or in that of another, or in a feigned name, and whether the contract be signed by his own hand or that of an agent, are inquiries not different in their nature from the question, Who is the person who has just ordered goods in a shop? If he is sued for the price, and his identity made out, the contract is not varied by appearing to have been made by him in a name not his own." [1]

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[1] Kingsley *v.* Siebrecht, 92 Me. 23; Williams *v.* Bacon, 2 Gray, 387; White *v.* Dahlquist Mfg. Co., 179 Mass. 427; Tobin *v.* Larkin, 183 Mass. 389; Phillips *v.* Cornelius, 28 So. Rep. 871 (Miss.); Haubelt *v.* Rea & Page Co., 77 Mo. App. 672; Dykers *v.* Townsend, 24 N. Y. 57; Thayer *v.* Luce, 22 Ohio St. 62; Brodhead *v.* Reibold, 200 Pa. 618, 623, *acc.*

So the signature of one of the parties is a sufficient signing to charge the firm. Soames *v.* Spencer, 1 D. & R. 32; Long on Sales, 58.

It has also been held in the case of a sold note which expressed "eighteen pockets of hops at 100*s.*," that parol evidence was admissible to show that the 100*s.* meant the price per cwt. Spicer *v.* Cooper, 1 Gale & D. 52, 5 Jurist, 1036.

The memorandum in that case was as follows: —

> Sold to Waite Spicer, of S. Walden, 18 pos. Kent hops, as under July 23, 1840; 10 pos. Barlow East Kent, 1839; 8 pos. Springall Goodhurst Kent, 1839, 100*s.* Delivered.
>
> JOHN COOPER.

Evidence was admitted on the trial to prove that the 100*s.* was understood in the trade to refer to the price per cwt., and the ruling approved by the King's Bench. Lord Denman put a case to the counsel in the argument to illustrate his view, that bears upon the case before us. Suppose, he said, the contract had been for ten butts of beer, at one shilling, the ordinary price of a gallon, — and intimated that the meaning could hardly be mistaken.

Now, within the principles above stated, we are of opinion that the memorandum in question was a sufficient compliance with the statute. It was competent to show by parol proof that Mason signed for the firm of Mason & Lawrence, and that the house was acting as agents for the plaintiffs, a company engaged in manufacturing the goods which were the subject of the sale; and also to show that the figures $7\frac{1}{4}$ and $8\frac{3}{4}$, set opposite the 300 bales and 100 cases of goods, meant seven and a quarter cents and eight and three-quarter cents per yard.

The memorandum, therefore, contains the names of the sellers and of the buyer, the commodity, and the price; also the time of credit and conditions of the delivery; and in the absence of any specified time or place of delivery, the law will supply the omission, namely, a reasonable time after the goods are called for, and usual place of business of the purchaser, or his customary place for the delivery of goods of this description.

In respect to the giving of the note, which was to run during the period of the credit, it appears to be the uniform custom of the house of Mason & Lawrence to take notes for goods sold of this description. The defendant was one of their customers and knew this usage; and it is a presumption of law, therefore, that the purchase was made with reference to it, there being no stipulation to the contrary in the contract of the parties.

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[1] In Bibb *v.* Allen, 149 U. S. 481, the memorandum relied on was made up of slip contracts. The court said: "It is no valid objection to these 'slip contracts,' executed in duplicate, that the sales purported to be made on account of 'Albert,' 'Alfred,' 'Alexander,' 'Amanda,' and 'Winscon,' etc., which names were adopted by the defendants, and which represented them and their account.

But in North *v.* Mendel, 73 Ga. 400, the court refused to allow proof that "Mendel" meant "M. Mendel & Brother." *Conf* American Mfg. Co. *v.* Midland Steel Co., 101 Fed. Rep. 200; Lee *v.* Cherry, 85 Tenn. 707.

We are also of opinion, even admitting that there might be some obscurity in the terms of the memorandum, and intrinsic difficulty in a proper understanding of them, that it would be competent, under the circumstances of the case, to refer to the bill of parcels delivered for the purpose of explanation. We do not say that it would be a note in writing of itself sufficient to bind the defendant within the statute; though it might be to bind the plaintiff.

It was a bill of sale made out by the seller, and contained his understanding of the terms and meaning of the contract; and having been received by the buyer, and acquiesced in (for the order to have the goods forwarded was given after it was received), the natural inference would seem to be that the interpretation given was according to the understanding of both parties. It is not necessary to say that this would be the conclusion if the bill differed materially from the written contract; that might present a different question; but we think it is so connected with, and naturally resulting from, the transaction, that it may be properly referred to for the purpose of explaining any ambiguity or abbreviations, so common in these brief notes of mercantile contracts.

A printed bill of parcels delivered by the seller may be a sufficient memorandum within the statute to bind him, especially if subsequently recognized by a letter to the buyer. 2 B. & P. 238; 3 Esp. 180. And generally the contract may be collected from several distinct papers taken together as forming parts of an entire transaction, if they are connected by express reference from the one to the others. 3 Ad. & Ell. 355; 9 B. & Cr. 561; 2 *id.* 945; 3 Taunt. 169; 6 Cow. 445; 2 M. & Wels. 660; Long on Sales, 55, and cases.

In the case before us the bill of parcels is not only connected with the contract of sale, which has been signed by both parties, but was made out and delivered in the course of the fulfilment of it; has been acquiesced in by the buyer, and the goods ordered to be delivered after it was received. It is not a memorandum sufficient to bind him, because his name is not affixed to it by his authority; but if he had subsequently recognized it by letter to the sellers, it might have been sufficient. 2 B. & P. 238; 2 M. & Wels. 653; 3 Taunt. 169.

But although we admit, if it was necessary for the plaintiffs to rely upon the bill as the note or memorandum within the statute, they must have failed, we think it competent within the principle of the cases on the subject, from its connection with and relation to the contract, to refer to it as explanatory of any obscurity or indefiniteness of its terms, for the purpose of removing the ambiguity.

Take, for example, as an instance, the objection that the price is uncertain, the figures $7\frac{1}{4}$ and $8\frac{3}{4}$ opposite the 300 bales and 100 cases of drills, given without any mark to denote what is intended by them.

The bill of parcels carries out these figures as so many cents per yard, and the aggregate amount footed up; and after it is received by the defendant, and with a knowledge of this explanation, he orders the goods to be forwarded.

We cannot doubt but that the bill under such circumstances affords competent evidence of the meaning to be given to this part of the written memorandum. And so in respect to any other indefinite or abbreviated item to be found in this brief note of a mercantile contract.

For these reasons we are of opinion that the judgment of the court below must be reversed, and the proceedings remitted with directions to award a *venire de novo.*

CATRON, J., DANIEL, J.,[1] and CURTIS, J., dissented.

CURTIS, J. I have the misfortune to differ from the majority of my brethren in this case; and as the question is one which enters into the daily business of merchants and at the same time involves the construction of a statute of the Commonwealth of Massachusetts, I think it proper to state briefly the grounds on which I rest my opinion.

The first question is, Whether the writing of the 19th of September is a sufficient memorandum within the 3d section of the 74th chapter of the Revised Statutes of Massachusetts? The writing is in these words and figures: —

Sept 19, — W. W. Goddard, 12 mos.

300 bales S. F. drills	$7\frac{1}{4}$
100 cases blue "	$8\frac{3}{4}$

Credit to commence when ship sails; not after Decr. 1 — delivered free of charge for truckage.

R. M. M.
W. W. G.

The blues, if color is satisfactory to purchaser.

Does this writing show upon its face, and without resorting to extraneous evidence, that W. W. Goddard was the purchaser of these goods? I think not. Certainly it does not so state in terms; nor can I perceive how the fact can be collected from the paper by any certain intendment. If it be assumed that a sale was made and that Goddard was a party to the transaction, what is there on the face of the paper to show whether Goddard sold or bought? Extraneous evidence that he was the seller would be just as consistent with this writing as extraneous evidence that he was the purchaser. Suppose the fact had been that Mason was the purchaser, and that the writing might be explained by evidence of that fact; it would then be read that Goddard sold to Mason on twelve months' credit; and this evidence would be consistent with everything which the paper contains, because the paper is wholly silent as to the fact whether he was the seller or the purchaser. In Bailey *et al. v.*

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[1] The dissenting opinion of DANIEL, J., is omitted. His dissent was on the ground that the court had no jurisdiction of the case. On the question in regard to the Statute of Frauds, DANIEL, J., expressed assent to the opinion of NELSON, J.

Ogden, 3 Johns. Rep. 399, an action for not accepting sugars, the memorandum was: —

14 DECEMBER.

J. Ogden and Co. Bailey & Bogart.

$$\left.\begin{array}{l}\text{Brown, } 12\frac{1}{2}\\ \text{White, } 16\frac{1}{4}\end{array}\right\}\ \text{60 and 90 days.}$$

Debenture part pay.[1]

Mr. Justice Kent, who delivered the opinion of the court, enumerating the objections to the memorandum, says, no person can ascertain from this memorandum which of the parties was seller and which buyer; and I think it would be difficult to show that the memorandum now in question is any more intelligible in reference to this fact.

Indeed I do not understand it is supposed that in the absence of all extraneous evidence it could be determined by the court as matter of law, upon an inspection of the paper alone, that Goddard was the purchaser of these goods. The real inquiry is whether extraneous evidence of this fact is admissible.

Now it is true the statute requires only some note or memorandum in writing of the bargain; but I consider it settled that this writing must show who is vendor and who is purchaser. In Champion *v.* Plummer, 1 B. & P. New Rep. 252, the memorandum contained the name of the vendor, a description of the goods and their price, and was signed by the vendee; yet it was held that the vendee could not maintain an action thereon, because it did not appear from the writing that he was vendee, though it was clearly proved by parol.

In Sherburn *et al. v.* Shaw, 1 N. H. Rep. 157, the plaintiffs caused certain real estate to be sold at auction, and the defendant being the highest bidder signed a memorandum agreeing to take the property: this memorandum was written on a paper headed, "Articles of sale of the estate of Jonathan Warner deceased," containing the terms of the sale; and this paper was also signed by the auctioneer. Yet the court, through Mr. Justice Woodbury who delivered the opinion, held that, as the paper failed to show that the plaintiffs were the vendors, it was radically defective. Here also there was no doubt that the plaintiffs were the vendors, but extraneous evidence to supply this fact was considered inadmissible.

It seems to me that the fact that the defendant was the purchaser is, to say the least, as necessary to be stated in the writing as any other fact, and that to allow it to be proved by parol is to violate the intent of the statute and encounter the very mischiefs which it was enacted to prevent. Chancellor Kent, 2 Com. 511, says: "The contract must however be stated with reasonable certainty, so that it can be understood from the writing itself without having recourse to parol proof." And this position rests upon a current of authorities both in England and America, which it is presumed are not intended to be disturbed. But how can the contract be understood from the writing itself, when that fails to state which party is vendor and which purchaser?

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[1] This was an entry in pencil in the pocket memorandum book of Francis Huguet, who acted as broker for the defendants in purchasing the sugars. The following memorandum of the sale was also entered by the plaintiffs in their memorandum book: —

"14th December.

"Sold Huguet for J. Ogden & Co., notes with approved indorser,   boxes white,   do. brown Havanna sugars, at $12\frac{1}{2}$ for brown and $16\frac{1}{4}$ for white, payable at 60 and 90 days; debenture we will receive in part payment."

I am aware that a latent ambiguity in a contract may be removed by extraneous evidence according to the rules of the common law; and that such evidence is also admissible to show what in point of fact was the subject-matter called for by the terms of a contract. Bradley *v.* Steam P. Co., 13 Pet. 98. So when an act has been done by a person, and it is doubtful whether he acted in a private or official capacity, it is allowable to prove by parol that he was an agent and acted as such. But these cases fall far short of proving that when a statute requires a contract to be in writing you may prove by parol the fact that the defendant was purchaser, the writing being silent as to that fact; or that a writing which does not state who is vendor and who purchaser does contain in itself the essentials of a contract of sale.

It is one thing to construe what is written: it is a very different thing to supply a substantive fact not stated in the writing. It is one thing to determine the meaning and effect of a complete and valid written contract, and it is another thing to take a writing which on its face imports no contract and make it import one by parol evidence. It is one thing to show that a party who appears by a writing to have made a contract made it as an agent, and quite a different thing to prove by parol that he made a purchase when the writing is silent as to that fact. The duty and power of the court is a duty and power to give a construction to what is written, and not in any case to permit it to be added to by parol. Least of all when a statute has required the essential requisites of a contract of sale to be in writing, is it admissible, in my judgment, to allow the fact that the defendant made a purchase to be proved by parol. If this fact, which lies at the basis of the action and to which every other is but incidental, can be proved by evidence out of the writing signed by the defendant, the statute seems to me to be disregarded.

It has been argued that the bill of parcels, sent to Goddard by Mason & Lawrence and received by him, may be resorted to for the purpose of showing he was the purchaser. But it is certainly the law of Massachusetts, where this contract was made and the case tried, as I believe it is of most other States and of England, that unless the memorandum which is signed contains a reference to some other paper, no paper not signed by the party to be charged can be connected with the memorandum or used to supply any defect therein. This was held in Morton *et al. v.* Dean, 13 Met. 385, a case to which I shall have occasion more fully to refer hereafter. And in conformity therewith Chancellor Kent lays down the rule in 2 Com. 511, and refers to many authorities in support of it. I am not aware that any court has held otherwise.

That this bill of parcels was of itself a sufficient memorandum under the statute, or that it was a paper signed by the defendant or by any person by him thereunto lawfully authorized, I do not understand to be held by the majority of the court.

Now the memorandum of the 19th September is either sufficient or insufficient under the statute. If the former, there is no occasion to resort to the bill of parcels to show who was vendor and who purchaser; if the latter, it cannot consistently with the statute be made good by another paper not signed and connected with it only by parol. To charge a party upon an insufficient memorandum, added to by another independent paper not signed, would be to charge him when there was no sufficient memorandum signed by him, and therefore in direct conflict with the statute. It does not seem to me to be an answer to say that the bill of parcels was made out pursuant to the memorandum. If the signed memorandum itself does not contain the essentials of a contract of sale, and makes no reference to any other paper, in no legal sense is any other paper pursuant to it; nor can any other paper be connected with it save by parol evidence, which the statute forbids. In point of fact it would be difficult to imagine any two independent papers more nearly connected than a memorandum made and signed by an auctioneer, and the written conditions read by him at the sale. Yet it is settled that the latter cannot be referred to, unless expressly called for by the very terms of the signed memorandum. Upon what principle does a bill of parcels stand upon any better ground?

The distinction heretofore has been between papers called for by the memorandum by express reference, and those not thus called for: this decision, for the first time I believe, disregards that distinction, and allows an unsigned paper, not referred to, to be used in evidence to charge the purchaser.

In my judgment this memorandum was defective in not showing who was vendor and who purchaser, and oral evidence to supply this defect was not admissible.

But if this difficulty could be overcome, or if it had appeared on the face of the paper that Goddard was the purchaser, still in my judgment there is no sufficient memorandum. I take it to be clearly settled that, if the court cannot ascertain, from the paper itself or from some other paper therein referred to, the essential terms of the sale, the writing does not take the case out of the statute. This has been so often decided that it is sufficient to refer to 2 Kent's Com. 511, where many of the cases are collected.

The rule stated by the Chancellor as a just deduction from the authorities is: "Unless the essential terms of the sale can be ascertained from the writing itself, or by a reference contained in it to something else, the writing is not a compliance with the statute; and if the agreement be thus defective it cannot be supplied by parol proof, for that would at once introduce all the mischiefs which the Statute of Frauds and Perjuries was intended to prevent."

The statute then requires the essential terms of the sale to be in writing; the credit to be allowed to the purchaser is one of the terms of the sale.

And if the memorandum shows that a credit was to be given, but does not fix its termination, it is fatally defective; for the court cannot ascertain from the paper when a right of action accrues to the vendee, and the contract shown by the paper is not capable of being described in a declaration. The rights of the parties in an essential particular are left undetermined by the paper. This paper shows there was to be a credit of six [twelve] months, and contains this clause: "Credit to commence when ship sails; not after Decr. 1." According to this paper when is this credit to commence? The answer is, when ship sails, if before December 1. What ship? The paper is silent.

This is an action against Goddard for not delivering his note on twelve months' credit, and it is an indispensable inquiry on what day, according to the contract, the note should bear date. The plaintiffs must aver in their declaration what note Goddard was bound to deliver, and the memorandum must enable the court to say that the description of the notes in the declaration is correct. They attempt this by averring in the declaration that the contract was for a note payable in twelve months from the sailing of a ship called the "Crusader," and that this ship sailed on the 6th day of November. But the writing does not refer to the "Crusader;" and if oral evidence were admissible to prove that the parties referred to the "Crusader," this essential term of their contract is derived from parol proof, contrary to the requirement of the statute. It was upon this ground the case of Morton *et al. v.* Dean, and many other similar cases, have been decided. In that case there was a memorandum signed by the auctioneer as the agent of both parties, containing their names as vendor and vendee, the price to be paid, and a sufficient description of the property. But it appeared that there were written or printed conditions read at the sale, but not referred to in the memorandum, containing the terms of credit, &c., and therefore that the memorandum did not fix all the essential parts of the bargain, and it was held insufficient.

But, further, even if oral evidence were admissible to show that the parties had in view some particular vessel, and so to explain or render certain the memorandum, no such evidence was offered, and no request to leave that question of fact to the jury was made. Mason, who made the contract with Goddard, was a witness; but he does not pretend the parties had any particular vessel in view, still less that they agreed on the "Crusader" as the vessel the sailing of which was to be the commencement of the credit. I cannot perceive, therefore, how either of the counts in this declaration is supported by the evidence, or how a different verdict could have lawfully been rendered.

The count for goods sold and delivered was clearly not maintained, because when the action was brought the credit had not expired, even if it began on the 19th of September. One of the special counts avers that the notes were to be due twelve months from the 30th of September; but this is inconsistent with the written memorandum, and there is no evidence to support it. The other special counts all declare for a note due twelve months after the sailing of the "Crusader;" but, as already stated, there is no evidence whatever to support this allegation, and a verdict of the jury affirming such a contract must have been set aside.

It may be added also that no one of the prayers for instructions, contained in the bill of exceptions, makes the fact that the parties had reference to the "Crusader" any element of the contract, but that each of them asks for an instruction upon the assumption that this necessary term of the contract had not been in any way supplied.

I consider the language of Chief Justice Marshall in Grant *v.* Naylor, 4 Cranch, 234, applicable to this case. That great judge says: "Already have so many cases been taken out of the Statute of Frauds, which seem to be within its letter, that it may well be doubted whether the exceptions do not let in many of the mischiefs against which the rule was intended to guard. The best judges in England have been of opinion that this relaxing construction of the statute ought not to be extended further than it has already been carried, and this court entirely concurs in that opinion."

I am authorized to state that Mr. Justice Catron concurs in this opinion.[1]

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[1] In Grafton *v.* Cummings, 99 U. S. 100, 111, Mr. Justice Miller, in delivering the opinion of the court, said of Salmon Falls Manufacturing Co. *v.* Goddard: "It may be doubted whether the opinion of the majority in all it says in reference to the use of parol proof in aid of even mercantile sales of goods by brokers is sound law." The decision is also expressly disregarded in Mentz *v.* Newwitter, 122 N. Y. 491, 497. In Frank *v.* Eltringham, 65 Miss. 281, a memorandum which did not show on its face which party was vendor and which was vendee was held insufficient. See, also, Oglesby Grocery Co. *v.* Williams Mfg. Co., 112 Ga. 359.

THOMAS B. CODDINGTON AND OTHERS *v.* WILLIAM W. GODDARD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, NOVEMBER, 1860.

[*Reported in* 16 *Gray*, 436.]

ACTION of contract to recover damages for not delivering two hundred thousand pounds of copper alleged to have been sold by the defendant to the plaintiff. Trial and verdict for the plaintiff before Merrick, J., who reported the case to the full court, in substance as follows: —

Charles Canterbury, called as a witness for the plaintiffs, testified that he was a merchandise broker; that on the 9th of December, 1856, acting under instructions contained in a telegraphic despatch from the plaintiffs, merchants in New York, which he received between two and three o'clock in the afternoon, he called at the defendant's place of business in Boston, and not finding him there, followed him to his house, where he had an interview with him, and stated to him the plaintiffs' offer to buy three hundred thousand pounds of copper, at twenty-four and a quarter cents per pound, on a credit of nine months, with satisfactory paper, and deliverable on board a vessel in Boston bound for New York, the seller to pay freight to New York, and the buyer to pay the insurance; that the defendant asked if the steamer, which had that day arrived in New York, brought intelligence of any advance in the price of copper in Europe; to which the broker replied, "None that I know of;" and the defendant after a moment's hesitation, said that he would sell to the plaintiffs two hundred thousand pounds of copper on the terms proposed, reserving the right to add one hundred thousand on the next day if he should then elect to do so; that the broker urged him to sell the whole of the three hundred thousand pounds then, saying that the purchase was made for exportation, and would take that quantity out of this market; but the defendant said he would not do differently from what he had proposed; and the broker then said, "Well, if that is the ultimatum, it is a sale," and, returning to his office, communicated to the plaintiffs by telegraph what he had done, informing them that he should write the particulars by the next mail; which he did; and made a memorandum in his books of the transaction, according to his usual custom.

This memorandum was on a page of a book headed, "Boston, December, 1856," and was in the following terms: —

> 9th. W. W. Goddard to T. B. Coddington & Co., 200,000 pounds Chili pig copper, 24¼ a 9 mos. from delivery, f. o. b. packet here for N. Y., seller paying freight, and buyer paying insurance to N. Y. To be 96 per cent pure copper, and paper satisfactory to seller.

The broker testified that in this memorandum the figures denoting the quantity were written in pencil, in order to facilitate alteration in case the defendant should, as he had a right to do, elect to deliver a larger quantity. No sale note or letter relating to the sale or entry was sent by the broker to the defendant. . . .

The defendant, being called as a witness, testified that in his interview with the broker he said that he would sell to the plaintiffs two hundred thousand pounds of copper in case no intelligence had been received by the steamer of any advance in the price of the article in Europe, reserving the right to add one hundred thousand pounds the next day on the same terms at his option. And he contended that, if there was any verbal contract for the sale of two hundred thousand pounds of copper, it was upon this condition, and upon the further condition that the copper, if sold and delivered, should be exported by the plaintiffs, and therefore the plaintiffs could not recover.

The defendant also contended that the entry in the broker's books was not a sufficient memorandum in writing to take the case out of the Statute of Frauds; because no authority was shown in the broker to sign the memorandum in his behalf or in behalf of the plaintiffs; because it was not intended by the broker, when he made it, as a complete and final statement of the bargain made; because it did not state all the material terms of the bargain; because it was not signed as required by the statute; and because the broker was not authorized by the defendant to make the bargain so entered by him.

But the judge ruled that if Canterbury was a merchandise broker, and that was known to the parties, and they were dealing with him in this transaction in his capacity of broker, and made a contract through him for the purchase and sale of two hundred thousand pounds of copper, this gave him authority to bind them both by making a memorandum of the contract in writing, and signing it in their behalf respectively; that the memorandum in his book was sufficient in form to bind the parties, if he had authority to make and sign it for them; that if he did, in fact, make the entry in his book as and for a complete note or memorandum of the contract of sale made by the parties through him, such memorandum was conclusive evidence of the terms of the contract, and was to be considered and treated in all respects as if it was a written contract signed by the parties themselves; that it was in its terms a perfect and complete statement of a contract, and capable of a clear and intelligible exposition, and therefore parol evidence was inadmissible to contradict or vary the terms of it; and that even if the defendant did in his verbal contract with Canterbury make the sale upon such conditions as he contended, he could not avail himself of either of those conditions, because they were not contained or expressed in the memorandum. To these rulings the defendant alleged exceptions.

C. B. Goodrich and *O. G. Peabody*, for the defendant.

C. A. Welch and *E. Bangs*, for the plaintiffs.

Bigelow, C. J. . . . There can be no doubt that the broker, if he acted as the agent of both parties in completing the contract of sale, was empowered to do all that was necessary to make the bargain valid and binding in law. For this purpose he had authority to make the requisite memorandum to satisfy the Statute of Frauds. Rev. Sts. c. 74, § 4. It is not denied that this memorandum may well be made in the book of a broker. Indeed, such entry may be resorted to as the original evidence of the contract, even when bought and sold notes of the bargain, differing from each other, have been delivered to the parties. Sievewright *v.* Archibald, 17 Q. B. 102, 109.

But it is objected that the memorandum made by the broker in the present case was insufficient to take the case out of the operation of the statute, because it does not show who were the vendor and vendee of the merchandise. This would be a fatal objection if it was well founded; for although a memorandum of this nature may be very brief, it must nevertheless show with reasonable certainty who were the parties to the contract, and the terms of the sale, so that they may appear from the writing itself. But in the present case the entry is perfectly intelligible and free from doubt. If it is read with reference to the book in which it is made, as an entry by a broker in the regular course of his business as an agent of third parties for the purchase and sale of goods, it clearly indicates a sale from defendant to the plaintiffs. It is susceptible of no other interpretation.

It is also objected that the memorandum is deficient, because it does not state the amount for which insurance was to be procured, nor for whose benefit, and because it contains no stipulation concerning the mode or place in which the assaying of the copper was to be had, in order to ascertain its purity. The answer to these objections is that the memorandum states with accuracy the terms of the contract as testified to by the broker, and that there was no proof at the trial that there was any agreement made concerning the particulars of the bargain which are now alleged to be omitted.

Nor does it affect the validity of the memorandum, that the broker did not include in it the stipulation made by the defendant, that he should have the right to add to the sale one hundred thousand pounds of copper the next day. This was a wholly separate and independent agreement, which in no way affected the sale actually made, and which could not be properly entered in the book of the broker, unless it had ripened into a sale by the election of the defendant on the next day to sell the additional quantity to the plaintiffs. But he made no such election, and there was therefore no contract as to that portion of the copper of which the broker was empowered to make a memorandum.

The remaining objection to the sufficiency of the entry in the book as a memorandum within the statute is that it was not duly signed by the broker or the parties. We know of no case in which it has been held that the signature of the name of the agent through whom the contract is negotiated should appear in the writing. It is sufficient if the names of the parties to be charged are properly inserted, either by themselves or by some persons duly authorized to authenticate the document. Brokers and auctioneers are deemed to be the agents of both parties, and by virtue of their employment stand in such relation to their principals that they can sign the names of the parties to a contract of sale effected through their agency. Such authority is implied from the necessity of the case; because without it they could not complete a contract of sale so as to make it legally binding on the parties. Nor is it at all material that the names should be written at the bottom of the memorandum. It is sufficient if the names of the principals are inserted in such form and manner as to indicate that it is their contract, by which one agrees to sell and the other to buy the goods or merchandise specified, upon the terms therein expressed. It is the substance, and not the form, of the memorandum, which the law regards. The great purpose of the statute is answered, if the names of the parties and the terms of the contract of sale are authenticated by written evidence, and do not rest in parol proof. Penniman *v.* Hartshorn, 13 Mass. 87; Hawkins *v.* Chace, 19 Pick. 502, 505; Fessenden *v.* Mussey, 11 Cush. 127; Morton *v.* Dean, 13 Met. 385; Salmon Falls Manuf. Co. *v.* Goddard, 14 How. 446.

The only other exception taken to the ruling of the court presents a question of some difficulty. To understand it, it is necessary to recur to the positions assumed by the respective parties at the trial. The plaintiffs contended and offered evidence to show that the sale was an absolute one, and was made upon the terms set out in the written memorandum. The defendant, on the other hand, insisted and endeavored to prove that the contract of sale was a conditional one, and was not to take effect, if intelligence had been received by the steamer of an advance in the price of copper, nor unless the plaintiffs should agree to export it, if the sale and delivery were completed. In this state of the case, one of the points urged by the defendant was that the broker had no authority to bind him by the memorandum which was offered in evidence. Among the instructions given to the jury, they were told that if the defendant did, in his verbal contract entered into with Canterbury, make the sale on the conditions above stated, he could not avail himself of either of them, because they were not contained in the written memorandum made by the broker. This instruction was strictly accurate as applied to the contract, if it was made by the authorized agent of both the parties. But upon the issue whether the broker was authorized to sign the memorandum offered in proof as the agent of the defendant, it shuts him out from the benefit of testimony which has a direct and material bearing. Upon the facts as they appear in the report of the case, the broker was not the general agent of the defendant. He had no authority to bind him, except such as was derived from the verbal contract into which he entered for the sale of the copper. He was in the strictest sense a special agent for a special and single object, and could not bind the defendant beyond the limits conferred by the precise terms of the agreement to which he assented He was his agent only to sign a memorandum which contained the whole contract, with the terms and conditions annexed to it by him. A broker, from the very nature of his employment, has only a limited authority, when it appears, as it does in the present case, that he had no relation to a party, other than what is derived from a single contract of sale. When he applies to a vendor to negotiate a sale, he is not his agent. He does not become so until the vendor enters into the agreement of sale. It is from this agreement that he derives his authority, and it must necessarily be limited by its terms and conditions. He is then the special agent of the vendor to act in conformity with the contract to which his principal has agreed, but no further, and he cannot be regarded as his agent, unless he complies with the terms of his special authority as derived from the contract. In short, a broker is authorized to sign only that contract into which the vendor has entered, not another and different contract. If he omits to include in the memorandum special exceptions and conditions to the bargain, he signs a contract which he has no authority to make, and the party relying upon it must fail, because it is shown that the broker was not the agent of the vendor to sign that contract. It would seem to follow as a necessary consequence that evidence of the verbal agreement into which the defendant entered for the sale of the copper was competent and material on the question of the extent of his authority to bind the defendant.

Nor does the admission of this evidence for this purpose at all contravene the rule, that parol proof is incompetent to vary or control a written contract. It is offered for a wholly different purpose. It bears solely on a preliminary inquiry. The object is not to explain or alter a contract, but to show that no contract was ever entered into, because the person who executed it had no authority to make it. The authority of an agent may always be shown by parol; but the contracts into which he enters within the scope of his authority, when reduced to writing, can be proved only by the writing itself.

The necessity of admitting evidence of the verbal contract entered into with a broker, in cases where his authority is drawn in question, is quite obvious. If such proof were incompetent, a broker who had entered into negotiations with a person might make a memorandum of a contract wholly different from that which he was authorized to sign, and thereby effectually preclude all proof that no such contract was ever made. Allen *v.* Pink, 4 M. & W. 144; Pitts *v.* Beckett, 13 M. & W. 743, 750. *New trial granted.*[1]

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[1] Turner *v.* Lorillard Co., 100 Ga. 645; Fisher *v.* Andrews, 94 Md. 46, *acc.*

DOHERTY *v.* HILL.

SUPREME JUDICIAL COURT, MARCH 16 — MAY 9, 1887.

[*Reported in* 144 *Massachusetts*, 465.]

CONTRACT for breach of an agreement to convey to the plaintiff certain real estate in Stoneham. Answer, the Statute of Frauds.

Trial in the Superior Court, before Blodgett, J., who allowed a bill of exceptions, in substance as follows: —

J. H. Green, who claimed to act as agent for the defendant, and who executed the contract declared on, testified, for the plaintiff, that the estate referred to in said contract was placed in his hands by the defendant in May, 1884, at which time the defendant instructed him to sell it for the sum of $1,300; that on May 28, 1885, in reply to a telegram from him inquiring at what price she would sell, the defendant sent him the following telegram, signed by her: "Eleven hundred and fifty cash, if possible try for more;" that on May 30, 1885, the defendant wrote the witness a letter, which contained the following: "As I telegraphed you, I will sell the house in Lincolnville for $1,150; will pay last year's taxes and throw in insurance, which lasts until 1887. . . . I will make terms easy for the party purchasing it, say three or four hundred down and the other payments satisfactorily secured by mortgage;" and that on June 1, 1885, and after receiving this letter, the witness received from the plaintiff $100 in cash, and executed and gave to the plaintiff the following paper, being the same declared on: "$100. Stoneham, June 1st, 1885. Rec'd of Patrick Doherty one hundred dollars to bind sale of estate on Congress Street owned by Sarah A. Hill. $350 cash. $850 in mortgage at 6 per cent. J. Horace Green, agent for Sarah A. Hill."

The witness further testified, that he had never paid back to the plaintiff the $100 received; and that he told the plaintiff he would pay interest on it, and that the plaintiff could have the money whenever he called for it. The plaintiff offered the contract of sale in evidence, to which the defendant objected; but the judge admitted it.

There was also evidence tending to show that the defendant, by her agent, one Kimball, sold said estate, on June 11, 1885, to one Almy, and delivered to Almy a deed thereof.

The defendant testified, and upon this point her testimony was not controverted, that in addition to the estate claimed to have been sold to the plaintiff, and which consisted of a lot of land with a dwelling-house on it, she owned, on June 1, 1885, several lots, containing two or three acres in all, and all in one parcel, of other land on said Congress Street, upon the other side of the street and nearly opposite to the land in question; and that this parcel of land had no buildings upon it.

The plaintiff offered to show that the estate named in the agreement was the lot with the dwelling-house on it. The defendant requested the judge to rule that it could not be shown by extrinsic evidence to which of the defendant's estates on Congress Street the written memorandum referred; but the judge declined so to rule.

The plaintiff offered in evidence a draft of a deed from the defendant to him of the estate which the plaintiff claimed to have purchased, which draft was made by Green and sent by him to the defendant to be executed, and which the defendant refused to execute. To the admission of this draft in evidence the defendant objected; but the judge admitted it.

The defendant, for the purpose of showing the value of the estate as affecting the question of damages, offered to prove that said estate had been, since December, 1885, in the hands of a real estate agent in Stoneham, with authority to sell it for $1,200, but no purchaser had been found. The judge excluded the evidence offered.

The jury returned a verdict for the plaintiff in the sum of $200; and the defendant alleged exceptions.

A. V. Lynde, for the defendant.

E. B. Powers and *J. C. Kennedy* (*S. L. Powers* with them), for the plaintiff.

HOLMES, J. The memorandum would have satisfied the Statute of Frauds, if the evidence had shown that there was only one "estate on Congress Street owned by Sarah A. Hill," in Stoneham, where the memorandum is dated. Hurley *v.* Brown, 98 Mass. 545; Scanlan *v.* Geddes, 112 Mass. 15; Mead *v.* Parker, 115 Mass. 413. But the evidence shows that there were more than one. The plaintiff argues that this is an ambiguity introduced by parol, and that therefore it may be removed by parol. 98 Mass. 548. But the statement seems to us mis leading. The words show on their face that they may be applicable to one estate only, or to more than one. If, on the existing facts, they apply only to one, then the document identifies the land; if not, it fails to do so. In every case, the words used must be translated into things and facts by parol evidence. But if, when so translated, they do not "identify the estate intended, as the only one which would satisfy the description," they do not satisfy the statute. See Slater *v.* Smith, 117 Mass. 96, 98; Potter *v.* Duffield, L. R. 18 Eq. 4, 7.

The letter from the defendant to her agent did identify the estate, we will assume, as the only one owned by her which had a house upon it. But, of course, this letter was not of itself a sufficient memorandum. It has been held that an offer in writing, afterwards accepted orally, satisfies the statute. Sanborn *v.* Flagler, 9 Allen, 474. Browne, St. of Frauds (4th ed.), § 345 *a*. But this letter was only an authority to offer. It does not appear to have been exhibited to the plaintiff, as in Hastings *v.* Weber, 142 Mass. 232, and plainly was not intended to be. We express no opinion whether it would have been sufficient if it had been shown and its terms had been accepted.

Again, the letter cannot be used to help out the memorandum, on the ground that the latter impliedly incorporates it. The memorandum, it is true, purports to be signed by an agent, and therefore may be said to refer by implication to some previous authority. But this implied reference is at most rather an implied assertion that authority exists (which may be oral), than a reference to documents containing the authority. Jefts *v.* York, 10 Cush. 392, 395; Boston & Albany Railroad *v.* Richardson, 135 Mass. 473, 475. It would hardly be argued as a defence to an action of deceit, against a person who had assumed to act as agent without authority, that the memorandum signed by him impliedly referred to and incorporated the written communications from his alleged principal, and that therefore the plaintiff must be taken to have known them, and that they did not confer the authority assumed. In this case, the agent had authority by telegram before he received the letter; the argument, therefore, would have to go the length of saying that all documents of authority were tacitly incorporated.

In Hurley *v.* Brown, *supra*, it was held that a memorandum of an agreement to sell "a" house on a certain street should be presumed to mean a house belonging at the time to the contractor. It may be asked whether there is not at least as strong a presumption that a memorandum signed by an agent refers to property which he is authorized to sell. But unless the document of authority is specifically incorporated, then the memorandum is only of a sale of a house which the agent is authorized in some way to sell, and, so far as the memorandum goes, his authority may as well be oral as written. The difference may be one of degree, but the distinction is none the less plain between an identification by extrinsic proof of the usually manifest, external, and continuing fact that the party owned but one house on a certain street, and that by similar proof of possibly oral communications between principal and agent, which is precisely the kind of identification the statute seeks to avoid. See Whelan *v.* Sullivan, 102 Mass. 204, 206; Rossiter *v.* Miller, 3 App. Cas. 1124, 1141; Potter *v.* Duffield, *supra;* Jarrett *v.* Hunter, 34 Ch. D. 182.

The same considerations would apply to an attempt to help out the memorandum by evidence that the estate intended was the only one which the plaintiff knew of as belonging to the defendant.

The remaining exceptions become immaterial. The draft of a deed of the premises was admissible in connection with proof that it was offered to the defendant for execution, to show a breach, but not to aid the memorandum. The deed was not referred to by the previously executed memorandum, nor were its contents governed by the signature of the latter.

Evidence that a real estate agent had not sold the land for $1,200 was not evidence of its value. *Exceptions sustained.*

NOTE. — Few cases have arisen involving the sufficiency of the description of personal property in a memorandum necessary to satisfy the Statute of Frauds. See, however, Brewer *v.* Horst and Lachmund Co., 127 Cal. 643; Burgess Fibre Co. *v.* Broomfield, 180

Mass. 283. Many cases have arisen presenting similar questions as to real estate, and the cases show some conflict. See Wood on the Statute of Frauds, § 353. In Mead *v.* Parker, 115 Mass. 413, it was held, following Hurley *v.* Brown, 98 Mass. 545, that in a memorandum of sale, dated at Boston, the words "a house on Church Street" sufficiently described the property. WELLS, J., in delivering the opinion of the court, said: "The most specific and precise description of the property intended, requires some parol proof to complete its identification. A more general description requires more. When all the circumstances of possession, ownership, situation of the parties, and of their relation to each other and to the property, as they were when the negotiations and the writing was made, are disclosed, if the meaning and application of the writing, read in the light of those circumstances, are certain and plain, the parties will be bound by it as a sufficient written contract or memorandum of their agreement. Mead *v.* Parker was followed by Slater *v.* Smith, 117 Mass. 96. In Hodges *v.* Kowing, 58 Conn. 12, "his place in Stratford containing about 15 acres" was held sufficient, but in Andrew *v.* Babcock, 63 Conn. 109, "a tract of land with all the buildings thereon, adjoining the New Haven and Derby R.R., in the town of Orange, and containing some twenty acres more or less" was said to be insufficient though apparently the seller owned no other property answering the description. In Fortesque *v.* Crawford, 105 N. C. 29, "his land" was held "too vague and indefinite to admit parol evidence to locate the land." In Falls of Neuse Manufacturing Co. *v.* Hendricks, 106 N. C. 485, "his land where he now lives" was held sufficient if susceptible of identification by extrinsic evidence. In Lowe *v.* Harris, 112 N. C. 472, the description was also "his land," but since the earlier cases and since the cause of action arose in this case, the legislature had enacted that parol testimony might be introduced to identify the land. The description was held insufficient, a majority of the court holding that the act could not operate retroactively.

In Jones *v.* Tye, 20 Southwestern Rep. 388 (Ky. 1892), "land adjoining the McKebly land" was held insufficient, the seller having two parcels answering that description.

In Holmes *v.* Evans, 48 Miss. 247, "a piece of property on the corner of Main and Pearl Streets, city of Natchez, county of Adams, State of Mississippi," was held insufficient, because there was no reference in the memorandum itself to anything extrinsic that would define which corner was intended. The court said, however, "Extraneous evidence so referred to, and any other evidence in connection with it, which may serve to identify and fix the limits of the land intended is admissible and proper. There would appear to be no limit in that direction except what is to be found in the general reference of the contract. For example, if a contract purports to embrace all the land owned by the vendor in a certain county, it would be admissible to prove any and all the land owned by him in that county."

In Mellon *v.* Davison, 123 Pa. 298, "a lot of ground fronting about 190 feet on the P. R.R. in the 21st ward, Pittsburgh, Pa.," was held insufficient, though the seller owned but one piece of land in the ward named. See also Rineer *v.* Collins, 156 Pa. 342.

In an article by F. Vaughan Hawkins, Esq., on the Principles of Legal Interpretation with Reference especially to the Interpretation of Wills, 2 Juridical Soc. Papers, 298, it is said (p. 326, *et seq.*): "The other limit of interpretation of which I have spoken is the result of the necessity of there being a sufficient written expression; the meaning of the words cannot be added to or corrected beyond a certain point, or the words cease to be capable of bearing the interpretation to be put upon them; and though the intent may be known, there is no expression in which it can clothe itself. It cannot be too often repeated that legal interpretation is not a mere ascertaining of the intent; it acts only by putting a meaning consistent with the intent, upon the words. And the answer to the question, What is a sufficient written expression? will vary largely with different classes of writings, and under different systems of jurisprudence. In this respect it is manifest that private documents must be interpreted more strictly than public. A deed or will made by a private person is made with the knowledge of the command of the law, which requires the writer to express himself fully and completely, and gives validity to the instrument only on the condition of reasonable compliance with the demand which it has imposed. On the other hand a document, such as a treaty, which as to its form is almost wholly independent of everything but the will of the contracting parties, leaves the amount of the expression much less determinate; and, although an intention must fail of effect which has no corresponding expression of any kind in the document, yet the interpreter must resort very much to the inferred will of the parties themselves for a criterion of sufficiency of expression, which thus becomes almost wholly merged in the general inquiry after the probable intention, — meaning as I do, by *intention*, wherever it occurs in this paper, not a mere inchoate act of the mind, that which a person intended to do, but took no step towards doing, but something which as a mental act was complete, and which the writer endeavored to express by the words he made use of, although those words in fact express his meaning more or less imperfectly.

"In the interpretation of writings where the latitude allowed to the interpreter is considerable, and particularly where direct evidence of intention not contained in the writing is admitted, the question of what is a sufficient written expression becomes evidently of great practical importance. If a perfectly definite intent can be collected by the aid only of collateral evidence of it, coupled with the meaning of the words, it is probable that the latter element, that of the meaning of the words, bears a sufficiently great proportion to the former, to assure the interpreter that the words will bear the meaning and express it sufficiently. But this security does not exist where parol declarations of intention, for example, are admissible. The undoubted fact that no general definition of what is in such cases a sufficient expression can be fixed upon beforehand, is made use of by Sir James Wigram as a constant argument against admitting evidence of intention generally. 'Once admit,' says he (p. 128), 'that the person or thing intended by the testator need not be adequately described in the will, and it is impossible to stop short of the conclusion that a mere mark will in every case supply the place of a proper description.' Surely there is no impossibility such as here contended. It is reasonable to say that if a testator, for instance, describes a person by his surname and Christian name, that is a sufficient description to satisfy the letter of the law, though it may in fact be insufficient completely to identify the person intended. If, on the other hand, a testator should say, 'I give so and so to *my son*,' when he has nine sons, it would probably be right to decide that such a description was not a sufficient one, since it was one which the writer must have known, or ought to have known, would prove ambiguous, and to allow of an addition to which by parol testimony would be to offer a great temptation to perjury. It is evident that a line must be drawn somewhere, and when necessary it will doubtless be drawn in practice: but as yet the boundary of testamentary interpretation on this side is somewhat imperfect, and there is no rule forbidding the introduction of parol testimony of intention to fill up even such a manifestly inadequate description as that I have last supposed.

"Many questions on the sufficiency of expression arise upon the interpretation of informal writings, as, for instance, contracts; what part of a contract required by law to be in writing need be expressed in the writing: how far usages and customs of trade may be imported, and the like. In fact all the most difficult problems of interpretation arise upon the limits of it, upon the extent to which the meaning of words may be modified by other signs of the intent; upon the contest in short, as it is often termed, between the letter and the spirit. Into the principles which questions of this nature involve, I will not at present enter more minutely; they will suggest themselves in relation to the different classes of legal writings to any one who clearly appreciates the real nature of the process of what I have called inferential interpretation, a process in reality simple, and which, like reasoning, is practised correctly every day by persons who have never considered what it is they do, when they perform it, but which can never be understood so long as it is confounded with the mere grammar and dictionary operation of ascertaining the meaning of words. One consideration, however, I will not pass over: I mean the great differences which exist in the measure of interpretation as applied under different judicial systems and by different judicial minds, and the consequent necessity for accumulating a certain mass of decisions, in order to supply a uniform standard, and to fix the nearest approach to absolute correctness by striking an average of opinions through a long series of years. It is sometimes said, in relation particularly to testamentary interpretation, that authorities can be of no service, that to quote cases is to construe one man's nonsense by another man's nonsense, and that all a judge has to do is to read the writing and endeavor to make out from it the meaning of the testator. Now, if interpretation were, like the determination of the meaning of words whose signification is fixed, something that can be done with absolute certainty, in which one man would come to the same conclusion as another, and which is, so to speak, the same all the world over, the study of previous authorities might indeed be unnecessary. But, in truth, it would be as reasonable to say that no authorities were to be consulted on a question of equity; that a judge ought to act upon his own notions of what was equitable; and that as circumstances are infinitely various, one case could never show what it was right to do in another. Experience shows that the limits of interpretation will be fixed at very different points by different persons; and there is perhaps no legal subject which brings out peculiarities of individual bias and disposition more strongly than difficult problems of construction. By the combined result of the decisions of a succession of judges, each bringing his mind to bear on the views of those who preceded him, a system of interpretation is built up, which is likely to secure a much nearer approach to perfect justice than if each interpreter were left to set up his own standard of how far it was right to go in supplying the defective expression, or of what amounted to a conviction of the intent as distinguished from mere speculative conjecture. *Rules* of construction are matters, the expediency of which may be more doubtful; but that *principles* of construction there must be in every system of rational interpretation, and that these are only to be gathered by a comparison of a large number of important cases, and by striking the average of a large number of individual minds, will not, I think, be denied by any one who considers interpretation to be, as I have described it, a process of reasoning from probabilities, a process of remedying, by a sort of equitable jurisdiction, the imperfections of human language and powers of using language, a process whose limits are necessarily indefinite and yet continually requiring to be practically determined, — and not, as it is not, a mere operation requiring the use of grammars and dictionaries, a mere inquiry into the meaning of words."

See, further, Catling *v.* King, 5 Ch. D. 660, 665; Waldron *v.* Jacob, Ir. R. 5 Eq. 131; Thompson *v.* New South Coal Co., 135 Ala. 630; Turner *v.* Lorillard, 100 Ga. 645; Moayon *v.* Moayon, 24 Ky. L. Rep. 1641; Strubbe *v.* Lewis, 25 Ky. L. Rep. 605; McGovern *v.* Hern, 153 Mass. 308; Tobin *v.* Larkin, 183 Mass. 389; Ruzicka *v.* Hotovy, 101 N. W. Rep. 328 (Neb.); Claphan *v.* Barber, 65 N. J. Eq. 550; Chellis *v.* Grimes, 72 N. H. 337; Henry *v.* Black, 210 Pa. 245; Dyer *v.* Winston, 77 S. W. Rep. 227 (Tex. Civ. App.).

KENWORTHY *v.* SCHOFIELD.

In the King's Bench, Easter Term, 1824.

[*Reported in* 2 *Barnewall & Cresswell*, 945.]

Special assumpsit against the defendant for not taking away a carding engine purchased by him at an auction agreeable to the conditions of sale (which were set out), in consequence whereof it was re-sold at a loss. Plea, *non assumpsit.* At the trial before Holroyd, J., at the Lancaster summer assizes, 1823, it appeared that the engine in question was put up to sale by auction among a variety of other things: the sale was subject to certain conditions, which were read by the auctioneer before the biddings commenced, but they were not attached to the catalogue or referred to by it. One Luke Winterbottom as agent for the defendant was the highest bidder for the engine; and it was knocked down to him, and the auctioneer wrote his name, and the price, £105, against that article in the catalogue. For the defendant it was objected, first, that the Statute of Frauds was not satisfied by writing down the name of the agent of the purchaser; secondly, that the conditions of sale were part of the bargain, and not being annexed to the catalogue the signature to the latter did not amount to a signature of a note or memorandum of the bargain within the meaning of the 17th section of 29 Car. 2, c. 3. The learned judge overruled the first objection, but reserved the second point; and the plaintiff having obtained a verdict, Cross, Serjt., in Michaelmas term obtained a rule *nisi* for a nonsuit or a new trial, against which

J. Williams, now showed cause.

Cross, Serjt. (with whom was *Starkie*), contra.

Bayley, J. It has been decided by many cases that in sales of land by auction the auctioneer is agent for both the vendor and vendee, and that such auctions are within the Statute of Frauds. Walker *v.* Constable, 1 B. & P. 306; Emmerson *v.* Heelis, 2 Taunt. 38; White *v.* Proctor, 4 Taunt. 209; Kemeys *v.* Proctor, 3 V. & B. 57. Now the language of the 17th section of the Statute of Frauds relating to sales of goods is in substance the same as that of the 4th section relating to sales of land; the only difference being that the latter speaks of an agreement, the former of a bargain. The word "bargain" means the terms upon which parties contract, and it appears by Saunderson *v.* Jackson, 2 B. & P. 238, that in order to satisfy the statute the signature must be either to some written document containing in itself the terms of the bargain or connected with some other document which does. Then comes Hinde *v.* Whitehouse in which Lord Ellenborough after time taken for consideration delivered it as his opinion that an auctioneer had not satisfied the requisitions of the statute by signing the name of the purchaser to the catalogue, that not being connected with or referring to the conditions of sale. In the present case nothing was said at the time when the engine was put up as to the terms upon which the sale was to proceed. The very mischief contemplated by the statute might occur in such a case as this. There is abundant room for fraud and perjury respecting the conditions of sale. Inasmuch therefore as there was not any memorandum of the terms of the bargain signed by the parties, I think that the case is within the 29 Car. 2, c. 3, § 17, and that a nonsuit must be entered.

HOLROYD, J. Upon the trial of this case two objections were made. First, that the defendant's name was not put down by the auctioneer. I thought there was no weight in that, and still continue of the same opinion. The other objection was reserved, and upon the authority of Hinde *v.* Whitehouse I both think that auctions of goods are within the Statute of Frauds, and that there has not been a signature to a memorandum of the bargain sufficient to satisfy the 17th section of that act. It appears to me that you cannot call that a memorandum of a bargain which does not contain the terms of it. The argument for the plaintiff is, that the conditions being in the room were virtually attached to the catalogue. But I think that, as they were not actually attached or clearly referred to, they formed no part of the thing signed. In the case put of a separation of the conditions from the catalogue during the progress of the sale, I should say that the signatures to the latter made after the separation were unavailing. It occurred to me at first that this might be likened to the case of a will consisting of several detached sheets, when a signature of the last, the whole being on the table at the time, would be considered a signing of the whole; but there the sheet signed is a part of the whole. Here the catalogue was altogether independent of the conditions. I agree therefore that this rule for a nonsuit must be made absolute.

Rule absolute.

LITTLEDALE, J., was absent.

GRANT AND OTHERS *v.* FLETCHER AND ANOTHER.

IN THE KING'S BENCH, APRIL 15, 1826.

[*Reported in* 5 *Barnewall & Cresswell,* 436.]

ASSUMPSIT for not accepting 400 bags of Egyptian cotton pursuant to contract. Plea, general issue. At the trial before Hullock, B., at the last spring assizes for the county of Lancaster, the following appeared to be the facts of the case. The plaintiffs having received advices that 600 bags of cotton were shipped for them at Alexandria by the ship Robert, of which one Wake was master, directed their broker Withington to sell 400 bags at 17¾*d.* per pound. Withington accordingly entered into a verbal contract with the defendants, and made the following entry of it in his memorandum book: "Sold Peter Fletcher & Son 400 Egyptians, to arrive *per* Robert, Wake, at 17¾*d.* per pound." And he delivered to the defendants the following note of the contract: "Robert, Wake, 400 bags of Egyptian cotton at 17¾*d.*, shipped on the 22d of February for William Grant & Brothers. Henry Withington." On the same day he delivered to the plaintiffs the following note: "400 certain to Messrs. Fletcher & Son, at 17¾*d.*, ten days and three months from the delivery, you allowing me my commission. H. W." It was objected that as the notes delivered to the contracting parties were different neither was bound; and Cumming *v.* Roebuck, Holt's N. P. C. 172, was cited. The learned judge was of opinion that there was no valid contract binding both parties, and the plaintiff was nonsuited.

Cross, Serjt., moved for a new trial.

ABBOTT, C. J. The broker is the agent of both parties, and as such may bind them by signing the same contract on behalf of buyer and seller. But if he does not sign the same contract for both parties, neither will be bound. It has been decided accordingly that where the broker delivers a different note of the contract to each of the contracting parties there is no valid contract. The entry in the broker's book is properly speaking the original, and ought to be signed by him. The bought and sold notes delivered to the parties ought to be copies of it. A valid contract may probably be made by perfect notes signed by the broker and delivered to the parties, although the book be not signed; but if the notes are imperfect, as in the present case, an unsigned entry in the book will not supply the defect. It is the duty of brokers to make the contract so as to be binding on both parties. They are employed to prepare contracts on which great sums of money depend: and I must say that in many cases which have come before me they appear to conduct their business in a very slovenly, negligent manner. *Rule refused.*

GOOM *v.* AFLALO.

IN THE KING'S BENCH, NOVEMBER 28, 1826.

[*Reported in* 6 *Barnewall & Cresswell*, 117.]

ASSUMPSIT brought by the plaintiff against the defendant for refusing to deliver a quantity of Barbary gum, pursuant to a contract of sale alleged to have been entered into with the plaintiff by a Mr. Virgo as the broker of the plaintiff and defendant. Plea, the general issue. At the trial before Abbott, C. J., at the London sittings after last Hilary term, a verdict was found for the plaintiff. Afterwards, upon a motion for a new trial, the court directed that the facts should be stated for their opinion in the following case: —

Mr. Virgo, as the broker of the defendant and with his authority, agreed with the plaintiff that the defendant should sell and deliver to him 170 serons of Barbary gum at the price of 55*s.* per cwt. The broker thereupon wrote in his broker's book the terms of the contract, as follows: —

LONDON, 23d February, 1825.

Sold for account of Mr. Aflalo, to Mr. S. T. Goom, 170 serons of Barbary gum, subject to approval of quality to-morrow, *per* the Mogadore, lying in the London Docks, at 55*s.* per cwt. in bond; customary allowance for tare and draft; 2½ per cent. discount for cash in fourteen days, or four months' credit. The gum remaining in the seller's name at the docks.

This entry in the broker's book was not signed by the broker or any other person. Between nine and ten o'clock at night of the said 23d February the broker sent to the plaintiff and defendant respectively paper writings, commonly called bought and sold notes, copied from the entry in his book and signed by him.

Between nine and ten o'clock in the morning of the 24th February the defendant objected to and returned the sold note to the broker, and wholly refused to deliver the gum. Whereupon this action was brought.

Law, for the plaintiff.

Chitty, contra. *Cur. adv. vult.*

The judgment of the court was now delivered by

ABBOTT, C. J. It appears in this case that Virgo the broker was authorized by the defendant to sell the goods in question, that he contracted for the sale of them to the plaintiff, entered a memorandum of the bargain in his broker's book but did not sign that entry, and then sent to each of the parties a copy of the memorandum signed by himself. The only objection to the validity of the contract is the want of his signature to the memorandum in the book.

It is clear that the contract was made in such a manner as to bind the defendant within the requisites of the Statute of Frauds. If therefore it is to be held invalid, this can only be done on the ground of some usage or custom of merchants which the court is at liberty to recognize as a part of the common law. No such usage has been found or stated as a fact upon the present occasion. There are several cases in the books in which this point has been noticed. They were all quoted in the argument at the bar, and it is unnecessary to repeat them. A signed entry in the broker's book, and signed notes conformable to each other delivered to the parties, are spoken of as making a valid contract: the entry in the book has been called the original, and the notes copies; but there is not any actual decision that a valid contract may not be made by notes duly signed if the entry in the book be unsigned; and in one case the late Lord Chief Justice Gibbs is reported to have spoken of some supposed decision to that effect as having been overruled. Under such circumstances we cannot say that the rule for which the defendant contends has been adopted by the court as part of the law merchant. Strong expressions as to the duty of the broker to sign his book do not go far enough for this purpose, nor does the obligation to do this which a broker is supposed to enter into upon receiving a license to practise in the city of London. Brokers are, I believe, established in the principal commercial towns on the continent under municipal regulations calculated to obtain punctuality and fidelity in their dealings; and the signature of their book is certainly one method of insuring these, and may in some cases furnish evidence and facilitate the proof of a contract. We have no doubt that a broker ought to sign his book, and that every punctual broker will do so. But if we were to hold such a signature essential to the validity of the contract we should go further than the courts have hitherto gone, and might possibly lay down a rule that would be followed by serious inconvenience, because we should make the validity of the contract to depend upon some private act of which neither of the parties to the contract would be informed, and thereby place it in the power of a negligent or fraudulent man to render the engagement of parties valid or invalid at his pleasure.

For these reasons we think the plaintiff is entitled to retain the verdict. *Postea to the plaintiff.*

HAWES AND ANOTHER *v.* FORSTER AND ANOTHER.

AT GUILDHALL, CORAM LORD DENMAN, JULY 3, 1834.

[*Reported in* 1 *Moody & Robinson*, 368.]

ASSUMPSIT to recover the sum of £320, being the amount of damages sustained by the plaintiffs by the non-delivery of oil on the 30th of June, 1831, pursuant to contract.

Plea, general issue.

This was the second trial of the action. On the first trial (which took place before Ld. C. J. Denman and a special jury at the London sittings after Michaelmas term, 1832), it appeared that the oil had been bought by the plaintiffs of the defendants through Mr. Wright, one of the sworn brokers of the city of London. The plaintiffs on that occasion put in the bought note, which was in the following terms: —

Bought for Messrs B. T. and W. Hawes, of Messrs. Forster and Smith, from 80 to 100 tons of palm oil of merchantable quality, free from dirt and water, at £26 per ton, payable per cash, &c. The above oil warranted to arrive on or before the 30th of June (current), ex Premier, Fullerton, Cape Coast. Customary allowances.

THOMAS WRIGHT, *Broker*.

LONDON, 27th of May, 1831.

And Mr. Wright, being called by the plaintiffs and having proved his being employed by the defendants to sell the oil, said that he made and signed an entry of the contract in his broker's book; that the bought note was written by his clerk, and signed by himself; that the entry was made, and the bought and sold notes written and sent to the respective parties on the same evening, but whether the entry or the notes were first written he could not say.

The plaintiffs proved that on the day mentioned in the bought note (30th of June) they required the defendants to deliver the oil; and that, default being made, they had bought other oil at an advanced price. The sold note was not called for by the plaintiffs on the trial; whereupon

Campbell, S. G., for the defendants, submitted that the plaintiffs must be nonsuited. It was the universal usage to produce both the bought note and the sold note; and there was no evidence of a binding contract between the parties without producing the two instruments and showing their correspondence with each other.

Sir J. Scarlett, for the plaintiff. The bought note which has been produced by the plaintiffs is evidence of a contract signed by Mr. Wright, who is proved to be the agent of the party charged therewith. It is not necessary for the plaintiffs to go further.

DENMAN, LD. C. J., was of opinion that the plaintiffs were not called upon to give any evidence of the sold note delivered by the broker to the defendants.

Campbell, S. G., then offered to produce the broker's book, according to which (as he suggested) the defendants were not to be bound by the contract unless the ship mentioned in the bought note should arrive by the 30th of June. And he contended that the entry in the broker's book formed the original contract; the bought and sold notes being in fact only minutes of the contract furnished by the broker to the two parties. And he cited Heyman *v.* Neale, 2 Campb. 337; Grant *v.* Fletcher, 5 B. & C. 436; Goom *v.* Aflalo, 6 B. & C. 117.

Sir J. Scarlett, contra, relied upon the case of Thornton *v.* Meux, M. & M. 43, as the last authority upon the subject, distinctly showing that the entry in the broker's book is not admissible in evidence to contradict the bought note.

DENMAN, LD. C. J. I am of opinion that the plaintiffs have proved a contract by producing the bought note signed by Mr. Wright, and showing that person to have been the agent engaged by the defendants to dispose of the oil. It is not shown that the sold note delivered to the defendants differed from the bought note delivered to the plaintiffs; had that been shown to be the case, it would have been very material; but in the absence of all proof of that nature I am clearly of opinion that I must look to the bought note, and to that alone, as the evidence of the terms of the contract; the defendants shall, however, have leave to move for a nonsuit.

The evidence was rejected; and under the direction of his Lordship the jury returned a verdict for the plaintiff.

In Hilary term following, Campbell, S. G., obtained a rule to show cause why the verdict should not be set aside, and a nonsuit entered on the ground of the non-production of the sold note; or else why a new trial should not be granted on the ground that the entry in the broker's book formed the contract, and that such book ought, therefore, to have been received as evidence for the defendants on the trial.

The rule as to the nonsuit was discharged; but the rule for a new trial was, after argument and time taken by the court for consideration, made absolute; the Lord Chief Justice saying that the court doubted whether the case involved any point of law at all, and whether it did not rather turn upon the custom, viz., how the broker's book was treated by those who dealt with him. Looking to the importance of the question the court thought it fit to let it undergo further consideration in order that evidence might be given as to the usage of trade in the city; and his Lordship added that, if it were deemed matter of law, it would be better to tender a bill of exceptions; if matter of fact, to let the opinion of the jury be taken upon it.

The case accordingly now came down for a second trial; and on this occasion the plaintiffs (after putting in the bought note and examining the broker to the same effect as on the former trial) called upon the defendants after due notice to produce the sold note: it was accordingly produced, and corresponded with the bought note already set forth. The plaintiffs then called several of the most eminent merchants in the city, all of whom concurred in declaring that they had never known any instance where the broker's book had been referred to, and that they always looked to the bought and sold notes as the contract; and some of them added that, if the broker's bought or sold note (as the case might be) were not consonant with their directions to the broker, they returned it.

For the defence, the broker's book was produced; and the entry respecting the transaction in question was, without opposition, read. It agreed with the bought and sold notes excepting that, instead of the words, "The above oil warranted to arrive on or before the 30th of June, ex Premier, Fullerton, Cape Coast," the words in the broker's book were, "If the above do not arrive on or before the 30th of June, this contract to be void." The defendants did not call witnesses to rebut the evidence given by the plaintiffs as to the usage; but they produced a copy of the regulations made in the year 1818 by the Court of Aldermen for the conduct of sworn brokers, and which regulations were proved to have been generally circulated.[1]

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[1] According to these regulations the broker is directed to enter all contracts on the day of the making thereof, &c., and deliver a contract note to both buyer and seller, or either of them, within twenty-four hours after request, containing therein a true copy of such entry; and shall, upon demand being made by buyer or seller, show such entry to them, to manifest and prove the truth and certainty of such contract. The bond executed by brokers has, since these regulations, been conditioned for their making their entries, &c., in the manner pointed out in the regulations: before the making of

LORD DENMAN, C. J., in summing up the case said to the jury: "The only question before you is, whether the bought and sold notes constituted the contract; or whether the entry in the broker's book, which in this case differed from the bought and sold notes, constituted it. I have on a former occasion expressed my own opinion to be, that in point of law the note delivered by the broker to the party is the real contract; that is still my opinion: but it has been thought better that the point should be submitted to you simply as a matter of fact; that you may say which, according to the usage of trade in this city, has been the binding contract, — the broker's book or the bought and sold notes. If the evidence has satisfied you that, according to the usage of trade, the bought and sold notes are the contract (and the evidence adduced before you to show that they are so considered has not been met by any contradictory evidence from the other side), then you will find your verdict for the plaintiffs.

Verdict for the plaintiffs.

THORNTON AND ANOTHER *v.* CHARLES.

IN THE EXCHEQUER, APRIL 29, 1842.

[*Reported in* 9 *Meeson & Welsby*, 803.]

ASSUMPSIT for goods sold and delivered, and on an account stated. Plea, *Non assumpsit.*

At the trial before Lord Abinger, C. B., at the London sittings after last Michaelmas term, it appeared that the action was brought for the price of 50 casks of tallow alleged to have been sold and delivered by the plaintiffs to the defendant. On the 20th of February, 1841, the plaintiffs instructed their brokers, Messrs. Smith & Marshall, to sell for them 200 casks of tallow, to be delivered between the 1st of September and the 31st of December following, and on the same day received from the brokers a sold note in the following terms: "London, 20th February, 1841. Sold, for Messrs. B. & R. Thornton & West, to our principals 200 casks of St. Petersburg first sort of yellow candle tallow," &c. The bought note was in the same terms, except that it stated the purchase to be of 50 casks "for our principals." The entry in the brokers' book was as follows: "London, 20th February, 1841.

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these regulations, the broker was only required to enter the contract in his book within three days after it was made.

These regulations were made in consequence of the report of a committee of the corporation of London, appointed on the 7th of March, 1815, to inquire into the practice and general conduct of the brokers of the city. The report of the committee will be found to embrace the whole history of the brokers of London.

Sold for Messrs. R. Thorton & West (Messrs. Paton & Charles, 50; Mr. John Smith, 50; Messrs. Cattley & Stephenson, 100) 200 of St. Petersburg first sort of yellow candle tallow," &c. All the above documents were put in evidence at the trial. The names of the principals on either side were not disclosed. . . .

At the trial it was objected for the defendant that the plaintiffs ought to be nonsuited on the ground that, there being a variance between the bought and sold notes, and the entry in the brokers' book not being admissible, no valid contract had been proved. The learned judge being of that opinion nonsuited the plaintiffs, giving them leave to move to enter a verdict if the court should be of a contrary opinion.

Crowder and *C. A. Wood* now showed cause.

R. V. Richards and *Martin*, contra.

PARKE, B. . . . I apprehend it has never been decided that the note entered by the broker in his book and signed by him, would not be good evidence of the contract so as to satisfy the Statute of Frauds, there being no other. The case of Hawes *v.* Forster underwent much discussion in the Court of King's Bench when I was a member of that court, and there was some difference of opinion amongst the judges; but ultimately it went down to a new trial, in order to ascertain whether there was any usage or custom of trade which makes the broker's note evidence of the contract. In that case there was a signed entry in the book, which incorporated the terms of making the contract void in the event of the non-arrival of the goods within a certain time. The bought and sold notes which were delivered to the parties omitted that clause. Certainly it was the impression of part of the court that the contract entered in the book was the original contract, and that the bought and sold notes did not constitute the contract. The jury found that the bought and sold notes were evidence of the contract, but on the ground that those documents, having been delivered to each of the parties after signing the entry in the book, constituted evidence of a new contract made between the parties on the footing of those notes. That case may be perfectly correct; but it does not decide that, if the bought and sold notes disagree, or there be a memorandum in the book made according to the intention of the parties, that memorandum signed by the broker would not be good evidence to satisfy the Statute of Frauds. . . .

LORD ABINGER, C. B. I have purposely avoided giving any opinion about the question of the bought and sold notes, but I desire it to be understood that I adhere to the opinion given by me, that when the bought and sold notes differ materially from each other there is no contract, unless it be shown that the broker's book was known to the parties. . . . *Rule absolute.*[1]

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[1] *I. e.*, for a new trial, upon the ground that there was some evidence that the tallow had been delivered to the defendant and the statute satisfied in that mode. As that question turned entirely upon special facts, raising no point of law and possessing no general interest, so much of the case as relates to it has been omitted.

SIEVEWRIGHT *v.* ARCHIBALD.

IN THE QUEEN'S BENCH, JUNE 17, 1851.

[*Reported in* 17 *Queen's Bench Reports*, 103.]

IN this term (June 17th), the court being divided in opinion, the learned judges delivered separate judgments.

ERLE, J. In this case it appeared by the evidence of the broker at the trial that he agreed with the defendant to sell to him 500 tons of Dunlop's iron; that Dunlop's iron was Scotch; that he delivered to the defendant a bought note in which the thing bought was named Scotch iron, and to the plaintiff a sold note in which the thing sold was named Dunlop's iron: and it further appeared that the defendant had repeatedly admitted the existence of some contract by requesting the plaintiff to release him therefrom upon terms.

The plaintiff had declared for not accepting Dunlop's iron; but on the defendant producing the bought note so that it was in evidence, and objecting that there was no contract because the bought and sold notes varied, the plaintiff then contended that the defendant had ratified the contract expressed in the bought note sent to the defendant. The declaration was then amended to agree with the bought note; and the jury found their verdict for the plaintiff, and that the defendant had ratified the contract alleged in the amended declaration. I take this to be the substance of the evidence, as stated more fully in the judgment of the Lord Chief Justice. The defendant obtained a rule to set aside this verdict for the plaintiff, and enter it for the defendant, on two grounds: First, he contended that, in cases where a contract has been made by a broker and bought and sold notes have been delivered, they alone constitute the contract; that all other evidence of the contract is excluded; and that if they vary a contract is disproved; and that the notes now in question did vary: and, secondly, he contended that, if evidence was in such cases admissible, there was no evidence here to go to the jury to prove the ratification of the contract alleged in the amended declaration. But after considering the argument, it appears to me that he has failed to establish either ground.

With respect to the first ground, I would observe that the question of the effect either of an entry in a broker's book signed by him, or of the acceptance of bought and sold notes which agree, is not touched by the present case. I assume that sufficient parol evidence of a contract in the terms of the bought note delivered to the defendant has been tendered, and that the point is, Whether such evidence is inadmissible because a sold note was delivered to the plaintiff? in other words, Whether bought and sold notes, without other evidence of intention, are by presumption of law a contract in writing? I think they are not. If bought and sold notes which agree are delivered and accepted without objection, such acceptance without objection is evidence for the jury of mutual assent to the terms of the notes; but the assent is to be inferred by the jury from their acceptance of the notes without objection, not from the signature to the writing, which would be the proof if they constituted a contract in writing. This seems to me to be the effect of the evidence of mercantile usage relating to bought and sold notes given in Hawes *v.* Forster, 1 Moo. & Rob. 368, 372, mentioned below; and this is the ground on which the verdict in that case is to be sustained, according to the opinion of Parke, B., expressed in Thornton *v.* Charles, 9 M. & W. 802. The form of the instruments is strong to show that they are not intended to constitute a contract in writing, but to give information from the agent to the principal of that which has been done on his behalf: the buyer is informed of his purchase, the seller of his sale; and experience shows that they are varied as mercantile convenience may dictate. Both may be sent, or one, or neither; they may both be signed by the broker, or one by him and the other by the party; the names of both contractors may be mentioned, or one may be named and the other described; they may be sent at the time of the contract or after, or one at an interval after the other. No person acquainted with legal consequences would intend to make a written contract depend on separate instruments, sent at separate times in various forms, neither party having seen both instruments: such a process is contrary to the nature of contracting, of which the essence is interchange of consent at a certain time. The governing principle in respect of contracts is to give effect to the intention of the parties; and where the intention to contract is clear, it seems contrary to that principle to defeat it because bought and sold notes have been delivered which disagree. They are then held to constitute the contract only for the purpose of annulling it.

It seems to me therefore that, upon principle, the mere delivery of bought and sold notes does not prove an intention to contract in writing, and does not exclude other evidence of the contract, in case they disagree. Before examining the authorities on which this proposition is supposed to be founded, I would draw attention to the distinction between evidence of a contract and evidence of a compliance with the Statute of Frauds. The question of compliance with the statute does not arise until the contract is in proof. In case of a written contract the statute has no application. In case of other contracts the compliance may be proved by part payment, or part delivery, or memorandum in writing of the bargain. Where a memorandum in writing is to be proved as a compliance with the statute, it differs from a contract in writing in that it may be made at any time after the contract, if before the action commenced; and any number of memoranda may be made, all being equally originals; and it is sufficient if signed by one of the parties only or his agent, and if the terms of the bargain can be collected from it, although it be not expressed in the usual form of an agreement. Egerton *v.* Mathews, 6 East, 307.

I now advert to the authorities usually cited on this point. In Thornton *v.* Kempster, 5 Taunt. 786, the bought and sold notes could not be reconciled, and no other evidence appears to have been offered of the contract, and the plaintiff did not adopt the note delivered to the defendant; and he was nonsuited. As the case stands in the reports, there was no evidence of mutual assent to the contract alleged by the plaintiff. The point was not raised whether other evidence of the contract was admissible. In Cumming *v.* Roebuck, Holt, N. P. C. 172, the statement is that the bought and sold notes varied; and Gibbs, C. J., is reported to have ruled that, if the broker delivers a different note of the contract to each party contracting, there is no valid contract; and he nonsuited the plaintiff. In this case also it does not appear that any other evidence of the contract besides the notes was offered; and if not, this ruling is in the same way irrelevant to the present question. The learned judge is reported to have added that a case which states the entry in the broker's book to be the original contract has been since contradicted. The facts in relation to which this opinion was expressed are not given: if it was intended to be unqualified, there is authority and principle against it. In Heyman *v.* Neale, 2 Campb. 337, an entry was made in the broker's book, and bought and sold notes were delivered; and the defendant returned the bought note, and contended that there was no contract till the note delivered was assented to. Lord Ellenborough held that neither party could recede from a contract after it was entered in the book, that the bought and sold note is not sent on approbation, nor does it constitute the contract: it is only a copy of the entry, which would be valid although no bought or sold note was sent. In Grant *v.* Fletcher, 5 B. & C. 436, the plaintiff proved a verbal contract of purchase by the broker, and to comply with the statute gave in evidence an unsigned entry in the broker's book and imperfect bought and sold notes; and a nonsuit was supported, because these imperfect instruments did not constitute a sufficient memorandum in writing of the bargain. In the judgment it is stated that the entry in the broker's book is the original, and the bought and sold notes ought to be copies of it, and that a valid contract may probably be made by perfect notes signed by the broker and delivered to the parties, although the book be not signed: the court therefore was far from holding the notes, if delivered, to be the sole evidence of the contract. In Goom *v.* Aflalo, 6 B. & C. 117, the broker had made an unsigned entry in his book, and had delivered to the parties signed bought and sold notes: it was objected that the entry in the book was the original, and that therefore the notes were inadmissible; and this objection was only overruled after argument on a special case. The court therefore was still far from recognizing the doctrine that bought and sold notes are the contract itself. In Thornton *v.* Meux, M. & M. 43, Abbott, C. J., states that he used to think the broker's book the proper evidence of the contract; but he afterwards changed his opinion, and held, conformably with the rest of the court, that the copies delivered to the parties were the evidence of the contract they had entered into. It is obvious that this ruling does not follow from the judgments that had lately preceded it: it avows a late change of opinion; it was not acted on in the case so as to nonsuit the plaintiffs thereon, but the trial proceeded, and the plaintiffs were nonsuited on another ground; and therefore there was no opportunity to review the ruling in *banc;* and both the last cases are expressed as if a contract in writing was necessary for a contract of sale of chattels. In Hawes *v.* Forster, *supra*, the contract as stated in the bought and sold notes varied from the contract as stated in the broker's book. On the first trial the plaintiff's note only was in evidence, and the broker's book was excluded. On the second trial the plaintiffs relied on both the notes, with the evidence of some merchants stating that they always looked to the bought and sold notes as the contract, and that if the note was not consonant to their direction to the broker they returned it; the defendants relied on the entry in the broker's book: the jury were directed to find for the plaintiffs if the bought and sold notes in their opinion constituted the contract; and they found for the plaintiffs. This case ought not to be taken to establish the general proposition of law, that the notes in all cases constitute the contract. The verdict may well be supported upon the facts of the case, as the acceptance of the notes without objection was evidence for the jury of mutual assent to a contract upon the terms expressed in those writings, which agreed. This view is explained by Parke, B., in Thornton *v.* Charles, 9 M. & W. 804, 807, where he says, speaking of Hawes *v.* Forster: "The jury found that the bought and sold notes were evidence of the contract, but on the ground that those documents, having been delivered to each of the parties after signing the entry in the book, constituted evidence of a new contract made between the parties on the footing of those notes. That case may be perfectly correct; but it does not decide that, if the bought and sold notes disagree, or there be a memorandum in the book made according to the intention of the parties, that memorandum signed by the broker would not be good evidence to satisfy the Statute of Frauds." The same learned judge expresses himself to the same effect in Pitts *v.* Beckett, 13 M. & W. 743. It is clear also that, if according to the opinion of the witnesses there is a right to return the note if contrary to instructions, the keeping of the note makes it binding, and not the signature.

These are the principal authorities cited by Mr. Smith on Mercantile Law (Smith, Merc. L. 452, 4th ed.) in support of the principle now discussed; and from this review I gather that in the greater number of the cases the doctrine that bought and sold notes are the sole evidence of the contract is not recognized, nor was the point decided that other evidence of the contract and of a compliance with the statute is inadmissible if bought and sold notes have been delivered which disagree. And if the principle is not established by direct authority, the manifest evil resulting from it is a strong ground for believing that it is not founded on law.

Then, if other evidence of the contract and of a compliance with the statute was admissible, the second question raised by the defendant remains to be considered, namely, whether there was sufficient evidence to sustain the verdict for the plaintiff. Upon this point I think the jury were warranted in inferring that the substance of the contract was as alleged in the amended declaration and as stated in the defendant's note. The broker who made the contract appears to have so understood it, as he so expressed it at the time: the defendant with whom he made it probably so understood it, as he kept the note in that form without objection, and treated for a compromise on the assumption that he was bound thereby, and produced it at the trial as the contract. The plaintiff might well so understand it; for as Dunlop's iron was a Scotch iron, the article which he intended to deliver was the article which the defendant intended to buy. There is no evidence that Scotch iron made by Dunlop was better than any other Scotch iron; on the contrary, it is probable from the conduct of the parties that the mention of Dunlop's name was an immaterial accident, not affecting the substance of the bargain. As in the case of the purchase of wheat or other article of usual supply by its known denomination, if the dock where it was stored or the ship in which it was brought was mentioned in one note and omitted in another, the omission of the place would, I presume, be held immaterial; so the omission of the manufacturer of Scotch iron in the defendant's note ought to be held immaterial if the subject of his purchase was intended to be Scotch iron; and his conduct is good evidence of such intention. If the evidence was that the defendant had proposed to buy Scotch iron, and that the plaintiff had proposed to sell him the article he wanted, namely, Dunlop's, and the defendant had described his contract to be a purchase of Scotch iron in a memorandum made at the time, the jury would infer that Scotch iron was of the substance of the contract. The evidence now in the case appears to me to warrant the same conclusion. If the substance of the contract was as alleged in the defendant's note, that note alone would be a sufficient memorandum of the bargain signed by an agent within the statute. The note delivered to the defendant was held sufficient by Lord Kenyon in Rucker *v.* Cammeyer, 1 Esp. N. P. C. 105; one note only was offered in evidence by the plaintiffs in Powell *v.* Divett, 15 East. 29, and no objection was made on that account; one note alone was held by Lord Denman to be sufficient in Hawes *v.* Forster, *supra;* one note signed by the defendant was held sufficient in Rowe *v.* Osborne, 1 Stark. N. P. C. 140, though it varied from the note signed by the plaintiff's broker which had been sent to the defendant. But it is not necessary to discuss whether one note alone would be a sufficient memorandum; for, if the substance of the contract was as is alleged, the notes did not substantially vary. As it was held in Bold *v.* Rayner, 1 M. & W. 343; s. c. Tyr. & G. 820, that several apparent differences in the terms of bought and sold notes might be reconciled by evidence of mercantile usage in respect to those terms, so where two descriptions are used in those instruments, of that which in the intention of the parties may be the same article, I think the apparent discrepancy may be removed by evidence of such intention; and that if both notes were essential to the plaintiff's case, both may be reconciled upon this evidence and held valid, they not being inconsistent, as was the case in Thornton *v.* Kempster, *supra.*

If it is further objected for the defendant that the question of ratification was left to the jury instead of asking them what was the substance of the contract, it appears to me that the jury intended to find that the contract was as alleged in the declaration and expressed in the bought note; but if not, this objection would not warrant the entry of a verdict for the defendant, which is the present rule: if the point can be resorted to at all, it goes to a new trial only. For these reasons my opinion is against the defendant on this second ground also; and I think his rule ought to be discharged.

PATTESON, J., after stating that it was unnecessary to recapitulate the facts, as he adopted the full statement in the judgment of Lord Campbell, C. J., proceeded as follows: —

The Statute of Frauds requires that some note or memorandum in writing of the bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized. The question is, Whether in this case there was any such note or memorandum in writing signed by the defendant or his agent? If there was, I take it to be clearly immaterial whether there was any such note or memorandum signed by the plaintiff (see Egerton *v.* Mathews, *supra*, where the memorandum was signed by the defendants themselves, not by a broker or agent, and none was signed by the plaintiff, yet it was held that the statute was satisfied); for I consider that the memorandum need not be the contract itself, but that a contract may be made without writing; and if a memorandum in writing be afterwards made, embodying that contract, and be signed by one of the parties or his agent, he being the party to be charged thereby, the statute is satisfied. Still it is plain that, if the original contract was itself in writing signed by both parties, that would be the binding instrument, and no subsequent memorandum signed by one party could have any effect. In this case the contract was made by a broker acting for both parties; but such contract was not in writing signed by him or them. If there be any writing to satisfy the statute it must be some subsequent memorandum in writing signed by the defendant or his agent. There are subsequent memoranda in writing signed by the broker, namely, the bought and sold notes. Which of these, if either, is the memorandum in writing signed by the defendant or his agent? The bought note is delivered to the buyer, the defendant; the sold note to the seller, the plaintiff; each of them in the language used purports to be a representation by the broker to the person to whom it is delivered of what he, the broker, has done as agent for that person. Surely the bought note delivered to the buyer cannot be said to be the memorandum of the contract signed by the buyer's agent in order that he may be bound thereby; for then it would have been delivered to the seller, and not to the buyer; and *vice versa* as to the sold note. Can then the sold note delivered to the seller be treated as the memorandum signed by the agent of the buyer, and binding him, the buyer, thereby? The very language of it shows that it cannot. In the city of London, where this contract was made, the broker is bound to enter in his book and sign all contracts made by him; and if the broker had made such signed entry I cannot doubt, notwithstanding the cases and *dicta* apparently to the contrary, that such memorandum would be the binding contract on both parties. In the case of Hawes *v.* Forster, *supra*, there was such a memorandum signed in the broker's book: there were also bought and sold notes tallying with each other, but varying from the book. On the first trial of that case Lord Denman held that the bought note produced by the buyer (the plaintiff) was sufficient, and was the proper evidence of the contract and not the book, and that no notice to produce the sold note need be given to the defendant. The court on motion granted a new trial, holding that this evidence was not the proper evidence of the contract, unless there was a custom of trade in London that the bought and sold notes, and not the signed broker's book, were the contract, and considering that such custom had not been sufficiently inquired into. The case is so explained by Parke, B., in Thornton *v.* Charles, *supra,* and again in Pitts *v.* Beckett, 13 M. & W. 746; and my own note of the case (I having been a member of the court which granted the new trial) is in entire conformity with that explanation. On the new trial the jury found the custom that the bought and sold notes constituted the contract, and not the broker's book: a bill of exceptions was tendered; but the defendant did not persist, and submitted to the verdict. Possibly, if he had, it might have been held that the bought and sold notes acquiesced in constituted a new contract; but that they could ever be treated under such circumstances as the original contract seems to me impossible.

However, in the present case there was no signed memorandum in the broker's book: therefore the bought and sold notes together, or one of them separately, must be the memorandum in writing signed by the defendant's agent, or there is none at all, and the statute will not be satisfied.

If the bought and sold notes together be the memorandum, and they differ materially, it is plain that there is no memorandum: the court cannot possibly say, nor can a jury say, which of them is to prevail over the other; read together they are inconsistent, assuming the variance between them to be material; and if one prevails over the other, that one will be the memorandum, and not the two together.

If on the other hand one only of these notes is to be considered as the memorandum in writing signed by the defendant's agent and binding the defendant, which of them is to be so considered, the bought note delivered to the defendant himself, or the sold note delivered to the plaintiff? I have already stated that I cannot think that either of them by itself can be so treated. In no one of the cases has the court or a judge at *nisi prius* held that it could: all that Lord Denman held in Hawes *v.* Forster, *supra*, on the first trial, was that proof of one was sufficient without notice to produce the other, thereby holding only that the other must be taken to correspond with that produced until the opposite party produced the other and showed the variance. But or the second trial notice to produce the other was given, and it was produced, and the two corresponded. In Goom *v.* Aflalo, *supra*, there was no variance at all; and the only question was, whether, as there was an unsigned memorandum in the broker's book, the bought and sold notes could be treated as a memorandum; and the court held that they could. All three corresponded in that case.

If this were *res integra* I am strongly disposed to say that I should hold the bought and sold notes together not to be a memorandum to satisfy the Statute of Frauds; but I consider that point to be too well settled to admit of discussion; yet there is no case in which they have varied in which the court has upheld the contract; plainly showing that the two together have been considered to be the memorandum binding both parties: the reason of which is to my mind, I confess, quite unsatisfactory; but I yield to authority.

I do not go through and examine all the cases on this subject: they are collected in the last edition of Smith's Mercantile Law by Mr. Dowdeswell; and they show that it has invariably been held that, where the bought and sold notes are resorted to as the contract or as the memorandum of the contract, and they vary in any material point, there is no writing to satisfy the statute.

It seems to me therefore that the only question to be determined in this case is, Do the bought and sold notes differ in any material point? Now the one is "Dunlop's Scotch iron," the other "Scotch iron" generally: the one would be complied with by delivery of Scotch iron of any person's manufacture, possibly greatly inferior to that of Messrs. Dunlop; the other ties the parties down to Dunlop's; possibly again that may be inferior to some other Scotch iron. How is it possible to read the two notes together and say that they mean the same thing, or to say that if you incorporate the one note with the other that which specifies Dunlop's iron will not immediately prevail over that which does not? I cannot but think that they are as much at variance as the bought and sold notes in Thornton *v.* Kempster, *supra,* where the one was "Riga" and the other "Petersburg" hemp, and where the Court of Common Pleas held there was no contract, independent even of the Statute of Frauds. The broker indeed stated in his evidence that he made the original contract verbally for Dunlop's Scotch iron; but how can that evidence make the bought note, delivered to the defendant for Scotch iron generally, to be a memorandum signed by the defendant's agent binding the defendant? The question is, not whether either of the notes corresponds with the contract originally made by word of mouth, but whether either of the notes separately, *per se*, be a signed memorandum binding upon either party. Upon the whole therefore, however much I may regret that such an objection should prevail, I feel bound to say that in my opinion there was no evidence in this case of any contract binding on the defendant.

LORD CAMPBELL, C. J. I regret to say that the view which I take of the law in this case compels me to come to the conclusion that the defendant is entitled to our judgment, although the merits are entirely against him; although, believing that he had broken his contract, he could only have defended the action in the hope of mitigating the damages; and although he was not aware of the objection on which he now relies till within a few days before the trial. But it appears to me that we cannot refuse giving effect to this objection without disregarding the Statute of Frauds, without overturning decided cases, and without danger of introducing uncertainty and confusion into the rules for enforcing mercantile contracts of buying and selling.

The plaintiff in his declaration set out the following written document, stated to be a "sold note" of certain goods agreed to be purchased from him by the defendant: —

26 LOMBARD STREET, LONDON, February 26, 1849

Sold Charles Dickson Archibald, Esq., 48 Upper Harley Street, for Messrs. Sievewright, Watson, & Co., Glasgow, 500 tons Messrs. Dunlop, Wilson, & Co.'s pig-iron, three-fifths No. 1 and two-fifths No. 3, at 52*s.* per ton, free on board at Troon. Payment, cash within one month from this date against orders of delivery.

This professed to be signed by "Wm. Richardson, broker."

The declaration in the usual form averred that the iron was duly tendered to the defendant, but that he refused to accept or to pay for it. The only material plea was *non assumpsit.* William Miller being called as a witness swore as follows: "I am a metal broker in the city: plaintiff carries on business at Glasgow under the firm of Sievewright, Watson, & Co. I received instructions from him to sell 500 tons of Dunlop, Wilson, & Co.'s pig-iron. I sold it to the defendant. I saw the defendant in London: he gave me a verbal authority to make the purchase for him. I agreed with him that he was to be the purchaser of 500 tons of Dunlop, Wilson, & Co.'s iron. The name of Sievewright, Watson, & Co. was mentioned as the sellers. On the 26th of February I wrote a contract, and sent it to the defendant in a letter." (The bought note being called for, it was produced by the defendant; and it corresponded with the sold note set out in the declaration, except that, instead of "500 tons Messrs. Dunlop, Wilson, & Co.'s pig-iron," it stated "500 tons of Scotch pig-iron." The bought note being read, the witness continued.) "This was enclosed in a letter of 26th February, and sent to the defendant in Upper Harley Street. I sent to the plaintiff the same day a sold note" (a copy of it was admitted and read as set out in the declaration). "Dunlop, Wilson, & Co. are manufacturers of iron in Scotland; and their iron is Scotch iron."

The defendant's counsel insisted that there was no binding contract between the parties, there being a material variance between the bought and sold notes; for according to the bought note the seller would perform his obligation by tendering 500 tons of pig-iron made by any manufacturer in any part of Scotland, whereas by the sold note the buyer might demand 500 tons of pig-iron made by Dunlop, Wilson, & Co., which might be of a peculiarly good quality and of superior reputation in the market. I intimated an opinion that the variance was material, and that as there was no entry in the broker's book signed by him, and the plaintiff had proposed to prove the contract by the bought and sold notes, the variance was fatal. The plaintiff's counsel then said that he had clear evidence to prove that the defendant had subsequently ratified the contract; and objection being made that he could not have ratified the contract as set out in the declaration, I permitted the declaration to be amended according to the terms of the bought note.

Miller the broker being recalled, after stating that he had the delivery orders for the 500 tons of iron ready to be handed over to the defendant on the 26th of March, said: "I saw the defendant about the end of March. On the 4th of April he agreed that I should propose to the plaintiff to take a bill at four months, and the delivery orders to be lodged as a security at the Union Bank. The price of iron had then fallen 5*s.* a ton. Before the 29th of March the defendant had given me unlimited authority to get the transaction settled as I thought fit."

There were read a letter from the defendant to Richardson of 5th April, saying, "You must manage the iron speculation as you think fit;" a letter written by Richardson to the plaintiff, saying that "Mr. Archibald agreed to give a bill at four months;" the plaintiff's answer, refusing to take a bill at four months, but offering to take one at three months; another letter written about the same time by the defendant to Richardson, saying, "I hope you will conduct it to a successful issue:" and further letters between the parties, continuing the negotiation till 27th October, 1849, when the defendant denied his liability. I left the question to the jury, Whether the defendant had ratified the contract sent to him, contained in the bought note? The jury found that he had; whereupon a verdict was entered for the plaintiff for £125 damages, with liberty for the defendant to move to enter the verdict for him if the court should be of opinion that there was not evidence to prove the declaration as amended.

Having heard the rule obtained for this purpose learnedly argued, I do not think that there was any sufficient evidence of ratification. Nothing having such a tendency was done by the defendant before the 26th of March, the day on which he ought to have performed the contract and on which he broke it. What constituted the ratification? And what date is to be given to it? There never was any reference by the defendant to the terms of the bought note more than of the sold note. The variance between them was not known to him till after the action was brought. Nor was there ever any assent by the plaintiff to accede to the terms of the bought note, whereby he would have become bound to deliver Dunlop, Wilson, & Co.'s pig-iron. The sold note containing different terms, instead of being discarded by the plaintiff, was actually declared on by him, and was set up by him as the true contract till the declaration was amended. The plaintiff likewise sought to recover under a count for goods bargained and sold: but this could not avail him; for the defendant never accepted the goods; and the contract was not for the sale of any specific goods, the property in which could be considered as transferred to him. Recurring to the special count, the plaintiff attempted to support it by the parol agreement alleged to have been entered into between the broker and the defendant, using the bought note as a memorandum of the agreement to satisfy the Statute of Frauds.

In the first place there seems a difficulty in setting up any parol agreement where the parties intended that there should be and understood that there was a written agreement: what passed between the defendant and the broker previous to the 26th of February seems to me only to amount to an authority from the defendant to the broker to enter into the contract; and Miller himself says: "On the 26th of February I wrote a contract and sent it to the defendant. I sent a sold note the same day to the plaintiff." Again, the memorandum under the 17th section of the Statute of Frauds must be signed by the party to be charged or his agent. But assuming that the parol agreement was the contract, and that when Miller wrote the bought note it was only to tell his principal what he had done, there is a difficulty in saying that, being *functus officio* as far as making the bargain was concerned, he had any authority to sign the memorandum as the defendant's agent, and thereby to charge him. But if he had, can this be said to be a true memorandum of the agreement? We are here again met by the objection of the variance, which is as strong between the parol agreement and the bought note as between the bought note and the sold note. If the bought note can be considered a memorandum of the parol agreement, so may the sold note; and which of them is to prevail? It seems to me therefore that we get back to the same point at which we were when the variance was first objected and the declaration was amended. I by no means say that where there are bought and sold notes they must necessarily be the only evidence of the contract: circumstances may be imagined in which they might be used as a memorandum of a parol agreement. Where there has been an entry of the contract by the broker in his book signed by him, I should hold without hesitation, notwithstanding some *dicta* and a supposed ruling of Lord Tenterden in Thornton *v.* Meux, *supra*, to the contrary, that this entry is the binding contract between the parties, and that a mistake made by him, when sending them a copy of it in the shape of a bought or sold note, would not affect its validity. Being authorized by the one to sell and the other to buy in the terms of the contract, when he has reduced it into writing and signed it as their common agent, it binds them both according to the Statute of Frauds, as if both had signed it with their own hands: the duty of the broker requires him to do so; and till recent times this duty was scrupulously performed by every broker. What are called the bought and sold notes were sent by him to his principals by way of information that he had acted upon their instructions, but not as the actual contract which was to be binding upon them. This clearly appears from the practice still followed of sending the bought note to the buyer and the sold note to the seller; whereas, if these notes had been meant to constitute the contract, the bought note would be put into the hands of the seller, and the sold note into the hands of the buyer, that each might have the engagement of the other party and not his own. But the broker to save himself trouble now omits to enter and sign any contract in his book, and still sends the bought and sold notes as before. If these agree, they are held to constitute a binding contract; if there be any material variance between them, they are both nullities, and there is no binding contract. This last proposition, though combated by the plaintiff's counsel, has been laid down and acted upon in such a long series of cases that I could not venture to contravene it, if I did not assent to it; but where there is no evidence of the contract unless by the bought and sold notes sent by the broker to the parties, I do not see how there can be a binding contract unless they substantially agree; for contracting parties must consent to the same terms; and where the terms in the two notes differ there can be no reason why faith should be given to the one more than the other. This is certainly a most inconvenient mode of carrying on commercial transactions: from the carelessness of brokers and their clerks mistakes not unfrequently arise, of which unconscientious men take advantage; and no buyer or seller can be safe unless he sees the sold or bought note as well as his own; a precaution which the course of business does not permit to be taken. But these inconveniences can only be remedied by the Legislature enforcing upon the broker the faithful performance of his duty in entering and signing the contract in his book.

In the present case, there being a material variance between the bought and sold note, they do not constitute a binding contract: there is no entry in the broker's book signed by him; and if there were a parol agreement, there being no sufficient memorandum of it in writing, nor any part acceptance or part payment, the Statute of Frauds has not been complied with; and I agree with my brother Patteson in thinking that the defendant is entitled to the verdict.

My brother Wightman, who heard the argument but is now engaged elsewhere in the discharge of a public duty, has authorized me to say that he has read this judgment and that he entirely concurs in it. But the court being divided, instead of making the rule absolute to enter the verdict for the defendant, we think that a nonsuit should be entered, so that the plaintiff may have the opportunity to bring a fresh action, and by a special verdict or a bill of exceptions to take the opinion of a court of error on his rights. *Rule absolute to enter a nonsuit.*

DURRELL *v.* EVANS AND OTHERS.

IN THE EXCHEQUER CHAMBER, MAY 19, 1862.

[*Reported in* 31 *Law Journal Reports, Exchequer,* 337.]

APPEAL from the Court of Exchequer.

First count, for not accepting pursuant to agreement thirty-three pockets of hops, at the price of £16 16*s.* per cwt., to be paid on the 3d of November, 1860; second count, for goods bargained and sold, and interest.

Plea: to the first count, a traverse of the agreement; and never indebted, to the residue of the declaration.

At the trial before Pollock, C. B., at the sittings in London after Michaelmas term, 1860, a verdict was found for the plaintiff on all the issues, with £20 damages, leave being reserved to move to enter a verdict for the defendants or a nonsuit.

A rule *nisi* was obtained accordingly, on the ground that there was no contract in writing nor part delivery of goods sufficient to satisfy the Statute of Frauds.

The Court of Exchequer (April 30, 1861) made the rule absolute to enter a nonsuit.[1]

The following is the statement of the case on appeal: —

The plaintiff is a hop grower in Kent; the defendants Messrs. Evans are hop merchants, carrying on business in Southwark. Previous to the 19th of October, 1860, the plaintiff had sent samples of the hops forming the subject of this action to Messrs. J. T. & W. Noakes, who carry on business as hop factors in Southwark, with instructions to sell the same for the plaintiff, but not under £18 per cwt. On Friday, October 19, the defendant J. C. Evans called on Messrs. Noakes and asked to see samples of the plaintiff's hops, which were shown to him. Upon asking the price, Mr. J. T. Noakes replied that he was instructed by the plaintiff not to sell under £18 per cwt. The defendant J. C. Evans said that was too high a price for them, and he should not give so high a price for them. He then left Messrs. Noakes's premises. On the afternoon of the same day, Friday, October 19, the plaintiff happened to be in the borough, and met the defendant J. C. Evans: a conversation took place between them with reference to the plaintiff's hops. Mr. J. C. Evans offered the plaintiff £16 16*s.* per cwt., which the plaintiff refused, but ultimately both parties went to Messrs. Noakes's counting-house, and saw Mr. J. T. Noakes upon the subject. Some further conversation took place as to the purchase of the hops, which ended in Mr. J. C. Evans refusing to give more than £16 16*s.* per cwt. The plaintiff in the presence and hearing of Mr. Evans asked Mr. J. T. Noakes whether he would recommend him (the plaintiff) to accept Mr. Evans's offer. Mr. Noakes advised him to do so, and the plaintiff agreed to sell the hops at that price. Mr. Noakes then drew out a sale note in duplicate.

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[1] 30 L. J. Exch. 254.

By the custom of the hop trade the purchase-money for hops is payable on the Saturday week following the day of the sale. This transaction took place on Friday the 19th of October; and the money would consequently have become payable in due course on Saturday, October the 27th. Mr. Noakes therefore drew out the following memorandum, and dated it the 19th of October, whereupon Mr. Evans requested him to alter the date to the 20th, in order that he might have another week's time for payment. The plaintiff and Mr. Noakes consented to this, and the alteration was accordingly made by Mr. Noakes, who then gave the memorandum so altered to Mr. J. C. Evans, who took the same away with him, and he has never yet returned it. The memorandum was torn from a book which contained a counterfoil, and which was filled up and retained by Messrs. Noakes.

The following is a copy of the memorandum first referred to: —

Messrs. Evans
Bought of J. T. & W. Noakes
Bags. Pockets. T. Durrell, } £ s.
33 Ryarsh and Addington } 16 16
20th,
Oct. 19th, 1860.

The following is a copy of the counterfoil above referred to: —

Sold to Messrs. Evans
Bags. Pockets. T. Durrell, } £ s.
33 Ryarsh and Addington } 16 16
20th,
Oct. 19th, 1860.

[In both documents 19th was struck through with the pen, and 20th inserted above.]

No memorandum (except as aforesaid) was signed or given by the defendants or any person on their behalf, nor was there any writing relating to the contract except as above set out and the invoice after mentioned. A sample of each of the pockets of hops was sent by Messrs. Noakes to the defendants the same evening; and the defendants have ever since retained them, and still keep them.

In the usual course of business, after the purchase is completed by the factor an appointment is made between the vendor and the purchaser for the hops to be weighed; for which purpose they are sent by the vendor to his factor's warehouse. In this instance the appointment was made for the following Tuesday, October 23; and on that morning the hops were sent to Messrs. Noakes's warehouse. The warehouseman of the factor generally weighs in behalf of the vendor, and the purchaser either comes himself or sends some one to see the hops weighed on his behalf. In this case the plaintiff came up to see his hops weighed, and the defendants sent one of their men (James Wenn) to see them weighed for them. Each weigher has a book in which he records the weight of each pocket, and also the excise weight, with the number or figure with which each pocket is marked or distinguished. On this occasion the weighing proceeded in the usual course until five pockets had been weighed, when a dispute took place between the weighers, and ultimately the defendants' weigher refused to weigh any more. The defendant R. P. Evans came into the warehouse at this time, and went to the scale and saw weighed the pocket that was therein. Having done so, he cut it open and took out a portion of the hops and said they were damp. The plaintiff denied that they were damp; but the defendant persisted in his statement, and finally said he should not take the hops at all, and left the warehouse with his man.

After the defendant and his weigher left the warehouse and after such refusal, the plaintiff's weigher completed the weighing, and the weight amounted in the whole to 50 cwt. 13 lb.

On the 9th of November, 1860, Messrs. Noakes sent to the defendants an invoice, of which the following is a copy: —

Messrs. EVANS & Co. BOROUGH.
To J. T. & W. Noakes.
1860.
cwt. lb. £ *s.* £ *s.*
Oct. 20, Durrell bt. 33 po. 50 13 @ 16 16, 841 19.

It was stated by Mr. Noakes at the trial that, a day or two after the difference relative to the weighing, he had an interview with the defendant R. M. Evans, at which he requested R. M. Evans to send and have the weighing completed, when R. M. Evans promised Noakes that he would do so and accept the hops and complete the purchase; but the defendants subsequently refused to do so, and thereupon the plaintiff instructed his attorneys to write and send a letter to the defendants, which was done.

Copy letter from plaintiff's attorneys: —

37 KING WILLIAM STREET, LONDON BRIDGE,
NOV. 9, 1860.

SIRS, — We have been consulted by Mr. Durrell of Banstead with reference to your refusal to complete your contract for the purchase of 33 pockets of hops, sold to you by Messrs. Noakes on behalf of our client on the 20th of October last.

We beg to enclose you the delivery order, and are instructed to inform you that the goods remain in Messrs. Noakes's warehouse, awaiting your order or disposal, and at your risk and costs; and further that unless the sum of £841 19*s.*, being the amount of the invoice already sent you for these hops, be paid to us by 11 o'clock on Monday morning, we shall take immediate proceedings against you for its recovery.

In the event of your deciding to resist this claim, we have to request a reference to your solicitors. We are, etc.,

INGLE & GOODDY.

MESSRS. R. M. EVANS & CO., GEORGE YARD, BOROUGH.

The invoice above referred to has ever since been retained by the defendants.

On the 9th of November the plaintiff's attorneys sent to the defendants in the first-mentioned letter a delivery order, of which the following is a copy: —

Messrs. NOAKES'S HOP WAREHOUSE,
Sparrick Row, Weston Street.

GROOMBRIDGE, — Weigh and deliver to Messrs. R. M. Evans & Co. 33 po. hops — T. I. Durrell — Ryarsh and Addington.
For J. T. & W. Noakes, P. N. NORRIS.

This delivery order the defendants refused to receive; and it was taken back by the clerk who brought it, and on the same day returned with a letter as follows: —

37 KING WILLIAM STREET, LONDON BRIDGE,
NOV. 9, 1860.

GENTLEMEN, — Our clerk has taken back the enclosed in error: we therefore return it to you. INGLE & GOODD".
Messrs. EVANS & Co.

The defendants returned it with the following letter: —

Messrs. Evans & Co. present their compliments to Messrs. Ingle & Gooddy, and beg to say the enclosed was taken back by their clerk at Messrs. Evans & Co.'s request.
SOUTHWARK, LONDON, Nov. 9, 1860.

The action was then commenced on the 15th of November, 1860.

No part of the said hops (except the samples) has ever been delivered to the defendants.

T. Jones, for the plaintiff.

Lush, for the defendants.

CROMPTON, J. In this case a verdict for the plaintiff was consented to, leave being reserved to enter a nonsuit; and if there was any evidence to go to the jury on which they might have found for the plaintiff, the verdict must stand, and the rule for entering a nonsuit be discharged. I certainly was at first struck at the way in which the case was put by my brother Wilde in the court below, and which was adopted by the rest of that court, — that what the defendant did was simply taking an invoice and asking to have it altered; and if the jury had found that, a nonsuit would have been right. But I cannot agree with my brother Wilde and Mr. Lush that the document in question was merely an invoice: on the contrary I think there was plenty of evidence to go to the jury on the question whether Noakes the agent was to make a record of a binding contract between the parties, and that there was at least some evidence from which the jury might have found in the affirmative. One of the defendants having seen Noakes on the subject of the purchase of the hops, afterwards the plaintiff and the defendant meet at Noakes's, and Noakes in their presence writes a memorandum in duplicate, except that the one copy has "bought" and the other "sold," and hands that which has "Messrs. Evans bought" on it to the defendant; he reads it, and takes it, and adopts it with the alteration ot the date which he had wished to be made, and which had been made in his presence. This was evidence that the parties did intend a binding record of the contract should be made and that Noakes was the agent of both parties to make such a binding contract. That being so, did Noakes do this? If this were the first case on the Statute of Frauds I should have doubted whether, if the vendee put his name at the top of the document, this would have been a signing within the statute. But it has been decided that it does not signify where the name is put, if it be put somewhere on the document by the parties themselves who are to be bound by the signature, or by the person having authority from them to make a contract on their behalf. Thus in Schneider *v.* Norris the defendant's name was printed at the commencement of an invoice to which he had added the plaintiff's name, and which he handed to the plaintiff, and it was held sufficient; and it seems to me that, when it is once established that, if the putting of the name be the act of the party, that is sufficient in whatever part of the document the name may be, a similar act of an agent must have the same effect. This case comes nearer to Johnson *v.* Dodgson than Graham *v.* Musson. In the former case the defendant wrote, "Sold J. Dodgson" (his own name) so and so, and requested the plaintiff's agent to sign; and the court held the defendant bound by a signature of this nature; and Parke, B., says: "I think this was a sufficient memorandum in writing. The defendant's name was contained in it in his own handwriting, and it was signed by the plaintiffs. The point is in effect decided by the cases of Saunderson *v.* Jackson and Schneider *v.* Norris. There the bills of parcels were held to be a sufficient memorandum in writing, it being proved that they were recognized by being handed over to the other party. Here the entry was written by the defendant himself, and required by him to be signed by the plaintiff's agent. That is amply sufficient to show that he meant it to be a memorandum of contract between the parties." In the present case the writing was by another in the presence of the defendant, but in every other point it is the same as Johnson *v.* Dodgson. In that case the defendant never meant when he put his name that the signature should be a signature within the Statute of Frauds, but he did intend to make a memorandum of the contract. So here it was clearly meant that there should be a memorandum of the contract between the parties. Lord Abinger, C. B., in the same case, Johnson *v.* Dodgson, says: "The Statute of Frauds requires that there should be a note or memorandum of the contract in writing signed by the party to be charged. And the cases have decided that, although the signature be in the beginning or middle of the instrument, it is as binding as if at the foot of it; the question being always open to the jury, whether the party not having signed it regularly at the foot meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it. But, when it is ascertained that he meant to be bound by it as a complete contract, the statute is satisfied, there being a note in writing showing the terms of the contract, and recognized by him. I think in this case the requisitions of the statute are fully complied with." That seems to me directly to apply to the present case. It is true the words "Messrs. Evans" were not written by the defendant himself, but he takes the document and sees the name written on it, and then returns it to Noakes to make a slight but important alteration, and so recognizes it as the record of the contract. The case therefore is not really different in principle from Johnson *v.* Dodgson; for supposing the person signing the name was the person intended by him whose name is signed to make a binding contract on his behalf, it follows that the person signing would have sufficient authority to put the signature; and there is nothing in any of the cases to show that it must be proved that the person signing it was expressly authorized to put the name, or that it was intended to put the name as a binding signature within the Statute of Frauds: the mere writing of the name is sufficient. If Noakes had formally signed the names of Evans and Durrell, he would clearly have had authority to do it; and if the person signing is the party authorized to make a binding contract, that is sufficient, although there was no express idea at the time that he should sign. Graham *v.* Musson had some weight with me at first; but on examination it is not so near the present case as Johnson *v.* Dodgson. Graham *v.* Musson turned on the nature of the signature by the clerk when he signed his own name: he did not sign the name of the defendant Musson, and in signing his own name he meant to sign as his employer's, the plaintiff's agent, and not as the defendant's. If he had signed Musson's name, the case would have been within the authority of Bird *v.* Boulter, and it may be that, even as it was, there was evidence to go to the jury. Bird *v.* Boulter is strongly in the plaintiff's favor. In that case the auctioneer's clerk was held to be the party intended and impliedly authorized to act as agent of both parties merely from the surrounding circumstances of the case; and the writing by him of the name of the purchaser was held sufficient, although it was never intended by the purchaser to give him distinct authority to make a signature binding under the Statute of Frauds. The cases of a broker and auctioneer, when properly considered, show the nature of the thing; when it is shown from the course of trade or the surrounding circumstances that the persons signing are the persons authorized to contract, then they are the persons to make a signature binding within the statute; and this may also be shown by evidence that the person sought to be charged afterwards assumed the memorandum to be a binding contract.

It may be that if the jury had found that this document was merely an invoice, and was treated by the defendants as such, the defendants would have been entitled to a nonsuit; but if there was any evidence to go to the jury of the contrary, then the plaintiff is entitled to keep his verdict. We think that there was evidence (and that is the only point on which we differ from the court below) that Noakes was intended by the defendant as well as the plaintiff to make a record of a contract which was to be binding upon both.

I am to add that my brother Willes entertains a strong view the same way; and indeed I believe he is of opinion, not only that there was evidence to go to the jury, but that the verdict ought to have been for the plaintiff.

BYLES, J. I am of the same opinion. I do not wish to go through the cases on the subject, but I cannot help stating my short view of the effect of the facts. It seems to me that there was evidence sufficient to sanction a verdict for the plaintiff. It is plain that the signature, though not at the foot of the document but at the beginning, is abundantly sufficient. Then in the first place was the plaintiff bound by what Noakes did? The Messrs. Noakes were employed by him as factors; there was therefore no doubt more evidence against him than against the defendants. But the defendant and the plaintiff knew what Noakes was doing. What does the defendant do? First of all he sees a duplicate written by the hand of the agent, and he knows it a counterpart of that which was binding on the plaintiff: he knew what was delivered out to him was a sale note in duplicate, and accepts and keeps it. The evidence of what the defendant did, both before and after Noakes had written the memorandum, shows that Noakes was authorized by the defendant; and the case comes directly within the terms of Lord Abinger's judgment in Johnson *v.* Dodgson.

BLACKBURN, J. I also am of opinion that there was evidence on which the jury might have found that the memorandum was signed on behalf of the defendants Messrs. Evans in such a way as to bind them. Noakes no doubt was not acting as broker as between the parties, nor did he purport to deliver bought and sold notes: in which case, if there had been a variance between them, there would have been no contract. Thornton *v.* Kempster, 5 Taunt. 786. Nevertheless there was evidence from which the jury might have inferred that that was a memorandum according to the decided cases, so as to be binding within the Statute of Frauds. In order to do this it is essential that there should be a signature made by an agent authorized to make it. Now "Messrs. Evans" was written by Noakes at the top of the document. If the matter were *res integra* I should very much doubt whether the name so written would be a sufficient signature; but in Saunderson *v.* Jackson, Lord Eldon, C. J., recognized as law that the name, though at the beginning, might be a sufficient signature, and it is now too late to question such a doctrine. If the name appears on the contract, and be written by the party to be bound or by his authority, and issued or accepted by him, or intended by him as the memorandum of a contract, that is sufficient. In Schneider *v.* Norris and Saunderson *v.* Jackson the name of the vendor, the person sought to be charged, was printed at the head of a bill of parcels; and in Johnson *v.* Dodgson the document was retained in the defendant's own possession, but there was evidence that the defendant intended that it should be the memorandum of the contract, and it was held binding on him, though there was strong evidence that the document was retained by the defendant in order to bind the other side, and that the document was not meant by him as binding himself, and as a voucher to the other side; and that circumstance it is important to observe as bearing on the present case, because what was handed to the defendant Evans was not meant as a voucher to the other side. The case in the court below proceeded on what was thrown out by my brother Wilde; and I agree with the decision of that court, if this document were a bill of parcels or an invoice in the strict sense, viz., a document which the vendor writes out, not as the account of both parties, but as being the account of the vendor, and not a mutual account. But in the present instance I cannot as a matter of course look at this instrument as an invoice or bill of parcels, as intended only as the vendor's account. Perhaps I should draw the inference that it was; but it is impossible to deny that there was plenty of evidence that the instrument was written out as the memorandum by which, and by nothing else, both parties were to be bound. [The learned judge then read the evidence as to what took place at Noakes's office.] There certainly was evidence, I may say a good deal of evidence, that Noakes was to alter this writing, not merely as the seller's account, but as a document binding on both sides. When therefore we get the name of Evans on a document intended to be a memorandum of a contract, the case is identical with Johnson *v.* Dodgson, except only that the defendant did not write the name himself: that circumstance however affords no solid distinction, except as to the weight of evidence; and I do not see any reason why Johnson *v.* Dodgson should be overruled. In that case we have the authority of two great judges; and what they say is that, when a document is drawn up under circumstances like the present, it is a question for the jury whether the party sought to be charged intended to be bound by the document. Graham *v.* Musson is not at all inconsistent with Johnson *v.* Dodgson. In Graham *v.* Musson the name of the defendant, the buyer, did not appear on the document; the signature was that of Dyson the agent of the seller, put there at the request of Musson the buyer, in order to bind the seller; and unless the name of Dyson was equivalent to that of Musson, there was no signature by the defendant; but in point of fact "J. Dyson" was equivalent to "for" or "*per pro.* North & Co., J. Dyson."

Judgment reversed; rule discharged.[1]

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[1] KEATING and MELLOR, JJ., delivered brief concurring opinions.

PARTON, Appellant, *v.* CROFTS, Respondent.

In the Common Pleas, February 3, 1864.

[*Reported in* 33 *Law Journal Reports, Common Pleas,* 189.]

Appeal from the decision of the judge of the County Court of Lancashire. holden at Liverpool.

The action was brought by the plaintiff (the respondent on this appeal) to recover £50 for loss and damage sustained in consequence of the non-performance by the defendant (the appellant on this appeal) of a contract for the purchase of 500 tons of Scotch pig-iron, and was tried at the said County Court without a jury on 9th of July, 1863. when the following evidence was given on the part of the plaintiff: —

On the 25th of August, 1862, the defendant called on Messrs. Bentley, Blain, & Co. of Liverpool, brokers (introduced and accompanied by a Mr. M'Monnies), and stated that he wished to make a purchase through them of Scotch pig-iron to the extent of 2000 tons. Mr. Bentley (Mr. Blain his partner being present at the interview) told the defendant that he thought they could buy the quantity he wished; but that they would make inquiries. The defendant then asked and was told the day's prices, namely, 58*s*. a ton; and he was also told that there would be an immediate deposit payable of 5*s*. a ton: in answer to which last remark he said that he was aware of the fact. Mr. Bentley added that the market that day was strong, and that the defendant before giving instructions to purchase had better make his own inquiries elsewhere, and return to their office after he had done so. The defendant said that it was not necessary for him to make other inquiries, as he was satisfied to leave the matter in the hands of Bentley, Blain, & Co.; and he instructed Mr. Bentley to buy (and acting on these instructions Mr. Bentley did buy) for him 2000 tons of Scotch pig-iron on the terms which are embodied in the contract notes hereinafter referred to.

At the date of this conversation Messrs. Bentley, Blain, & Co. had instructions from the plaintiff to sell as his brokers 500 tons of Scotch pig-iron, his property, then lying in Glasgow. They had similar instructions from other principals with regard to further quantities of the same description of iron; their instructions extending to more than 2000 tons. Mr. Bentley explained that to a certain extent his firm knew what they could do as to the sale; and that what he meant when he told the defendant they would inquire was, that they would inquire from their principals whether they would accept the price named; and this reference, Mr. Bentley added, applied to the whole quantity as to which they had instructions for sale. No question was asked at the trial as to how and when this reference was had. The plaintiff lived in Liverpool.

In the course of the afternoon of the same day Messrs. Bentley, Blain, & Co. sent the defendant a letter enclosing two contract notes for (in the whole) 2000 tons, one of such notes being for 1500 tons, and the other for the plaintiff's 500 tons, the subject-matter of this action.

The above letter and the contract note in question were produced by the defendant, and put in evidence by the plaintiff. The letter was in these terms: —

S. PARTON, ESQ.

DEAR SIR, — Enclosed please find contract notes for 2000 tons Scotch pig-iron, purchased this day on your account.

BENTLEY, BLAIN, & CO.

The contract note was in these terms: —

5 YORK BUILDINGS, LIVERPOOL, 25th of August, 1862.

Sold to S. Parton, Esq., on account of principals, 500 tons Scotch pig-iron of good merchantable brands, three-fifths No. 1, and two-fifths No. 3, at 57*s.* 9*d.* per ton, delivered in Glasgow; payment by 5*s.* per ton deposit at once, and the balance of 52*s.* 9*d.* per ton net cash in Glasgow on or before 21st November next, in buyer's option, on giving seven days' notice, against storekeepers' warrants for the delivery of the iron.

BENTLEY, BLAIN, & CO.

It was stated by Mr. Bentley that a contract note of the same date as the above, and relating to the same 500 tons of iron, was sent by the firm to the plaintiff, for whom as well as for the defendant Messrs. Bentley, Blain, & Co. acted as brokers in the transaction. That contract note was not tendered in evidence by the plaintiff; nor had any notice to produce it been given by the defendant.

There was no further evidence of any entry or memorandum of the transaction. The defendant did not pay the deposit according to the terms of the contract note, but promised payment in a few days. Ultimately however he refused to pay such deposit or to accept the iron, delivery of which it was admitted on the trial had been duly offered. In the mean time the market was, and continued to be, a falling market. It was also admitted that, if the plaintiff were entitled to recover, he was entitled to a verdict for the amount claimed.

For the defence the defendant was examined; and he denied that any such conversation, on the 25th of August or at any time, as that spoken to by Mr. Bentley and Mr. Blain, so far as related to himself, had occurred, or that he had given any instructions for the purchase of iron; and he added that the instructions given were by Mr. M'Monnies, and on his sole and separate account.

M'Monnies was not called.

It was objected on the part of the defendant that the documents above set out did not constitute a sufficient note or memorandum of the bargain to satisfy the 17th section of the Statute of Frauds; and on the evidence it was contended on his behalf that Messrs. Bentley, Blain, & Co., even if their version of the facts was accepted as true, were and acted as factors, not brokers, in the transaction.

The judge found as a fact on the evidence that Bentley, Blain, & Co. were and acted as brokers in the transaction, and that they were authorized as the defendant's agents to make the contract referred to; and he held as matter of law that the documents set out were sufficient to satisfy the 17th section of the Statute of Frauds. A verdict was thereupon entered for the plaintiff for £50.

The question for the opinion of the Court of Common Pleas was, whether upon the facts found by the judge he was right in point of law in his determination.

Quain, for the appellant.

C. Russell, for the respondent.

Erle, C. J. I am of opinion that the judgment of the County Court judge was right. The action was for not accepting goods sold by the plaintiff to the defendant. It is clear from the facts found by the County Court judge that Bentley & Co. the brokers were employed as such by both the buyer and the seller. The buyer proposed to take the iron, the subject of the action, at a certain price, and that price was accepted by the seller; and in my opinion the broker was the common agent of both parties, and had authority to make and so made the contract between them. The question which we have to determine is, whether the requisites of the Statute of Frauds have been complied with; that is to say, whether there has been, as required by that statute, a memorandum in writing of the contract. I am careful in drawing the distinction between making a contract and a memorandum showing that the contract has been made, and which may be made much later than the contract. In the present case the memorandum of the contract which was produced was signed by the brokers, who were agents for both parties; and it stated that the iron was sold to the defendant, and specifies the price. Mr. Quain says that the usual form of handing the bought note to the purchaser and the sold note to the seller was not complied with here by the brokers, and that the only one of the two instruments which was produced was not sufficient to satisfy the statute. I am of opinion that the note produced contained a memorandum of the contract between the parties, signed by their agents lawfully authorized as required by the statute. It is said that the note has only the term "sold," and has not the term "purchased," but the relation of buyer and seller cannot come into existence without there has been a purchase as well as a sale; and when therefore the memorandum says "sold," it in effect says also bought. In Sievewright *v.* Archibald, 17 Q. B. Rep. 103; S. C. 20 Law J. Rep. (N. S.) Q. B. 529, the bought and sold notes differed, and so the sufficiency of the memorandum of the contract was defeated; but here only one of the notes was produced, which therefore distinguishes this case from that of Sievewright v. Archibald. I am of opinion that it is enough for the plaintiff to produce in evidence one of the notes signed by a person acting as agent for both parties, and I think that the County Court judge came to a right conclusion.

Williams, J. I am of the same opinion. It appears that Bentley & Co. were constituted by the defendant as his agents to purchase the iron for him on certain terms; and I think if the Statute of Frauds had never been passed there was clearly evidence of a sale to the defendant of the iron on the terms stated in the sold note. Then is there anything in that statute which makes it invalid? I think not, for I think the sold note is a memorandum in writing of the contract, and that it was signed by the authorized agents of the defendant. My brother Keating has gone to chambers, but he desired me to state that he concurs in this judgment.

Willes, J. I think also that everything has been done which the Statute of Frauds requires. If in ordinary practice the bought and sold notes were different things, there might be some ground for Mr. Quain's argument; but it is well known that in ordinary practice they are identical, the one being a copy of the other, and therefore it would be a violent assumption to assume in favor of the defendant that the bought note was a very different one from the sold note, which had been delivered to the defendant and produced by him at the trial. For these reasons I agree with what was held by Lord Denman on the first trial of Hawes v. Forster, and that the one note put in evidence is to be presumed, until the contrary be shown, to represent the contract between the parties.

Judgment for the respondent.

THOMPSON v. GARDINER.

In the Common Pleas Division, Court of Appeal, June 28, 1876.

[*Reported in* 1 *Common Pleas Division*, 777.]

The judgment of the Court (Brett, Grove, and Archibald, JJ.) was delivered by

Brett, J. This was an action for not accepting butter pursuant to contract. It was tried before me, and I directed judgment to be entered for the plaintiff. A motion has been made to enter judgment for the defendant in pursuance of leave reserved by me for that purpose, on the ground that there was no evidence of any memorandum of the contract within the Statute of Frauds. The facts were these: The contract was made with a person who must be taken to be a broker, and who was acting for the seller only, and not for the buyer. The defendant agreed upon the terms of sale with the broker. These terms were not disputed. If there was a sufficient memorandum in writing signed by or on behalf of the party to be charged, the defendant had unjustifiably refused to accept the butter. The broker sent a note of the contract to the buyer and also to the seller. He signed the note which was sent to the seller, but he did not sign that which he sent to the buyer. He, however, entered in his broker's book both the bought and the sold note, and signed them both. The butter was tendered to the defendant some time after the note was sent to him, he having kept the latter until then without complaint or remonstrance. The reason he assigned for his refusal was, not that he had not entered into the contract, but that the note sent to him was not signed. I decline to enter into the terms of the two notes, as to which was the bought and which was the sold note. The real question upon the notes on this point always turns on the person to whom the note is sent. If the broker is authorized by the buyer to make a contract, the note sent by him to the seller is the note which is intended to be the bargain, and *vice versâ*. The note which was to bind the defendant here, was the sold-note. We are not driven to rely on the notes in the broker's book, because the note delivered to the plaintiff (if the broker had authority to sign the memorandum) binds him. The authorities are conclusive to show that the broker acting for one of the contracting parties, making a contract for the other, is not authorized by both to bind both. But the broker who makes a contract for one may be authorized by that person to make and sign a memorandum of the contract. That has frequently been held. The question here is whether there was any evidence that the broker was so authorized. The evidence was, that a note of the bargain was sent to the buyer; and that his only objection was, not that the broker who sent it had no authority to send it, or that no such contract was made, but that the memorandum sent to him was not signed. That was ample evidence for the jury that the defendant recognized the authority of the broker to sign for him. Luckily, however, the broker did sign the note which was to bind the defendant, that is, the sold note. Then, this further fact remains, that the broker kept a book in which both bought and sold notes were entered and signed by him. I therefore think that, even if the signature to the note sent to the seller was not sufficient to bind the buyer, the signature in the broker's book was enough to satisfy the statute. The broker being a broker authorized to make a memorandum of the contract on the defendant's behalf, the entry in his book was sufficient evidence of a memorandum of the bargain signed by a duly authorized agent within the meaning of the Statute of Frauds to bind the defendant.

My Brother Grove has doubts, and wishes me to say that, in his judgment, the fact of the defendant keeping the note sent to him without objection was not sufficient to show an authority in the broker to bind him. But he thinks that, inasmuch as when the defendant made the objection he confined it to saying, "You did not sign it," he thereby admitted the agency of the broker to make the contract on his behalf. He therefore agrees with me that judgment was rightly entered for the plaintiff.

My Brother Archibald authorizes me to say that he concurs in the above judgment, and in the reasons I have given.

Judgment for the plaintiff.

JACOB *v.* KIRK.

At Nisi Prius, coram Parke, B., June 5, 1839.

[*Reported in 2 Moody & Robinson, 221.*]

This was an action of assumpsit for goods bargained and sold. There was also a count on an account stated.

First plea, *non assumpsit;* second, no note in writing to satisfy the Statute of Frauds; and issue thereon.

It was proved that the plaintiff travelled over the country selling cigars, and that on the 3d July, 1838, the defendant ordered of him about fourteen pounds of cigars of different qualities. It was also proved that at the time of the order being given the plaintiff had not the cigars in his possession, but that it was his habit, after having obtained the orders, to send them from a wholesale dealer in London.

In order to satisfy the Statute of Frauds, the plaintiff produced a memorandum book, containing amongst other notes and orders the following pencil entry: "Mr. Kirk, 6 doz. King's, 6 doz. Queen's, at 25*s.* per lb.; 2 doz. others, at 20*s.* per lb.; to Russell Street, Manchester. Signed K. K.;" which signature was proved to be in the defendant's handwriting.

The plaintiff's name nowhere appeared in the book, nor was there any other evidence to connect the plaintiff with the order so entered, save a letter from the defendant in the month of August following, addressed to the plaintiff, stating that he had received a letter from the plaintiff; "that he was surprised at the plaintiff's expecting him to accept the cigars, which, instead of having been sent in nine or ten days, had not arrived in Manchester till the 10th of August;" that he therefore should not think of accepting them, and referred him to his solicitor. But the letter did not refer to the entry in the above book. This being the plaintiff's case,

Erle, for the defendant, submitted that the plaintiff must be nonsuited.

Platt and *Martin*, contra.

Parke, B. My opinion is that the first count is not made out, as there was not here a bargain for any specific ascertained chattels; but with respect to the application for an amendment, I must say I am disposed to open the door for amendments as wide as possible. By allowing the amendment here, and so giving the plaintiff an opportunity of bringing forward his real cause of action, I consider I shall be meeting the justice of the case; but of course the defendant must have time for pleading *de novo,* and the plaintiff must pay the costs of the day and of the amendment. I should greatly doubt, however, whether it will be worth while for the plaintiff to avail himself of these terms; for I am of opinion that he cannot get over the objection under the Statute of Frauds. My opinion is that the letter ought clearly to refer to the pencil memorandum; and that the whole mischief intended to be guarded against by the statute would be incurred, if verbal evidence were admitted to show that the documents must necessarily be presumed to refer to each other.

The plaintiff's counsel, notwithstanding this intimation of the learned Baron's opinion, requested to have the amendment made; and Erle, for the defendant, thereupon elected to plead forthwith; which being done, the defendant obtained a verdict on the ground that the cigars had not been sent within a reasonable time, as averred in the amended count; and under the direction of the learned Baron the defendant took a verdict also on the plea of the Statute of Frauds.

Verdict for the defendant.

BUXTON *v.* RUST.

IN THE EXCHEQUER CHAMBER, JUNE 3, 1872.

[*Reported in Law Reports,* 7 *Exchequer,* 279.]

APPEAL from the decision of the Court of Exchequer, discharging a rule to enter a verdict for the defendant.

At the trial before Pigott, B., at the Middlesex sittings, in Trinity Term, 1871, the following facts were proved: —

The plaintiff is a dealer in wool in London, and the defendant a farmer and cattle dealer, at Little Leighs, near Braintree. On the 11th of January, 1871, the parties met at Braintree, and entered into a contract for the purchase by the plaintiff from the defendant of some wool. The following memorandum, containing the terms which had been agreed upon, was drawn up and signed by the plaintiff, and handed to the defendant: —

"Bought Mr. G. J. Rust's (the defendant's) wool as examined, at 15*d.* per pound, net cash; greasy and damaged, at 12*d.* per pound, net cash; to be weighed and paid for on the premises, one half; and the whole to be cleared in about twenty-one days. The wool to be delivered at the Chelmsford railway station free of charge, net weight." The wool was worth £150.

On the 7th of February the plaintiff intimated to the defendant that he was coming to Braintree to weigh and pay for the wool, whereupon the defendant, on the 8th of February, wrote him thus: "It is now twenty-eight days since you and I had a deal for my wool, which was for you to have taken all away in twenty-one days from the time you bought it. I do not consider it business to put it off like this; therefore I shall consider the deal off as you have not completed your part of the contract. I shall now sell the wool to you again at a different price, or shall sell it to some one else. At the same time I shall be at Braintree to-morrow, Thursday, at eleven o'clock, ready for a fresh deal if you please to come; but do as you please about it. Yours, G. J. Rust." The plaintiff had started to weigh the wool before this letter reached him, and on reaching Braintree the defendant told him verbally he could not have the wool. At the same interview the plaintiff asked for a copy of the contract, and the next day received the following letter from the defendant signed by him: "9th February. Dear Sir, I beg to enclose copy of your letter of the 11th January, 1871" [here followed a copy of the memorandum of the 11th of January]. The plaintiff subsequently applied to the defendant for delivery of the wool, but the defendant took no notice of the application. This action was then brought.

It was contended that the defendant was not liable, inasmuch as there was no sufficient memorandum in writing of the contract signed by him to satisfy the Statute of Frauds, s. 17. The learned judge ruled that there was, and asked the jury whether the plaintiff, although more than the actual twenty-one days had elapsed, had fulfilled his part of the contract. The jury found that he had, and a verdict was entered for him for £150, with leave to move to enter a verdict for the defendant.

A rule was accordingly obtained on the ground that there was no memorandum signed by the defendant sufficient to satisfy the Statute of Frauds (29 Car. 2, c. 3), s. 17.

WILLES, J. I am of opinion that the judgment of the court below was right. The action was brought for the non-delivery of wool, alleged to have been sold to the plaintiff on the 11th of January, 1871; and there is no doubt that a bargain was made on that day. The question is whether it was sufficiently backed by a memorandum in writing, which was necessary under the Statute of Frauds, s. 17, the wool being worth more than £10, and there having been no delivery either of the whole or in part, and no part payment. Now it is certain there was a contract, and, in the first instance, a memorandum of it signed by the plaintiff and assented to by the defendant. The defendant, therefore, could have treated the contract as binding. For as regarded the chargeability of the plaintiff, the memorandum signed by him and assented to by parol by the defendant, would be sufficient. So it was decided in this court not long since, in a case (Reuss *v.* Picksley, Law Rep. 1 Ex. 342) where we approved the judgment of the Court of Common Pleas in Smith *v.* Neale, 2 C. B. (N. S.) 67; 26 L. J. (C. P.) 143.

But the memorandum, though binding on the plaintiff, was not then binding on the defendant because he had not signed it, and the question before us is, whether the letters signed by him, which afterwards passed, constitute a sufficient recognition of the contract by him. On the 7th of February the plaintiff wrote a letter clearly referring to the contract, and showing a willingness on his part to fulfil it. The defendant answers on the 8th, and in the course of his letter says: "I shall consider the deal off as you have not completed your part of the contract;" writing of the deal between them as a contract. Now it appears to me that having regard to the cases of Shortrede *v.* Cheek, 1 Ad. & E. 57, and Macdonald *v.* Longbottom, 1 E. & E. 977, 987; 28 L. J. (Q. B.) 293; 29 L. J. (Q. B.) 256, it might be well worth considering whether evidence would not have been admissible to show that the contract referred to in the letter of the 8th of February was the bargain made on the 11th of January. In the former case it was held that the words "the promissory note" used in a memorandum of a guarantee might be proved to refer to a certain promissory note made by the defendant's son and payable to the plaintiff. In the latter, evidence was admitted to show that the words, "your wool," referred to certain particular wool which the plaintiff had under his control at the time of the contract. And here it might, I think, well be contended that the "contract," mentioned in the letter of the 8th, might have been shown to be the contract of the 11th of January, and then that letter, on the principle that *verba relata inesse videntur*, would itself be sufficient. But we need not decide this point, because we have also the letter of the 9th of February sent by the defendant to the plaintiff, and enclosing a copy "of your letter of the 11th of January." The copy enclosed is in fact a copy of the memorandum of that date; and it may be that this also would be quite enough on the same principle that a printed name on an invoice has been held a sufficient signature. Schneider *v.* Norris, 2 M. & S. 286. However this may be, I am of opinion that the letters of the defendant of the 8th and 9th of February satisfy the Statute of Frauds. They amount to this. The defendant says: "I did enter into a contract with you on the 11th of January, but I will not perform it for a particular reason, and in order to show that my construction of the contract is the correct one, I forward you a copy of its terms." This is a sufficient admission, and the fact that it was accompanied by a repudiation of the obligation to perform the contract, does not prevent its being used as an admission. That was decided in the two cases referred to in the Court of Common Pleas of Bailey *v.* Sweeting, 9 C. B. (N. S.) 843; L. J. (C. P.) 150, and Wilkinson *v.* Evans, Law Rep. 1 C. P. 407. The judgment must therefore be affirmed.

BLACKBURN, J. I give no opinion as to whether the letters either of the 8th and 9th of February, taken singly, would constitute a sufficient memorandum to bind the defendant. But I am clearly of opinion that the two taken together are enough. First, we have a contract made on the 11th of January. Then on the 8th of February there is a record of its existence in the defendant's letter where he refers distinctly to the contract, and wishes to escape performance upon the grounds mentioned. Immediately afterwards he encloses a copy of the contract, stating that he sends a copy of "your letter of the 11th of January," and these words must necessarily refer to a copy of the memorandum of the bargain. Taking the two letters together, therefore, I have no doubt that the defendant is bound under the 17th section of the statute.

I may add, with reference to the statement read from Blackburn on the Contract of Sale, p. 66, to the effect that "it seems difficult on principle to see how an admission of the terms of a bargain signed for the express purpose of repudiation can be considered a memorandum to make the contract good," that the point has been clearly settled since the publication of that book by the decisions of the Court of Common Pleas, which have been referred to, and from which I do not see any reason to dissent; the rule they establish is as logical and more convenient than that suggested by myself.

Judgment affirmed.[1]

PEIRCE *v.* CORF.

IN THE QUEEN'S BENCH, JANUARY 27, 1874.

[*Reported in Law Reports,* 9 *Queen's Bench,* 210.]

APPEAL from the County Court of Lancashire holden at Liverpool.

The action was brought to recover the sum of £30, for damage sustained by the plaintiff through the negligence of the defendant, as an auctioneer, in not making a binding contract with Thomas Maguire, to whom a mare of the plaintiff's had been knocked down at a sale by auction at the defendant's repository, where the mare had been sent by the plaintiff to be sold.

At the trial the judge directed a verdict to be entered for the plaintiff, on the following facts: —

In March, 1872, the plaintiff, being the owner of a mare, placed her in the hands of the defendant (who is an auctioneer and proprietor of a horse repository, where, under the name of Lucas & Co., he holds periodical sales of horses by auction) with directions to offer her for sale at one of his public sales.

Accordingly the defendant advertised the mare with a number of other horses for sale by auction on the 28th of March, 1872, and circulated a printed catalogue of the horses and things intended to be sold at this sale.

In the catalogue the plaintiff's mare was numbered 49.

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[1] LUSH, BRETT, and BYLES, JJ., delivered brief concurring opinions. KEATING J., also concurred.

Upon the catalogue were printed the conditions of sale, the catalogue and the conditions forming one document.

The catalogue was headed, "To be sold by auction by Messrs. Lucas & Co., on Thursday, 28th March, 1872, at 12 o'clock, at their repository, Liverpool, 50 valuable horses." Then followed the conditions of sale, and afterwards an enumeration of the lots to be sold. The description of the plaintiff's mare was inserted thus: "Lot 49: Gray mare, 6 years old, 15–3 hands high, steady to ride and drive."

Prior to the sale the defendant (according to his practice) caused to be made in such of the columns in his "sales ledger" as were applicable to matters ascertainable before the sale, entries relating to the horses described in the catalogue. In this ledger the horses are entered in the same order, and were numbered as in the catalogue.

On the 28th of March, 1872, the lots described in the catalogue were put up for sale under the conditions by the defendant as auctioneer.

Neither the catalogue nor the conditions of sale were annexed or affixed to the "sales ledger," nor are they referred to therein; but the defendant during the sale held in his hand a catalogue with the conditions of sale.

The plaintiff's mare was, in her turn, according to numerical order in the catalogue, put up for sale, and knocked down to Thomas Maguire for thirty-three guineas.

Thereupon the defendant's clerk wrote in the columns of the "sales ledger," left blank for the purpose opposite to the lot in question, the name of the purchaser and the price.

The "sales ledger" was headed: "Select sales by auction, Thursday, 28 March, 1872." And the entry as to the plaintiff's mare was as follows: —

"Owner: Peirce. Lot 49: Gray mare, age 6. Warranty as to soundness: ———. Warranty as to harness: 'Ride and drive.' Reserve: C. E. Purchaser: T. Maguire, £33. Amount: ———. Paid or entered: Commission, £1 19*s.* 6*d.* Livery: 10*s.* 6*d.* Total charge: £2 10*s.* 0*d.* Memo. returned."

The defendant did not ask for or obtain any deposit from Thomas Maguire, nor was anything given by the latter person in part payment.

As soon as the sale was over, Thomas Maguire requested the defendant to put the mare into harness, in order that he might before taking delivery test whether she was steady in harness. This was accordingly done, and Thomas Maguire, not being satisfied with the mare's steadiness, declined to take her, and thereupon wrote and handed to the defendant the following letter: "Liverpool, 28 March, 1872. Gentlemen, — I return the gray mare, Lot 49, bought at your sale this day, as not being steady in harness as warranted. Thomas Maguire."

Thomas Maguire refusing to take delivery of and pay for the mare, she was, after notice given to him, resold on the 16th of May, 1872, for the sum of £29 8*s*. The plaintiff thereupon brought an action in the County Court at Liverpool against Thomas Maguire, for the recovery of damages in respect of the loss sustained by the plaintiff by reason of Maguire's refusal to take the mare. This action was tried before the judge on the 23d October, neither the "sales ledger," nor Maguire's letter, being put in evidence; at the conclusion of the case of the plaintiff, the then defendant's counsel contended that no signed note or memorandum in writing of the bargain sufficient to satisfy the requirements of the 17th section of the Statute of Frauds had been proved. The judge nonsuited the plaintiff.

The plaintiff then commenced the present action against the present defendant. At the hearing the defendant put in evidence the catalogue and the conditions of sale, the sales ledger, and Maguire's letter. The defendant also proved by his own parol evidence that the entries, No. 49 of the catalogue and in the sales ledger related to the same animal, that is to say, to the mare of the plaintiff, and to the sale on the 28th of March.

It was contended on behalf of the defendant that there was evidence of a signed note in writing of the bargain, that is to say, of the sale of the mare to Maguire on the 28th of March, sufficient to satisfy the requirements of the 17th section of the Statute of Frauds. The judge was of opinion that there was no proof of a sufficient connection, by reference or otherwise, between the conditions of sale and the entries in the sales ledger; and gave judgment for the plaintiff.

The question for the opinion of the court was, whether under the circumstances there was evidence of a signed note or memorandum in writing of the bargain, sufficient to satisfy the 17th section of the Statute of Frauds.

Herschell, Q. C. (*Gully* with him), for the defendant.

Wheeler, for the plaintiff.

BLACKBURN, J. I am of opinion that the decision of the County Court judge should be affirmed. The defendant, who is an auctioneer, having undertaken to sell the mare at a price exceeding the sum of £10, was bound, as part of his duty, to take reasonable and proper care that the contract of sale was binding. The mode in which contracts are made by an auctioneer — and which must now be considered as recognized at law — is, that when an auctioneer is selling he has a catalogue to which are annexed the conditions of sale, and he has authority from the highest bidder to sign the catalogue on his behalf, and if the auctioneer signs the catalogue with the conditions, that is a sufficient memorandum in writing of a contract within the Statute of Frauds to bind the purchaser. But in order to make a valid contract, the document the auctioneer signs on behalf of the buyer must contain all the terms of the contract; the contract being, in fact, subject to the conditions contained in the catalogue, and the purchase being at the price noted at the time. The memorandum, to be a good memorandum, must be signed in such a manner that when the auctioneer attaches his signature it authenticates the contract as to the price and conditions of sale. I have already said that the usage of sales by auction which we must take notice of is, that the auctioneer is the person who has authority to sign, and generally he does wisely if he signs upon the catalogue. I am not prepared to say, if the auctioneer had a ledger or book in which the conditions were copied out, and he signed that ledger, that that, without other evidence, might be said to be a sufficient contract, although he had not signed the catalogue; but I take it as quite clear that the auctioneer's clerk has no authority to sign by the general custom; although, as Bird *v.* Boulter, 4 B. & Ad. 443, decided, there may be special circumstances to show that an auctioneer's clerk had authority to sign; where the bidder, that is, the person to be charged, by word or sign authorizes the auctioneer's clerk to sign on his behalf, he makes him his agent to sign, although by the general custom the auctioneer's clerk would not be the bidder's agent. The present case finds that the auctioneer's clerk signed a document called the sales ledger. There is nothing in the case that leads me to conclude that the ledger was intended to be shown or was known to the bidders. The ciphers in it referring to a reserve bid is a matter that would be kept by the auctioneer probably from his own clerk, and would lead to the conclusion that it was not intended that the bidder should see the sales ledger. I should be inclined to think that the defendant's clerk, in signing that document, was signing it as an agent employed by his master, the auctioneer, and not by the bidder; that is what I should infer; but however that may be, this point does not appear to have been taken before the County Court judge. What he decided was, assuming that the writing of Maguire's name in the sales ledger was a signature made by an agent with authority, that as there was not any reference in the sales ledger to the conditions of sale, there was no sufficient memorandum within the Statute of Frauds to constitute a binding contract with Maguire for the purchase of the mare. In Hinde *v.* Whitehouse, 7 East, 558, the auctioneer read the conditions, and then laid them on his desk; he held the catalogue in his hand and wrote down the name of the purchaser opposite the lots in the catalogue. Lord Ellenborough held that the contract, when made, was subject to the conditions; and as the contract that was signed did not incorporate the conditions, there was no memorandum of a bargain under the conditions. The catalogue and the conditions were not connected physically, nor had the catalogue any internal reference to the conditions to show they were incorporated. In the present case it was argued by Mr. Herschell that, inasmuch as the sales ledger was dated on the same day as the catalogue, and referred to certain "lots" which were identical with the lots in the catalogue, it must have referred to that particular sale on that day of those particular lots, and that there was a sufficient connection between the sales ledger and the catalogue, so that the lots were necessarily sold subject to the conditions in the catalogue. I am not able to concur in that argument. I am not aware there is any custom known to the law, and I do not believe there is such a custom as to make it necessary that every sale by the auctioneer should be upon the terms of the catalogue; on the contrary, in many instances the terms of the catalogue are departed from, and there is often a verbal notice, although the particulars are so and so, yet this lot will be put up subject to such a condition, and that practice often gives rise to disputes as to whether the party purchasing heard of the alteration in the conditions; and I do not think there is any usage or universal custom from which it follows that every sale is taken to be subject to the conditions as stated in the catalogue; I therefore cannot think that there is sufficient reference in the one to the other.

There is another point. After the sale Maguire wrote a letter to the defendant, in which he says: "I herewith return the gray mare, lot 49, bought at your sale this day, as not being steady in harness as warranted." I think that letter amounts in effect to a statement by Maguire that he bought the mare at the defendant's sale, and I think parol evidence would be admissible to show that he bought it subject to the conditions of the catalogue; and I am inclined to think, though it is not necessary to decide it, the letter is equivalent to Maguire saying: "I return the gray mare which I bought at your sale upon the conditions of the catalogue;" but such a writing would be a defective memorandum under the Statute of Frauds, because it does not state the price at which the mare was bought. But it may be said it sufficiently refers to the price written down by the clerk in the sales ledger. This point does not seem to have been raised before the County Court judge; but if it had been, I should have been of opinion that, in order to make out that the letter refers to the price written down by the clerk, it is essential to show that the clerk, when he was writing the price in the sales ledger, wrote it down in such a manner that the bidder was aware that he was writing it down as a memorandum for him.

I think that there is no sufficient memorandum in writing within the Statute of Frauds, and our judgment must be for the plaintiff.

Judgment for the plaintiff.[1]

LONG *v.* MILLAR.

IN THE COMMON PLEAS DIVISION, COURT OF APPEAL, MAY 14, 1879.

[*Reported in* 4 *Common Pleas Division*, 450.]

ACTION to recover damages for breach of contract to sell land.

At the trial before Manisty, J., during the Easter Sittings in Middlesex, 1878, the following facts were proved:—

The defendant was an estate agent, and was employed by one

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[1] QUAIN and ARCHIBALD, JJ., delivered concurring opinions.

Goddard to sell three plots of land at Hammersmith for the sum of £310. Afterwards Goddard spent certain sums of money in respect of the property, and became unwilling to sell it for less than £450; but of this change in Goddard's intentions the defendant was ignorant. The plaintiff agreed with the defendant to buy the property for £310, and to pay a deposit of £31 in respect of the purchase. The plaintiff signed the following document: —

21st September, 1877.

I hereby agree to purchase the three plots (40 feet frontage) of freehold land in Rickford Street, Hammersmith, for the sum of three hundred and ten pounds, and I agree to pay as a deposit and in part payment of the aforesaid purchase-money the sum of thirty-one pounds, and to complete the purchase and pay the balance of the purchase-money on or before the 5th day of October next.

£310	0	0	purchase-money
31	0	0	deposit
£279	0	0	balance.

GEORGE LONG.

The defendant signed a receipt for the deposit paid by the plaintiff in the following form: —

21st September, 1877.

Received of Mr. George Long the sum of thirty-one pounds as a deposit on the purchase of three plots of land at Hammersmith.

£31 0 0. CHAS. W. MILLAR.

Goddard, however, refused to complete the purchase for the sum of £310, and required £450, as the price of the plots of land. The defendant communicated these terms to the plaintiff, and offered to return the deposit, but the plaintiff insisted upon having the plots of land at the price of £310, and after some correspondence the present action was commenced. The defendant paid into court the sum of £31.

The jury found, first, that the defendant sold absolutely; secondly, that he sold as principal; thirdly, that he represented that he had authority to sell for £310; fourthly, that he actually had authority; and they assessed the damages at £70. Upon these findings Manisty, J., gave judgment for the plaintiff.

The Common Pleas Division ordered a new trial, on the ground that the second finding of the jury was against the weight of evidence.

The plaintiff appealed against the order of the Common Pleas Division.

The defendant appealed from the judgment of Manisty, J.

Holl, Q. C., and *G. Sills*, for the defendant.

Francis Turner, and *A. G. M. McIntyre*, for the plaintiff.

Cur. adv. vult.

THESIGER, L. J. The first question is, whether there is a sufficient reference in the receipt signed by the defendant to allow us to connect it with the document signed by the plaintiff. When it is proposed to prove the existence of a contract by several documents, it must appear upon the face of the agreement signed by the party to be charged that reference is made to another document; and this omission cannot be supplied by verbal evidence. If, however, it appears from the instrument itself that another document is referred to, that document may be identified by verbal evidence. A simple illustration of this rule is given in Ridgway *v.* Wharton, 6 H. L. C. 238, 27 L. J. (Ch.) 46; there "instructions" were referred to; now instructions may be either written or verbal; but it was held that parol evidence might be adduced to show that certain instructions in writing were intended. This rule of interpretation is merely a particular application of the doctrine as to latent ambiguity. Although parol evidence may be given to identify the document intended to be referred to, it must be clear that the words of the document signed by the party to be charged will extend to the document sought to be identified. In the present case the difficulty is whether there is a sufficient reference in the receipt to the document signed by the plaintiff. This document is somewhat informal, and does not contain such language as we should expect a lawyer to use; nevertheless, it contains all the terms necessary to create a valid contract except the name of the vendor; and the receipt contains the word "purchase," which must refer to the purchase of the plots of land mentioned in the document signed by the plaintiff; if we read the two instruments together, we shall not be unduly straining the law by holding that the two, taken together, form a complete contract; our decision will not go beyond the decisions in Allen *v.* Bennett, 3 Taunt. 167, and in Baumann *v.* James, Law Rep. 3 Ch. 508. If the two documents can be connected together, the objection fails that no vendor is named. These documents were meant to be exchanged between the parties; the one was drawn up with the intention that it should operate as a complete agreement; the other contained an acknowledgment of the payment of the deposit; they were respectively signed by the parties, both of whom, it must be taken on the findings of the jury, intended to bind themselves personally. The documents were meant to be read and compared with one another, and I think them sufficient to constitute a contract.

The only ground remaining to be considered is whether there should be a new trial. I think that although the defendant was an estate agent, there is some ground for saying that he intended to bind himself personally; therefore we cannot say that the findings were so utterly wrong as to enable us to enter judgment for him. There must be a new trial. *Appeals dismissed.*[1]

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[1] BRAMWELL and BAGGALLAY, L. JJ., delivered concurring opinions.

OLIVER *v.* HUNTING.

IN THE CHANCERY DIVISION, FEBRUARY 2, 3, 1890.

[*Reported in* 44 *Chancery Division*, 205.]

IN August, 1888, Emma Oliver, a married woman, possessed of considerable separate estate, negotiated with a Mr. Hunting for the purchase of a freehold property known as the Fletton Manor House estate. Eventually she agreed to purchase it for £2,375, and on the 7th of September, 1888, he signed the following document: —

Memorandum of terms of agreement between Mr. Hunting and Mrs. Oliver: —

> Price £2,375.
> Vendor to make good title.
> Purchaser to pay for her own conveyance.
> Fixtures included in purchase.
> Purchase to be settled as soon as possible.
> Possession on 25th September.
> Deposit to be paid on the 10th.

On the 12th of September, 1888, Mr. Hunting wrote and sent a letter to Mrs. Oliver in the following words: — "I beg to acknowledge receipt of check value £375 on account of the purchase-money for the Fletton Manor House estate."

Mr. Hunting having refused to complete, Mrs. Oliver commenced this action against him, claiming specific performance of the contract of the 7th of September, 1888, and alleging in her statement of claim that in pursuance of the said contract she, on the 10th of September, 1888, paid to Mr. Hunting the sum of £375 as a deposit and in part payment of the said purchase-money, and submitting that the memorandum of the 7th and the letter of the 12th of September, 1888, formed a valid contract and a sufficient memorandum within the Statute of Frauds.

Mr. Hunting, by his statement of defence, did not admit any of the allegations in the statement of claim, and relied on the Statute of Frauds. Issue was joined. This was the trial of the action.

Mrs. Oliver in her evidence deposed that she sent the check of £375, mentioned in the letter of the 12th of September, on account of the purchase-money of the Fletton Manor House estate. It was part of the £2.375. No other money was payable by her to the defendant. The £375 was the balance that Mr. Hunting was to receive, because the £2,000 was to be paid over to a mortgagee of the property. Her solicitor, Mr. Law, was going to find the £2,000 for her.

Neville, Q. C., and *Dunning*, for the plaintiff.

Warmington, Q. C., and *Swinfen Eady*, for the defendant.

KEKEWICH, J. The elementary proposition about which there is no doubt is this, — the memorandum to be signed by the party sought to be charged, so as to bring a particular case within the Statute of Frauds, need not be on one piece of paper, nor need it be a complete document, signed by the party at one and the same time. It may be contained in two or more pieces of paper, but they must be so connected that you can read them together, so as to form one memorandum of the contract between the parties. Directly you get beyond that, you get into difficulty. One can illustrate that in a simple manner. An intending purchaser accepts an offer made by a proposing vendor thus: "In reply to your letter of the 14th instant." Can one annex to that reply the letter of the 14th instant? Surely one cannot, without inquiring what letter it is; unless the purchaser has, with unusual prudence, completed the reference by saying, "In reply to your letter of the 14th instant, a copy of which is on the other side." In the absence of any such complete evidence as that, one must inquire what the letter of the 14th instant was, because *non constat*, it may have been a reference to any one of half a dozen different letters; and so, from that very simple illustration, one can go through a large variety of more complex ones. It is not for me to say that the old rule was better or worse than the present rule; but that it was a different rule, notwithstanding the criticisms in the cases which Mr Neville has given me, I have no doubt. I take the old rule from the original edition of Lord Blackburn, On the Contract of Sale, which is cited — I have not the original work before me — by Williams, J., in North Staffordshire Railway Company *v.* Peek, E. B. & E. 1001, where, after referring to Hinde *v.* Whitehouse, 7 East, 558, and Kenworthy *v.* Schofield, 2 B. & C. 945, he says: "The principle of these cases seems to me to be well stated in the same work by my Brother Blackburn, as follows: 'If the contents of the signed paper themselves make reference to the others so as to show by internal evidence that the papers refer to each other, they may be all taken together as one memorandum in writing [as in the case which I have mentioned of a letter referring to a previous letter, of which the copy is annexed]; but if it is necessary, in order to connect them, to give evidence of the intention of the parties that they should be connected, shown by circumstances not apparent on the face of the writings, the memorandum is not all in writing, for it consists partly of the contents of the writings and partly of the expression of an intention to unite them, and that expression is not in writing.'" The old case of Boydell *v* Drummond, 11 East, 142, and some other cases, might be consistent with that rule; but certainly of late a different rule has been introduced, and it is a rule, to say the least, consistent with the convenience of mankind, because if you were to exclude parol evidence to explain such a doubtful reference as "the letter of the 14th instant," or it might be simply "your letter," the result might in a large number of cases be gross injustice. Now I take it to be quite settled that in a case of that kind you may give parol evidence to show what the document referred to was. I take it that you may go further than that, and that if you find a reference to something, which may be a conversation, or may be a written document, you may give evidence to show whether it was a conversation or a written document; and, having proved that it was a written document, you may put that written document in evidence, and so connect it with the one already admitted or proved. So far there is no difficulty. That was applied in the case of Ridgway *v.* Wharton, 6 H. L. C. 238, where the question was on the meaning of instructions which did not by any means necessarily point to a written document; but later the cases have gone further than that, and it seems to me that Long *v.* Millar, 4 C. P. D. 450, followed by Field, J., in Cave *v.* Hastings, 7 Q. B. D. 125, does establish a very much larger series of exceptions. In Long *v.* Millar I profess myself rather embarrassed by the judgment of Thesiger, L. J., — that is to say, I am unable quite to understand what he means by the passages on p. 456, which seem to me rather inconsistent; but seeing that I have the judgments of Bramwell and Baggallay, L. JJ., without the slightest doubt or embarrassment, and that Thesiger, L. J., concurred in their judgment, I think I may put any difficulty of that kind aside. Bramwell, L. J., gave a judgment which, beyond its reference to the particular case, is exceedingly useful as illustrating this branch of law; because he gives an illustration which seems to me to go to the root of the matter. The illustration he gives is this (4 C. P. D. 454), "Suppose that A. writes to B., saying that he will give £1,000 for B.'s estate, and at the same time states the terms in detail, and suppose that B. simply writes back in return, 'I accept your offer.' In that case there may be an identification of the documents by parol evidence, and it may be shown that the offer alluded to by B. is that made by A., without infringing the Statute of Frauds, sec. 4, which requires a note or memorandum in writing." If that is sound, which I take it to be, according to other cases, and according to the convictions of Judges in older cases which are introduced into the old law, it is difficult, perhaps, to say where parol evidence is to stop; but substantially it never stops short of this, that wherever parol evidence is required to connect two written documents together, then that parol evidence is admissible. You are entitled to rely upon a written document, which requires explanation. Perhaps the real principle upon which that is based is, that you are always entitled in regarding the construction and meaning of a written document to inquire into the circumstances under which it was written, not in order to find an interpretation by the writer of the language, but to ascertain from the surrounding facts and circumstances, with reference to what, and with what intent, it must have been written. I think myself that must be the principle on which parol evidence of this kind is admitted. Turning to the case before me, I find a letter of the 12th of September, 1888, written by the defendant to Mrs. Oliver, and in that he says: "I beg to acknowledge receipt of check, value £375, on account of the purchase-money for the Fletton Manor House estate, for which I thank you." I have two things here perfectly clear, that there is a property called Fletton Manor House estate, which constitutes the subject of a purchase, and, therefore, the subject of a sale. I have also that £375 is part of the purchase-money for that house; but, beyond that I have no terms of a contract. I am entitled to consider the circumstances under which the letter was written, in order to give any meaning that I properly can to it — not to add terms to it, but to find out what the meaning necessarily must be, having regard to the facts and circumstances — and, having got the evidence which I have in this case, the conclusion is inevitable that it refers to a previous memorandum of terms of agreement under which Mrs. Oliver becomes the purchaser of this particular property for the price of £2,375, on account of which the check for £375 was sent. Having got that evidence in, having got the connection between the two documents, I have then enough to enable me to read the two documents together, and, reading them together, I have a distinct memorandum of contract, specifying all the terms, the second one supplying what the first one omitted to give, namely, singularly enough, the property which was intended to be purchased and sold. That being so, the objection that there is no memorandum within the Statute of Frauds fails.

I have not referred to the late case of Studds *v.* Watson, 28 Ch. D. 305, before Mr. Justice North, because I am not quite sure how far that learned Judge intended to go. If I am right in my view of his judgment, that he only allowed the parol agreement to be proved to see whether it connected the two written documents, and then, having got it in evidence, found that it did, and so was able to connect the two documents — if that is the right view, which I believe it to be, of what he intended — then it really follows Long *v.* Millar, *supra*, and Cave *v.* Hastings, *supra,* to both of which he referred in his judgment.

Under these circumstances, I think the plaintiff is entitled to judgment for specific performance, and, of course, to the costs of the action.

Under these circumstances, I think the plaintiff is entitled to judgment for specific performance, and, of course, to the costs of the action.[1]

BECKWITH *v.* TALBOT.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1877.

[*Reported in* 95 *United States*, 289.]

MR. JUSTICE BRADLEY delivered the opinion of the court.

This was an action brought by Talbot against George C. Beckwith in the District Court of Colorado for the County of Fremont, to recover damages for the breach of a contract alleged to have been made on the 7th of October, 1870, between the plaintiff and two others on the one part, and the defendant on the other, whereby they were to herd and care for a large herd of cattle for the defendant, from that time until the fifth day of December, 1872, for which he was to give them one half of what the cattle and their increase should then bring over, $36,681.60; that is, to each one third of such half. The declaration alleged that the plaintiff and the two persons who entered into the contract together with him (who were the sons of the defendant) performed their part of it, but that the defendant refused to sell the cattle, or to pay the plaintiff his share of their value above the said sum.

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[1] Sheers *v.* Thimbleby, 76 L. T. N. S. 709, *acc.*

On the trial, two defences were relied on which are made the subject of assignments of error here: First, that the alleged contract was void by the Statute of Frauds, because, though not to be performed within a year, it was not in writing signed by the defendant; secondly, that it was a joint contract on which the plaintiff could not maintain a separate action.[1]

The territorial Statute of Frauds declares that "every agreement which by its terms is not to be performed within a year, unless some note or memorandum thereof be in writing and subscribed by the party chargeable therewith, shall be void." The verbal difference between this statute and that of Charles II. is not material in this case.

It appeared on the trial that the agreement made by the parties was committed to writing at the defendant's instance, and was in the following words, to wit: —

WET MOUNTAIN VALLEY, Oct. 7, 1870.

This is to certify that the undersigned have taken two thousand two hundred and five head of cattle, valued at $36,681.60 on shares from George C. Beckwith; time to expire on the fifth day of December, 1872; then George C. Beckwith to sell the cattle and retain the amount the cattle are valued at above. Of the amount the cattle sell at over and above the said valuation, George C. Beckwith to retain one half, and the other half to be equally divided between C. W. Talbot, and Elton T. Beckwith, and Edwin F. Beckwith.

(Signed) C. W. TALBOT.
ELTON T. BECKWITH.
EDWIN F. BECKWITH.

This agreement was signed by the plaintiff and the two young Beckwiths, but was not signed by the defendant. It was delivered to him, however, and was kept by him until he produced and proved it on the trial. It was conceded by both parties that this was the agreement under which the services of the plaintiff were performed.

Two letters written by the defendant to the plaintiff on the subject-matter of the contract, and whilst he had the said agreement in his possession, and whilst it was being executed by the plaintiff, namely, one on the 21st of September, 1872, and the other on the 10th of November, 1872, were also produced in evidence; from which the following are extracts: —

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[1] A portion of the opinion, holding the second defence invalid because the plaintiff's interest was separate, is omitted.

DENVER, September 21, 1872.

MR. TALBOT, SIR, — On my arrival from the mountains, I received your letter. As I have wrote you before, every day I see parties here that is offering their cattle very low. . . . I have used every exertion for the last three months to sell. . . .

You suggest giving you a part of the cattle. That is entirely outside of the agreement. Also, where would be the interest on the amount put in the cattle coming from? And also Elton and Edwin would be glad to do the same; but at that rate I would not get my money back I put into the cattle.

The cattle must be sold and settled up according to the agreement. I will do everything I can to sell at the best advantage, and you shall have every chance to get a purchaser for the cattle, so as to make the most out of them. . . .

You shall have no chance to complain in my keeping up to the agreement, as I shall strictly, although I have heard you have made complaints to parties, which I think is very unfair, and the parties you told so said so too. . . .

Yours respectfully, GEORGE C. BECKWITH.

DENVER, Nov. 10, 1872.

MR. TALBOT, SIR, — At first I thought it useless to answer your letter, as I am bound by the agreement to sell the cattle in a very short time. . . . I notified you to get a purchaser for the cattle months ago; and what have I received from you in return and for my pay? I must say I have never been treated so meanly by a man in my life. My rights was to sell the cattle. Does the agreement say that I was to say anything to you or any one else?

But what next? You quarrelled with me because I would not break the agreement and give you the cattle to sell at figures less than I had kept them in Denver for sale. Now, I have been offered $31,000 for the cattle. I have written to Edwin, and he will state to you what I wrote him to say to you.

Yours, in haste, GEORGE C. BECKWITH.

We agree with the Supreme Court of Colorado that, in the face of this evidence, produced by the defendant himself, he cannot deny the validity of the agreement. His letters are a clear recognition of it. In them he refers to "the agreement" again and again. He declares his intention to adhere to it, and to hold the plaintiff to it. What agreement could he possibly refer to but the only one which, so far as appears, was ever made: the one which he took into his possession, and then had in his possession; the one under which it was conceded the parties were then acting? The defendant, being examined as a witness on his own behalf, and testifying with regard to the contract between the parties, said, "The matter was all talked over, and, I thought, understood. I said to my son Elton, 'You understand the matter. Will you take a pen and paper and write the contract?' He wrote it. Talbot read it and signed it, and then my sons signed it." On cross-examination, he said, "The contract was delivered to me after it was signed, and has remained in my possession ever since until this trial."

It is undoubtedly a general rule that collateral papers, adduced to supply the defect of signature of a written agreement under the Statute of Frauds, should on their face sufficiently demonstrate their reference to such agreement without the aid of parol proof. But the rule is not absolute. Johnson *v.* Dodgson, 2 Mee. & W. 653; Salmon Falls Co. *v.* Goddard, 14 How. 446. There may be cases in which it would be a violation of reason and common sense to ignore a reference which derives its significance from such proof. If there is ground for any doubt in the matter, the general rule should be enforced. But where there is no ground for doubt, its enforcement would aid, instead of discouraging, fraud. Suppose an agreement be made out and signed by one of the parties, the other being absent. On the following day, the latter writes to the party who signed it as follows: "My son informs me that you yesterday executed our proposed agreement, as prepared by J. S. I write this to let you know that I recognize and adopt it." Would not this be a sufficient recognition, especially if the parties should act under the agreement? And yet parol proof would be required to show what agreement was meant. The present case is as strong as that would be. In our judgment, the defendant, unless he could show the existence of some other agreement, was estopped from denying that the agreement referred to by him in his letters was that which he induced the plaintiff to sign, and which he put in his pocket and kept, and sought to enforce against the plaintiff for two whole years. *Judgment affirmed.*

BROWN *v.* WHIPPLE.

SUPREME COURT OF NEW HAMPSHIRE, DECEMBER, 1877.

[*Reported in* 58 *New Hampshire*, 229.]

ASSUMPSIT, for not accepting lumber. Verdict for the plaintiff: motion of the defendant for a new trial. As evidence of the memorandum required by the Statute of Frauds, the plaintiff introduced, subject to exception, a letter written and signed by the defendant, a memorandum written by the defendant, and a letter written and signed by the plaintiff.

The Defendant's Letter.

LANCASTER, Dec. 21, 1867.

J. B. BROWN, Esq.:

DEAR SIR: Can you get 20 M. feet maple, the best quality, the coming winter, saw it in the spring (or winter), and deliver it at the depot at your place in July next? If so, for how much per M.? Please call at my place when you are at Lancaster, and we will talk it over, or *write me* all the particulars.

Respectfully yours, J. M. WHIPPLE.

The Defendant's Memorandum.

Rock maple, clear, for J. M. Whipple, 15,000 feet; 10,000 feet 2 inches thick; 5,000 feet 1¼ inches thick. To be delivered at the railroad track. Price $20 per M.

The Plaintiff's Letter.

MAY, 1868.

JOHN M. WHIPPLE: The maple lumber which I agreed to get out for you is ready for delivery. Would like to have you call up and take the account of it, as I wish to draw it over to the railroad track.

JAMES B. BROWN.

Ray, *Drew*, and *Jordan*, for the defendant.

J. H. Benton, Jr., for the plaintiff.

DOE, C. J. When one document refers to another, the latter is, for the purpose of such reference, incorporated with the former. 1 Starkie Ev. 359 (p. 580 of 4th Eng. ed.); Simons *v.* Steele, 36 N. H. 73, 83; Church *v.* Brown, 21 N. Y. 315, 330–334. A list of taxes may, by annexation and reference, be made a part of a tax-collector's warrant. Bailey *v.* Ackerman, 54 N. H. 527. In Tallman *v.* Franklin, 14 N. Y. 584, it was held that a document was made a part of a memorandum by being fastened to it by a pin before the memorandum was signed, a blank column of the memorandum being headed "Terms of sale," and the annexed document having the same heading, and containing terms of sale.

In this case, the letter written by the plaintiff to the defendant is no part of the memorandum required by the Statute of Frauds, because it is neither signed by the defendant, nor made, by annexation or reference, a part of a writing signed by him. 2 Kent Com. 511; Benjamin on Sales, ss. 222-237; Blackburn on Sale, 46–54; authorities cited in Morton *v.* Dean, 13 Met. 385, and in Browne on Statute of Frauds, ss. 346-348, 371–376; Fitzmaurice *v.* Bayley, 9 H. L. Cas. 78; Skelton *v.* Cole, 1 DeGex & J. 587.

If it was held, in S. F. M. Co. *v.* Goddard, 14 How. 446, and in Lerned *v.* Wannemacher, 9 Allen, 412, that, by a writing signed by the plaintiff, not signed by the defendant (the party to be charged), and not made a part of a memorandum signed by the defendant, the plaintiff may prove a fact which the statute requires to be proved by a memorandum signed by the defendant, those cases are in conflict with a mass of authority too great to be overthrown. The soundness of the contrary doctrine was, in the former case, demonstrated in the dissenting opinion of two judges, and was, in the latter case, substantially admitted.

In Beckwith *v.* Talbot, 95 U. S. 289, 292, it was a question of legal construction, whether the written agreement, signed by the plaintiff, was sufficiently identified and referred to by the defendant, in his letters, to make it a part of a memorandum signed by him. It was held that the general rule is, that collateral papers, adduced to supply the defect of signature of a written agreement, should on their face sufficiently demonstrate their reference to such agreement without the aid of parol proof. In what was said of an exception in cases where parol evidence leaves no ground for doubt, we do not concur. Unless the essential terms of the sale can be ascertained from the writing itself, or by reference in it to something else, the writing is not a compliance with the statute; and if the agreement be thus defective, it cannot be supplied by parol proof, for that would at once introduce all the mischiefs which the statute was intended to prevent. Williams *v.* Morris, 95 U. S. 444, 456. A defective reference can no more be cured by parol than any other defective part of the memorandum.

The writing, called in this case the defendant's memorandum, is insufficient, because, if it is signed by the defendant, and if it shows that he bought lumber of some one, it does not show of whom he bought it. The defendant's letter of inquiry is insufficient, because it does not show that he bought or agreed to buy anything of anybody. If the necessary memorandum were described in the statute (Gen. St c. 201, s. 14) as a scintilla of proof of the essentials of the bargain, and if the question were, whether, in fact, the plaintiff is the person with whom the defendant contracted, one question of law would be, whether the defendant's memorandum and letter (with or without other evidence) are competent for the consideration of a jury. But the question is, not whether there is an infinitesimal or other amount of circumstantial evidence from which a jury may find the fact not stated in the writings, but whether the court does find, upon a fair legal construction of the writings, that the fact is stated in them. Taken together, with all the meaning that is expressed, and all that can be implied, by the most strained construction, in favor of the plaintiff, the defendant's memorandum and letter state, that at some time the defendant agreed to buy of somebody 15,000 feet of clear rock maple boards of certain dimensions, to be delivered at the railroad track, at $20 a thousand; and that, on the 21st day of December, 1867, the defendant inquired of the plaintiff, by letter, whether he could get, for the defendant, 20,000 feet of the best maple lumber, the coming winter, saw it in the winter or spring, and deliver it at the depot at the plaintiff's place the next July, — and at what price the plaintiff would do this. We do not think the legal import of this statement is, that the plaintiff is the person with whom the defendant contracted.

A memorandum (consisting of one or more writings) may be read, like other documents, in the light of the circumstances in which it was written, for the explanation of its latent ambiguities, and the application of its terms to the persons and things sufficiently described in it. But this rule does not admit parol evidence to supply an essential part of the contract, the omission of which is patent on the face of the memorandum. And the inequitable operation of the statute is not to be avoided by a narrow construction of the law, or a liberal construction of the memorandum. Arguments from inconvenience and injustice sometimes tend to show the lawmakers' intention. But there is reason to fear, that, in this country as well as in England, the favor with which some statutes, and the dislike with which others, have been regarded by courts, have enlarged the distinction between strict and loose construction, without reference to the legislative intent, and introduced a variable standard that exposes the province of the legislature to judicial invasion.

Verdict set aside.[1]

FOSTER, J., did not sit.

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[1] In Louisville Asphalt Varnish Co. *v.* Lorick, 29 S. C. 533, the plaintiff's travelling salesman secured an order from the defendants for certain kinds and quantities of paint at specified prices. He entered the order on his memorandum book specifying the parties, goods, and price, and sent a copy to his employer. A few days later the defendants wrote and signed the following letter: "Gents: Don't ship paint ordered through your salesman. We have concluded not to handle it." This was duly sent and received. On an action to recover the price of the paint which was sent but not accepted, a majority of the court were of opinion that the two papers might be connected by extrinsic evidence, and, as taken together they formed a sufficient memorandum, that the plaintiff was entitled to recover. Simpson, C. J., delivered a dissenting opinion.

In Thayer *v.* Luce, 22 Ohio St. 62, a suit for specific performance of a contract to sell land, the original memorandum contained no description of the property, and the plaintiff relied also on a deed which was signed but not delivered. McIlvaine, J., in delivering the opinion of the court, said: "That several writings, though executed at different times, may be construed together, for the purpose of ascertaining the terms of a contract and for the purpose of taking an action founded thereon out of the operation of the Statute of Frauds, is fully settled. 3 Taunt. 169; 1 Bing. 8; 3 Myl. & K. 353; 14 How. S. C. 447; 14 N. Y. 584.

"In such cases, however, the mutual relation of the several writings to the same transaction must appear in the writings themselves, parol evidence being inadmissible for the purpose of showing their connection. If one only of such papers be signed by the party to be charged in the action, the rule seems to be that special reference must be made therein to those papers that are not so signed; but if the several papers relied on be signed by such party, it is sufficient if their connection and relation to the same transaction can be ascertained and determined by inspection and comparison.

"In this case, upon inspection and comparison of the memorandum and the deed, although no reference is made in either to the other, we find with reasonable certainty that they do relate to the same transaction, and contain fully the terms of a contract of bargain and sale between the parties. The coincidences of names, dates, amount of purchase-money, and reference to and description of fractional lots, are quite sufficient. But when these coincidences are considered in connection with the averments and admissions in the pleadings, and the *res gestæ*, we arrive at a degree of certainty far beyond that which is required in determining civil issues." See, also, Devine *v.* Warner, 76 Conn. 229; Jackson *v.* Strowger Tel. Exch., 108 Ga. 646; Gaines *v.* McAdam, 79 Ill. App.

THOMAS P. LERNED AND ANOTHER *v.* CHARLES WANNEMACHER AND ANOTHER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, NOVEMBER, 1864.

[*Reported in* 9 *Allen,* 412.]

CONTRACT brought to recover damages for the failure to deliver a quantity of coal sold by the defendants to the plaintiffs. One ground of defence was that the contract was not binding because not executed in conformity to the Statute of Frauds.

At the trial in the Superior Court before Morton, J., the plaintiffs introduced evidence tending to show the following facts: Albert Betteley was authorized to sign contracts for the sale of coal in behalf of the defendants, who were commission merchants in Philadelphia under the firm of Wannemacher & Maxfield. On the 31st of March, 1863, the plaintiffs made a parol contract for the purchase of 1,000 tons of coal of Betteley, as agent of the defendants, according to the terms of the written memorandum hereinafter set out. The plaintiffs then signed and delivered to Betteley, as agent of the defendants, a memorandum of the contract, partly written and partly printed, as follows, the written parts being here put in italics: —

Coal, when delivered on board of vessels, boats, or barges, to be in all respects at the purchaser's risk; bills of lading, or other regular testimony of shipment, to be proof of such delivery, both as to time and quantity. Each cargo of coal to be settled for from time to time as delivered, in the mode specified in the contract. Captains of vessels sent by purchasers for their coal to bring written orders, and take each his regular turn in loading. All possible despatch will be given in loading, but no claims will be allowed for demurrage, nor for the consequences of unavoidable delay. No responsibility assumed as regards procuring vessels, boats, or barges; but every exertion will be used to engage them. Every effort will be made for the fulfilment of this contract; but if prevented or obstructed by breaches or other unavoidable occurrences on the canals or railroads or at the mines, or by combinations, strikes, or turn-outs among miners, boatmen, or laborers, no claim

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201; Kingsley *v.* Siebrecht, 92 Me. 23; Third Bank *v.* Steel, 129 Mich. 434; Swallow *v.* Strong, 83 Minn. 87; Wilkinson *v.* Taylor Mfg. Co., 67 Miss. 281; Coe *v.* Tough, 97 N. Y. 273; Darling *v.* Cumming, 92 Va. 521; Rahm *v.* Klerner, 99 Va. 10; Cobb *v.* Glenn Lumber Co., 49 S. E. Rep. 1005 (W. Va.).

In Wilstack *v.* Heyd, 122 Ind. 574, the face of the memorandum contained no description of the property, but a description was indorsed on the back. This was held insufficient on the ground that an indorsement was no better than a separate paper, and if it contained no reference to the face could not be used. But see Gage *v.* Cameron, 212 Ill. 146. Compare also Tallman *v.* Franklin, 14 N. Y. 584, where a letter pinned to a memorandum was held to be made part of it.

It is not essential that papers relied on to complete a memorandum should be in existence when the paper signed by the party to be charged is executed. Freeland *v.* Ritz, 154 Mass. 257.

for damages will be allowed. Wannemacher and Maxfield, commission merchants, Philadelphia. *Boston*, *March* 31, 1863.

On the above terms and conditions, please deliver on board at your wharves at *Philadelphia*, to be shipped to *Cambridgeport*, 10 feet of water, 7 bridges, 1,000 tons . . . *Swatara;* 800 *Stove*, 200 *Egg; Swatara* $4.50.

Terms cash, or approved paper at ; interest added from date of bill of lading or other proof of shipment; *United States tax to be added. We will send our own vessels. After first cargo is shipped, the purchaser has the right to refuse the balance if not satisfactory.*

T. P. Lerned and Son.

At the same time Betteley signed the name of "Wannemacher and Maxfield, by Albert Betteley" to a memorandum precisely similar to the above in every respect, except that the name of the plaintiffs was not signed to it, and delivered the same to the plaintiffs. Two or three weeks afterwards Betteley, as agent of the defendants, wrote upon the back of the memorandum delivered to him by the plaintiffs these words: "To be shipped immediately, if vessels are not sent;" and the plaintiffs signed the same, and redelivered the memorandum to him. Both of the above papers were put in evidence by the plaintiffs, the one signed by them being produced by the defendants on notice. The price of coal subsequently increased in the market, and the defendants refused to deliver the said 1,000 tons.

Upon the introduction of this evidence the judge ruled that the action could not be maintained, and a verdict was accordingly taken for the defendants. The plaintiffs alleged exceptions.

G. A. Somerby, for the plaintiffs.

C. A. Welch, for the defendants.

Hoar, J. The ruling to which exceptions were taken at the trial was this: that the plaintiffs could not maintain their action upon the contract set forth in the declaration, because it was a contract for the sale of merchandise for the price of more than fifty dollars, and there was no acceptance of any part of the goods, or giving anything in earnest to bind the bargain or part payment, and no sufficient note or memorandum in writing of the bargain made and signed by the defendants or by any person thereunto by them lawfully authorized. Gen. Sts. c. 105, § 5. And the question before us is of the sufficiency of the memorandum produced.

The first objection is that neither the memorandum signed by the purchasers and delivered to the sellers, nor the counterpart signed by the sellers and delivered to the purchasers, contains in itself a complete statement of the bargain; that there is nothing in the papers themselves by which they can be connected, and it is not sufficient to connect them by parol; and that if connected, they are only orders, and do not amount to a contract.

On examining the memorandum retained by the sellers, which is signed by the plaintiffs, we think it is a complete memorandum of the bargain proved, and would undoubtedly have been sufficient in an action by the defendants against the plaintiffs. It must be observed that the contract itself, and the memorandum which is necessary to its validity under the Statute of Frauds, are in their nature distinct things. The statute presupposes a contract by parol. Marsh *v.* Hyde, 3 Gray, 333. The contract may be made at one time, and the note or memorandum of it at a subsequent time. The contract may be proved by parol, and the memorandum may be supplied by documents and letters written at various times, if they all appear to have relation to it, and if coupled together they contain by statement or reference all the essential parts of the bargain, signed by the party to be charged or his agent. Williams *v.* Bacon, 2 Gray, 387. Now it was proved by parol testimony that the contract declared on was made orally by the defendants, through their agent, with the plaintiff; and that the memorandum was delivered to the defendants by the plaintiffs as a statement of the terms of the bargain. In the printed part it is spoken of as "this contract" and "the contract." It recites that "every effort will be made for the fulfilment of this contract." It then contains a request to the defendants to deliver the coal "on the above terms and conditions" "at your wharves at Philadelphia," — the defendants' place of business, "to be shipped to Cambridgeport," — the plaintiffs' place of business. The quantity, price, and terms of payment are then stated. It says, "We will send our own vessels," an agreement to receive; and concludes with an option to "the purchaser" to refuse all but the first cargo if that is not satisfactory. That there is a contract, — a seller, a purchaser, a thing sold, a price, a place of delivery, and terms of payment, — all sufficiently appear. It is true that part of the paper is in form an order; but we can have no doubt that, taking the whole together, it shows an agreement to purchase. As was said by Mansfield, C. J., in Allen *v.* Bennet, 3 Taunt. 169: "The defendant's counsel distinguishes between an order and an agreement to buy; but if I go to a shop and order goods, do I not agree to buy them?"

The only defect then is the want of the signature of the defendants or that of their authorized agent. If this had been the only paper executed, it would deserve serious consideration whether, if shown to have been made as a memorandum of a bargain concluded between the parties, delivered as such by the plaintiffs and accepted as such by the agent of the defendants, the printed name of the defendants would not have been sufficient, upon the authorities, to answer the requirements of the statute as a signature by them. Saunderson *v.* Jackson, 3 Esp. R. 180; s. c. 2 B. & P. 238. But we do not put the case on this ground, because the counterpart of the contract delivered by the defendants to the plaintiffs is signed by them through their agent Betteley. As a separate paper, that is in its turn defective by reason of not containing the name of the purchaser. But the two papers were prepared at one time, and delivered simultaneously as parts of the same transaction. The one produced by the plaintiffs is signed so as to charge the defendants. They gave to the defendants one by which they were themselves bound. The two show clearly, when construed by their own language as applied to the existing circumstances, which party was the seller and which the purchaser. And we can see no reason upon principle or authority why they should not have the same effect as if both the signatures were to the same paper. The intrinsic evidence which they afford that they refer to the same transaction is very strong and competent for the consideration of a jury; and in the absence of all proof that a precisely similar contract was made by either party with any other person, would be extremely cogent.

The case does not much resemble any of those cited for the defendants, in which the doctrine has been stated that when the memorandum is made out from several papers they must be shown upon their face to have a mutual relation to each other; and that this relation cannot be established by extrinsic evidence. This is the rule of the text-books (2 Kent's Com. 6th ed., 511; Browne on Statute of Frauds, § 350); and its general correctness is well settled. Morton *v.* Dean, 13 Met. 385. Most of the cases to which we have been referred have been those of sales at auction, where the conditions of sale were not contained in or annexed to the memorandum which was signed. Here the whole terms and conditions of the bargain are stated alike in the two copies of the memorandum, one of which is signed by each party.

There are however two specific objections which deserve attention. In each paper the statement is made, "We will send our own vessels;" and as they are signed, one by the plaintiffs and the other by the defendants, it is urged that the meaning of the word "we" becomes uncertain, or that the two parts of the memorandum are made contradictory. Beside this, one part of the contract was altered by the additional agreement written by the defendants' agent and signed by the plaintiffs, "to be shipped immediately, if vessels are not sent;" and no corresponding alteration has been signed by the defendants.

The first difficulty seems to be capable of a satisfactory solution. The printed part of the memorandum clearly contemplates that the shipment of the coal is to be made in vessels to be furnished by the vendors, although they assumed no responsibility about the vessels except reasonable diligence in procuring them. The insertion of the written clause, "We will send our own vessels," could only be explained as importing a change in this respect. In the part of the contract signed by the plaintiffs, "we" would mean the purchaser. In the other part the phrase follows the expression "your wharves," when speaking of the wharves of the defendants; and "we" is thus used in contradistinction from "you," the vendors. The agent of the vendors signs the paper; but still, if not with perfect grammatical correctness of expression, it is sufficiently obvious that in using the word "we" he means the purchasers.

The additional clause written upon the part of the memorandum retained by the defendants presents a more difficult question, though it shows very clearly who were meant by "we" in the part of the contract just considered. But it is obvious that it was not meant to impair the contract which had been made. It is an additional stipulation to take effect upon a contingency which has not happened. The evidence showed that vessels were sent by the plaintiffs. And if the contingency had happened, it was only the substitution of a new mode of performance of which the defendants or plaintiffs might have availed themselves, even if made only by parol. Cummings *v.* Arnold, 3 Met. 486; Stearns *v.* Hall, 9 Cush. 31. If it were not binding on the defendants because no memorandum of it was signed by them, it could not prevent the plaintiffs from enforcing the original contract. It is obviously inadmissible for the defendants to set it up as changing the contract as evidenced by the completed memorandum, and at the same time to deny its obligation for want of their own signature.

It was held by the English Court of Exchequer in the recent case of Bluck *v.* Gompertz, 7 Welsb., Hurlst. & Gord. 862, that where a correction was made upon the memorandum of a contract by the defendant, and signed only by the plaintiff, the original signature of the defendant was a sufficient signing under the statute. That decision would be applicable to the present case if the memorandum had been contained in one paper, or if the indorsement had been made upon the part containing the signature of the defendants' agent. It is more doubtful whether it can be held to have the same effect where the memorandum is contained on separate papers, and we do not put the decision on that ground.

The other grounds of exception taken at the trial have not been insisted on by the plaintiff's counsel, and are clearly untenable.

Exceptions sustained.[1]

CUFF AND OTHERS *v.* PENN.

IN THE KING'S BENCH, JANUARY 25, 1813.

[*Reported in* 1 *Maule & Selwyn*, 21.]

IN an action of assumpsit for not accepting a quantity of bacon, the case was this: The plaintiffs having offered to sell the defendant 300 hogs of bacon, the defendant, on the 10th of April, 1807, wrote to the plaintiffs the following letter: —

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[1] White *v.* Breen, 106 Ala. 159; Strouse *v.* Elting, 110 Ala. 132, 140; Brewer *v.* Horst and Lachmund Co., 127 Cal. 643, *acc.* *Conf.* Johnson *v.* Buck, 35 N. J. L. 338.

MESSRS. CUFF, DICKINSON, & CUFF,

I agree to accept your offer of 300 hogs of bacon, to be delivered at such times and in such quantities as mentioned beneath, at 69*s.* per cwt., each parcel to be paid for at two months after delivery, viz.: —

April 20th	25	hogs.
May 10th	25	,,
,, 20th	25	,,
June 10th	50	,,
,, 24th	50	,,
July 14th	50	,,
,, 24th	50	,,
Aug. 10th	25	,,
	300	

J. PENN.

On the 21st of April (and not on the 20th as stipulated in the contract) the first delivery was made; but it appeared that the defendant did not make any objection on that ground. After the third delivery, viz., on the 5th of June, the defendant wrote to the plaintiffs informing them that he should want the next delivery of bacon as soon as it could be got ready. On the 10th of June the defendant attended at the plaintiffs' warehouse, and 84 sides were then weighed in his presence; and on the 2d of July he again called on the plaintiffs and told them as the sale of bacon was very dull he hoped that they would not press it on him, and they assured him they would not: 84 sides were weighed at this time, and a further quantity was weighed on the 10th of July. The plaintiffs, having forborne to deliver any more bacon for some time, at length informed the defendant that he had exceeded a reasonable time, and requested him to name a time for delivery. This the defendant declined, observing that the sales were very dull. Similar applications having been afterwards made to the defendant without effect, the plaintiffs on the 28th September wrote to the defendant informing him "that on the 30th instant the remainder of the bacon would be weighed at their warehouse, and that he might see it weighed if he thought proper; if not, they should weigh it off and deliver it to him in the course of that day." After the receipt of this letter the defendant called on the plaintiffs, and said there was no contract; to which they answered that they had his handwriting, and should insist on the contract; the defendant replied there was no use in sending the bacon, as he would not take it. On the 30th of September the remainder of the bacon was weighed and sent to the defendant's house, but he refused to receive it. In the first count of the declaration the contract was stated according to the terms of the defendant's letter of the 10th of April; and the declaration then averred that the plaintiffs delivered a part of the bacon, which was accepted and paid for by the defendant under the contract; and that the plaintiffs offered to deliver the residue, but the defendant would not accept the same. In the second count, after setting forth the contract of the 10th of April, it was averred, that the plaintiffs had delivered a certain quantity of bacon, which was accepted by the defendant; and that the plaintiffs intended and were about to deliver the residue under the contract, but the defendant on the 2d of July, 1807, discharged the plaintiffs from such delivery, and requested them not to deliver any more bacon until further orders from the defendant, which the plaintiffs agreed to do; and thereupon in consideration of the premises, and also in consideration that the plaintiffs had agreed to deliver the residue of the bacon according to such orders within a reasonable time, the defendant promised to give such orders and accept the residue of the bacon within a reasonable time, and to pay for the same according to the terms of the original contract; that on the 30th of September, 1807, the plaintiffs offered to deliver the residue, which the defendant refused to accept. The third count was similar to the second, except that it stated that the defendant requested the plaintiffs to postpone the delivery of the residue of the bacon for a reasonable time.

At the trial before Lord Ellenborough, C. J., at the London sittings after last Trinity term, it was objected on the part of the defendant that this was a written contract for the sale and purchase of goods, and could not be varied by parol; but if the subsequent parol agreement was to be considered not as varying the written contract, but as substituting a new one in its place, then it was void by the Statute of Frauds, there being neither a part acceptance nor a part payment under it. But his Lordship was of opinion that this was a dispensation only with the performance of the original contract in respect of the delivery of the bacon at the stipulated times, and directed the jury to find a verdict for plaintiffs, with liberty to the defendant to move to enter a nonsuit: a verdict was accordingly given for the plaintiffs upon the second and third counts; and Marryat in the last term obtained a rule *nisi* for entering a nonsuit.

The Solicitor-General, *Park*, and *Lawes*, now showed cause.

Marryat and *Gurney*, contra.

Lord Ellenborough, C. J. I think this case has been argued very much on a misunderstanding of the Statute of Frauds, and the question has been embarrassed by confounding two subjects quite distinct in their nature; namely, the provisions of that statute and the rule of law whereby a party is precluded from giving parol evidence to vary a written contract. The principal design of the Statute of Frauds was that parties should not have imposed on them burdensome contracts which they never made, and be fixed with goods which they never contemplated to purchase. But by the express provisions of that statute it is only necessary, in order to make a contract for a sale of goods binding upon the parties, that there should be either a note or a memorandum of the bargain in writing; or if there be no writing, that there should be a part payment by way of earnest, or a part acceptance of the goods. In the present case there exist two *indicia* pointed out by the statute, viz., a contract for sale in writing and a part performance, so that not only the literal intention but the spirit also of the statute is satisfied. The objection then does not found itself upon a non-compliance with the provisions of that statute, but is more properly this: that an agreement once made in writing cannot be varied by parol. If this agreement had been varied by parol, I should have thought, on the authority of Meres *v.* Ansell, 3 Wils. 275, that there would have been strong ground for the objection. But here what has been done is only in performance of the original contract. It is admitted that there was an agreed substitution of other days than those originally specified for its performance: still the contract remains. Suppose a delivery of live hogs instead of the bacon had been substituted and accepted, might not that have been given in evidence as accord and satisfaction? So here the parties have chosen to take a substituted performance. It is clear that neither of them in the outset thought it necessary to stand on the letter of the agreement; for the first delivery was to have taken place on the 20th of April, and was not made until the 21st, and yet no objection was then taken. Afterwards a new mode of delivery is substituted at the defendant's express request. I am of opinion therefore that neither has the Statute of Frauds been trenched upon, nor has any rule of law respecting parol evidence not being admissible to vary a written agreement been violated in this instance.

PER CURIAM, *Rule discharged.*

STEAD *v.* DAWBER AND STEPHENSON.

IN THE QUEEN'S BENCH, MAY 7, 1839.

[*Reported in* 10 *Adolphus & Ellis*, 57.]

LORD DENMAN, C. J., in this term (May 7th) delivered the judgment of the court.

This was an action to recover damages for the non-delivery of a cargo of bones. By the sold note they were to be shipped on the 20th to the 22d of May, and to be paid for by an acceptance at three months from the delivery. The 22d happened to be on a Sunday; and a conversation taking place between the defendant and the plaintiff's agent respecting this, upon the suggestion of the defendant the Monday or Tuesday immediately following were substituted as the days of delivery. The agent who proved this also stated that the time for giving the acceptance would in consequence be also proportionably enlarged. The main question at the trial and before us was, whether this enlargement of the time was an alteration of the contract or only a dispensation with its performance as to time. The declaration after setting out the original contract stated that the plaintiff, at the special instance of the defendants, gave them time for the delivery to the 24th May, and averred a demand on the 24th. The fourth plea alleged that this giving time was parcel of a contract within the Statute of Frauds; that there was no acceptance wholly or in part, or any earnest or part payment; and that there was no note or memorandum in writing of it; and the replication traversed its being parcel of the contract.

The principles on which this case must be decided are clear and admitted. The contract is a contract within the Statute of Frauds, and cannot be proved, as to any essential parcel of it, by merely oral testimony; for to allow such a contract to be proved partly by writing and partly by oral testimony would let in all the mischiefs which it was the object of the statute to exclude. Many cases were cited in the argument on both sides, the plaintiff's counsel relying chiefly on Cuff *v.* Penn, 1 M. & S. 21, the defendants on Goss *v.* Lord Nugent, 5 B. & Ad. 58, the decision in which it is certainly not easy to reconcile with that in the former. But it seems to us that we are mainly called on to decide a question of fact, — What, namely, was the intention of the parties in the arrangement come to for substituting the 24th for the 22d as the day of delivery: did they intend to substitute a new contract for the old one, the same in all other respects, except those of the day of delivery and date of the accepted bill, with the old one? Where the variation is so slight as in the present case, and the consequences so serious, the mind comes reluctantly to this conclusion; and this reluctance is increased by considering in how many instances of written contracts within the Statute of Frauds slight variations are made at the request of one or other of the parties, without the least idea at the time of defeating the legal remedy or the original contract. But the same principle must be applied to the variation of a day and a week or a month; and it seems impossible to suppose that, when the plaintiff had agreed to substitute the 24th for the 22d, either party imagined that an action could be brought for non-delivery on the 22d, or that the delivery on the 24th would not be a legal performance of the contract existing between them.

It was urged by the plaintiff's counsel that the defendant's argument reduced him to an inconsistency; that he alleged on the one hand an alteration of the contract by parol, and yet on the other asserted that such alteration by parol could not be made. But this is in truth to confound the contract with the remedy upon it. Independently of the statute, there is nothing to prevent the total waiver or the partial alteration of a written contract not under seal by parol agreement, and in contemplation of law such a contract so altered subsists between these parties; but the statute intervenes, and in the case of such a contract takes away the remedy by action. It cannot be said that the time of delivery was not originally of the essence of this contract: the evidence shows that the value of this article was fluctuating; and the time of payment was to be calculated from the time of delivery. Where these circumstances exist, it cannot in strict reasoning be argued, as was said by Lord Ellenborough in the case of Cuff *v.* Penn, 1 M. & S. 21, that the contract remained, although there was an agreed substitution of other days than those originally specified for its performance. Nor does any difficulty arise from the want of consideration for the plaintiff's agreement to consent to the change of days; for the same consideration which existed for the old agreement is imported into the new agreement which is substituted for it.

Putting therefore that construction on what passed between these parties which best effectuates their intention, and giving also full effect, as we ought, to the salutary provisions of the Statute of Frauds, we think that this giving of time was parcel of the contract, and consequently that the verdict on the fourth plea should be entered for the defendants.[1] *Rule absolute accordingly.*[2]

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[1] At the trial the defendant's counsel contended that the written contract having been varied there was no complete written contract under the statute upon which the plaintiff could recover, but the Judge regarding the enlargement of time as only dispensing with prompt performance directed a verdict for the plaintiff giving leave to move to enter a verdict for the defendants on the issues upon the first (*non assumpsit*) and fourth pleas. A rule was obtained accordingly.

[2] Compare Ogle *v.* Vane, Law Rep 2 Q B 275, 3 Q B 272

MARSHALL *v.* LYNN.

IN THE EXCHEQUER, HILARY TERM, 1840.

[*Reported in* 6 *Meeson & Welsby*, 109.]

ASSUMPSIT to recover damages for the non-performance of a contract to purchase of the plaintiff a quantity of potatoes.[1]

At the trial before Vaughan, J., at the last summer assizes for Cambridge, it appeared that on the 15th of December, 1838, the plaintiff and defendant entered into a written contract, of which the following is a copy: —

WISBECH, 15th December, 1838.

Bought of Mr. Thomas Marshall as many potatoes as will load his brig, the "Kitty," Captain William Scott, say from sixty to seventy lasts, to be shipped on board the above vessel on her arrival here the next time — say what pink kidneys he has at 4*s.* 6*d.* per sack, and the round, white and blue ones at 4*s.* 3*d.* per sack, of fifteen ounces net merchants' ware, free on board the said ship. Payment, cash on delivery. (For William Lynn.) ROBERT LYNN.

Witness: T. MARSHALL.

On the 25th of December the "Kitty" arrived at Wisbech, that being the next arrival after the making of the contract, and on the following day the plaintiff's son informed the defendant that the "Kitty" would be ready to take in the potatoes on the 28th, when the defendant requested that the plaintiff would let the vessel go to Lynn and load a cargo of potatoes which he had purchased there, and for which he could not obtain a vessel, and take them to London; and he then promised the plaintiff to take the plaintiff's potatoes the next time the "Kitty" came to the port of Wisbech. This proposal was agreed to, on the understanding that the plaintiff's potatoes should be taken the next time the "Kitty" came. In pursuance of this arrangement the "Kitty" sailed to Lynn; and after proceeding to London, and there discharging her cargo, she returned to Wisbech, and arrived there on the 7th of February. On the 8th of February the vessel was ready to receive the potatoes, of which the defendant had full notice, and was requested to take them; but the defendant said he could not take them then, nor did he know when he could; and he ultimately declined taking them. They were afterwards shipped to London, and there sold by the plaintiff, who brought this action to recover the loss sustained by the defendant's non-performance of the contract. It was contended at the trial, on the part of the defendant, that the alteration in the time fixed by the terms of the original contract for shipping the potatoes was a variation of it in a material part, and ought to have been in writing. The learned judge directed the jury to find a verdict for the plaintiff, giving the defendant leave to move to enter a nonsuit. Storks, Serjt., in Michaelmas term obtained a rule accordingly, against which

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[1] In the original report the pleadings are stated at considerable length; but as no question arose upon them, they are here omitted.

Kelly and *Gunning* now showed cause.

Storks, Serjt., contra.

PARKE, B. I am of opinion that this rule ought to be made absolute. If it had not been for the decision in the case of Stead *v.* Dawber I should have wished to hear the argument on the other side, and probably to have taken time to consider; but as the case of Cuff *v.* Penn, which had before been very much doubted, appears to have been overruled by Stead *v.* Dawber, we do not think it necessary to do so. Here there was an original contract in writing to send these goods by the first vessel; an alteration as to the time of their delivery was subsequently made by parol; and the point to be decided is, whether such an alteration by parol of the written contract can be binding. It appears to me that it cannot, and that the same rule must prevail as to the construction of the 17th section of the Statute of Frauds which has already prevailed as to the construction of the 4th section. The decision in Goss *v.* Lord Nugent, the principle of which I have no doubt is perfectly correct, has clearly established, with respect to the case of a contract relating to the sale of an interest in lands, that if the original contract be varied, and a new contract as to any of its terms substituted in the place of it, that new contract cannot be enforced in law unless it also be in writing. The question is, whether the same reasoning does not apply to a contract for the sale of goods under the 17th section. [His Lordship read that section.] It appears to me that no distinction can be made; and I must also observe that it seems to me to be unnecessary to inquire what are the essential parts of the contract and what not, and that every part of the contract in regard to which the parties are stipulating must be taken to be material; and perhaps therefore the latter part of the judgment in Stead *v.* Dawber may be considered as laying down too limited a rule. Everything for which the parties stipulate as forming part of the contract must be deemed to be material. Now in this case, by the original contract the defendant was to accept the goods, provided they were sent by the first ship: the parties afterwards agreed by parol that the defendant would accept the goods if they were sent by the second ship on a subsequent voyage; that appears to me to be a different contract from what is stated before. Such was my strong impression, independently of any decision on the point; but the case of Stead *v.* Dawber is precisely in point with the present; and on looking at the judgment it does not appear to proceed altogether upon the time being an essential part of the contract, but on the ground that the contract itself, whatever be its terms, if it be such as the law recognizes as a contract, cannot be varied by parol. It has been said that the adoption of this rule will produce a great deal of inconvenience. I am not, however, aware of much practical inconvenience that can result from it, and none that furnishes any reason for altering the rule of law in respect of these mercantile contracts. They frequently vary in terms, and admit of some latitude of construction; but the expressions used in them generally indicate the intention of the parties sufficiently well: there is a sort of mercantile short-hand, made up of few and short expressions, which generally expresses the full meaning and intention of the parties. On the whole, it appears to me that no reasonable distinction can be made between this case and that of Goss *v.* Lord Nugent. This is a new contract, incorporating new terms; and I think it cannot be enforced by action unless there is a note in writing expressing those new terms distinctly, or in the mercantile phraseology which, as I have already said, admits of some latitude of interpretation. This action, therefore, cannot be maintained, and a nonsuit must be entered.

Rule absolute.[1]

NOBLE *v.* WARD AND OTHERS.

IN THE EXCHEQUER, JANUARY 12, 1866.

[*Reported in Law Reports*, 1 *Exchequer*, 117.]

IN THE EXCHEQUER CHAMBER, FEBRUARY 8, 1867.

[*Reported in Law Reports*, 2 *Exchequer*, 155.]

ACTION for non-acceptance of goods. The first count of the declaration stated that it was agreed between the plaintiff and the defendants that the plaintiff should sell and deliver to them, and that they should accept from him within a certain agreed period, which had elapsed before action, a quantity of cloth at certain prices therefor to be paid by the defendants, and then agreed upon between the plaintiff and the defendants; yet the defendants refused to accept or pay for the cloth, although all things were done, &c., whereby the plaintiff lost the difference between the agreed price and the lower price to which the goods sold fell. The second count was for money payable for goods bargained and sold, goods sold and delivered, and for money due on accounts stated.

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[1] ALDERSON and GURNEY, BB. delivered brief concurring opinions. ROLFE, B. also concurred.

No right of action lies for breach of the second agreement or of the first and second combined. Stead *v.* Dawber, 10 A. & E. 57 (overruling Cuff *v.* Penn, 1 M. & S. 21); Marshall *v.* Lynn, 6 M. & W. 116; Noble *v.* Ward, L. R. 1 Ex. 117; Carpenter *v.* Galloway, 73 Ind. 418; Bradley *v.* Harter, 156 Ind. 499; Cummings *v.* Arnold, 3 Met. 486, 491; King *v.* Faist, 161 Mass. 449, 456; Heisley *v.* Swanstrom, 40 Minn. 199; Burns *v.* Fidelity Real Est. Co., 52 Minn. 31; Thompson *v.* Thompson, 78 Minn. 379; Rucker *v.* Harrington, 52 Mo. App. 481; Warren *v.* Mayer Mfg. Co., 161 Mo. 112; Dana *v.* Hancock, 30 Vt. 616. If, however, the terms of the oral contract have been performed, such performance operates as a satisfaction of the liability on the original contract. Moore *v.* Campbell, 10 Ex. 323; Leather Cloth Co. *v.* Hieronymus, L. R. 10 Q. B. 140; Swain *v.* Seamens, 9 Wall. 254; Long *v.* Hartwell, 34 N. J. L. 116, 127; Jackson *v.* Litch. 62 Pa. 451; Ladd *v.* King, 1 R. I. 224, 231. *Conf.* Dana *v.* Hancock, 30 Vt. 616.

The defendants, as to the first count, pleaded: (1) *Non assumpsit;* (2) Traverse that the plaintiff was ready and willing to deliver the cloth within the agreed period; (3) That it was one of the terms of the alleged agreement that the cloth agreed to be sold and delivered should be of the same material and as well made as a sample piece then shown and delivered by the plaintiff to the defendants; and that the plaintiff was not ready and willing to deliver cloth of the same material and as well made as the sample piece; (4) Rescission of the alleged agreement; (5) To the second count, never indebted. Issues thereon.

The cause was tried before Bramwell, B., at the Manchester summer assizes, 1865, when the following facts were proved: —

The plaintiff is a manufacturer, and the defendants are merchants at Manchester. On the 12th August, 1864, the defendants gave to the plaintiff's agent an order for 500 pieces of 32-inch gray cloth at 38*s.* 9*d.*, and 1000 pieces of 35-inch gray cloth at 42*s.* 1½*d.*, the deliveries to commence in three weeks, and to be completed in eight to nine weeks. On the 18th of the same month a second order was given by the defendants for 500 pieces of 32-inch gray cloth at 39*s.*, and 100 pieces of 35-inch gray cloth at 42*s.* 3*d.*, to be delivered "to follow on after order given 12th instant, and complete in ten to twelve weeks." The plaintiff on the 10th and 19th September made a first and second delivery on account of the first order. Considerable discussion ensued both as to the time of delivery and as to the quality of the goods delivered; and eventually, on the 27th September, the plaintiff had an interview with the defendants, at which it was agreed that the goods delivered under the first order should be taken back, that that order should be cancelled, and that the time for delivering the goods under the second order should be extended for a fortnight. Goods were tendered to the defendants by the plaintiff in time either for the fulfilment of the agreement of the 18th August or of that of the 27th September; but the defendants refused to accept them on various grounds, — amongst others, on the ground that they were not of the stipulated quality. The plaintiff thereupon brought this action. The declaration was framed so as to fit either the agreement of the 18th August or that of the 27th September. The learned judge directed a nonsuit to be entered, being of opinion that the contract of the 18th August was no longer in existence, the parol agreement of the 27th September having rescinded it; and that the latter agreement could not be resorted to, not being in writing in accordance with § 17 of the Statute of Frauds, 29 Car. 2, c. 3. That section provides that "no contract for the sale of any goods, wares, or merchandises, for the price of £10 sterling or upwards, shall be allowed to be good . . . unless some memorandum or note in writing of the said bargain be made and signed by the parties to be charged with such contract or their agents thereunto lawfully authorized."

Holker and *Baylis* showed cause.

Mellish, Q. C., in support of the rule. *Cur. adv. vult.*

The judgment of the court (POLLOCK, C. B., BRAMWELL, CHANNELL, and PIGOTT, BB.) was delivered by

BRAMWELL, B. This case was tried before me at Manchester, and the plaintiff was nonsuited. The case comes before us on a rule to set aside the nonsuit. I think it was wrong, at least on the ground on which it proceeded. The action was for not accepting goods on a sale by the plaintiff to the defendants. The defendants pleaded among other things that the contract had been rescinded, and that the plaintiff was not ready and willing to deliver. The facts were that a contract for the sale and delivery of goods from the plaintiff to the defendants, at a future day, was entered into on the 12th of August, which may be called contract A; that another contract for sale and delivery was entered into on the 18th of August, say contract B; that before any of the days of delivery had arrived the plaintiff and defendants agreed verbally to rescind or do away with contract A, and to extend for a fortnight the time for the performance of contract B; that is to say, the plaintiff had a fortnight longer to deliver, and the defendants a fortnight longer to take and pay for those goods. This on principle and authority was a third contract, call it C. It was a contract in which all that was to be done and permitted on one side was the consideration for all that was to be done and permitted on the other. (See *per* Parke, B., in Marshall *v.* Lynn, 6 M. & W. 117.) It remains to add that the declaration would fit either contract B or contract C, and that goods were tendered by the plaintiff to the defendants in time for either of those contracts. My notes and my recollection of my ruling are that contract B was rescinded, and contract C not enforceable, not being in writing. I think that was wrong. Either contract C was within the Statute of Frauds, or not. If not, there was no need for a writing; if yes, it was because it was a contract for the sale of goods, and so within the 17th section of the statute. That says that no contract for the sale of goods for the price of £10 or upwards shall be allowed to be good, except there is an acceptance, payment, or writing. The expression "allowed to be good" is not a very happy one; but whatever its meaning may be, it includes this at least, that it shall not be held valid or enforced. But this is what the defendant was attempting to do. He was setting up this contract C as a valid contract. He was asking that it should be allowed to be good to rescind contract B.

It is attempted to say that what took place when contract C was made was twofold: first, that the old contracts were given up; secondly, a new one was made. But that is not so. What was done was all done at once, — was all one transaction, — one bargain; and had the plaintiff asked for a writing at the time, and the defendants refused it, it would all have been undone, and the parties remitted to their original contract.

I think therefore that on principle it was wrong to hold that the old contract was gone. Moore *v.* Campbell, 10 Ex. 323, 23 L. J. (Ex.) 310, is an authority to the same effect. It is true that case may be distinguished on the facts: namely, that there what was to be done under the new arrangement in lieu of the old was to be done at the same time, so that it might well be the parties meant, not that the new thing should be done, but if done it should be in lieu of the old. Such an argument could not be used in this case. But it was not the ground of the judgment there, which is that the new agreement was void. The case of Goss *v.* Lord Nugent, 5 B. & Ad. 58, Stead *v.* Dawber, 10 Ad. & E. 57, and others, only show that the new contract C cannot be enforced, not that the old contract B is gone. I think it was not. Inconvenience and absurdity may arise from this. For instance, if the defendants signed the new contract, and not the plaintiff, the plaintiff would be bound to the old and the defendants to the new. Or if in the course of the cause a writing turned up signed by the plaintiff, then they could first rely on the old and afterwards on the new contract. But this is no more than may happen in any case within the 17th section, where there has been one contract only.

But then it was said before us that the plaintiff was not ready and willing to deliver under contract B. Probably not, and he supposed contract C was in force. In answer to this, the plaintiff contended before us that this point was not made at the trial; to which the defendants replied, Neither was the point that the old contract was in force. My recollection is so, — that the case was opened and maintained as on the new contract, — but I agree with Mr. Mellish that a nonsuit ought to be maintained on a point not taken at the trial only when it is beyond all doubt. I cannot say this is. Consequently I think the rule should be absolute; but under the circumstances the costs of both parties of the first trial ought to abide the event of the second.

Channell, B. The case in my brother Bramwell's opinion turning on what was his own impression, he was desirous that this judgment should be read as his own judgment. But I am authorized by the Lord Chief Baron and by my brother Pigott to say that, although I have read it as the judgment of my brother Bramwell, it is a judgment in which we all agree. *Rule absolute.*

The defendants appealed from the foregoing decision to the Exchequer Chamber.

Holker (*Baylis* with him), for the appealing defendants.

Mellish, Q. C. (*Jones*, Q. C., with him), for the plaintiff.

Willes, J. This is an appeal from the judgment of the Court of

Exchequer, making absolute a rule to set aside a nonsuit, and for a new trial. The action was brought for non-acceptance of goods pursuant to a contract dated the 18th of August, by which the goods were to be delivered in a certain time. The defendants pleaded that the contract was rescinded by mutual consent. At the trial they established that on the 27th of September, before any breach of that contract, it was agreed between the plaintiff and the defendants that a previous contract of the 12th of August should be rescinded (as to which no question is made), that the time for delivering under the contract of the 18th should be extended for a fortnight; and other provisions were made as to taking back certain goods, which we need not further notice. The contract of the 27th of September, however, was invalid, for want of compliance with the formalities required by § 17 of the Statute of Frauds. The defendants contended that the effect of the contract to extend the time for delivery was to rescind the contract of the 18th of August; and if the former contract had been in a legal form, so as to be binding on the parties, that contention might have been successful, so far as the change in the mode of carrying out a contract can be said to be a rescission of it; but the defendants maintained that the effect was the same, although the contract was invalid. In setting aside the nonsuit directed by the learned judge who tried the cause, the Court of Exchequer dissented from that view, and held that what took place on the 27th must be taken as an entirety, that the agreement then made could not be looked on as valid, and that no rescission could be effected by an invalid contract. And we are of opinion that the Court of Exchequer was right. Mr. Holker has contended that, though the contract of the 27th of September cannot be looked on as a valid contract in the way intended by the parties, yet since, if valid, it would have had the effect of rescinding the contract of the 18th, and since the parties might have entered into a mere verbal contract to rescind *simpliciter*, we are to say that what would have resulted if the contract had been valid will take place though the contract is void; or, in other words, that the transaction will have the effect which, had it been valid, the parties would have intended though without expressing it, although it cannot operate as they intended and expressed. But it would be at least a question for the jury, whether the parties did intend to rescind, — whether the transaction was one which could not otherwise operate according to their intention; and a material fact on that point is that, while they simply rescinded the contract of the 12th of August, they simply made a contract as to the carrying into effect that of the 18th, though in a mode different from what was at first contemplated. It is quite in accordance with the cases of Doe d. Egremont *v.* Courtenay, 11 Q. B. 702, and Doe d. Biddulph *v.* Poole, 11 Q. B. 713, overruling the previous decision of Doe d. Egremont *v.* Forwood, 3 Q. B. 627 (see 11 Q. B. 723), to hold that, where parties enter into a contract which would have the effect of rescinding a previous one, but which cannot operate according to their intention, the new contract shall not operate to affect the previously existing rights. This is good sense and sound reasoning, on which a jury might at least hold that there was no such intention. And if direct authority were wanted to sustain this conclusion, it is supplied by Moore *v.* Campbell, 10 Ex. 323, 23 L. J. (Ex.) 310, where upon a plea of rescission the very point was taken by Sir Hugh Hill, who would no doubt have made it good, had it been capable of being estab'ished. With reference to his argument that the contract was rescinded, Parke, B., said (10 Ex. at p. 332): "We do not think that this plea was proved by the evidence. The parties never meant to rescind the old agreement absolutely, which the plea, we think, imports. If a new valid agreement substituted for the old one before breach would have supported the plea we need not inquire; for the agreement was void, there being neither note in writing, nor part payment, nor delivery nor acceptance of part or all." And he adds: "This was decided by the cases of Stead *v.* Dawber, 10 Ad. & E. 57, and Marshall *v.* Lynn, 6 M. & W. 109." As to the cases cited from East, too much importance has been attached to them. The first case, Hill *v.* Patton, 8 East, 373, amounts to no more than this: that the court was bound to construe the contract before it without regard to the stamp; and having done so, then to see how the Stamp Acts operated upon it. In the second case, French *v.* Patton, 9 East, 351, it was held that although the Stamp Acts operated to prevent the plaintiff from recovering upon the policy as altered, that circumstance could not enable him to recover upon it in its original form, when he had himself consented to the alteration of the written words.

BLACKBURN, MELLOR, MONTAGUE SMITH, and LUSH, JJ., concurred.

Judgment affirmed.[1]

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[1] If the terms of the oral agreement have not been performed, the original contract still remains in force. Noble *v.* Ward, *supra;* Hasbrouck *v.* Tappen, 15 Johns. 200; Barton *v.* Gray, 57 Mich. 622, 632. Even if one party offers to perform his promise under the new agreement, the other party may still insist on the original contract, and refuse to accept the substituted performance to which he had orally agreed. Stowell *v.* Robinson, 3 Bing. N. C. 937; Noble *v.* Ward, *supra;* Plevins *v.* Downing, 1 C. P. D. 220; Swain *v.* Seamens, 9 Wall. 254, 271; Lawyer *v.* Post, 109 Fed. Rep. 512; Bradley *v.* Harter, 156 Ind. 499; Walter *v.* Victor G. Bloede Co., 94 Md. 80; Rucker *v.* Harrington, 52 Mo. App. 481; Warren *v.* Mayer Mfg. Co., 161 Mo. 112; Clark *v.* Fey, 121 N. Y. 470. See also Dana *v.* Hancock, 30 Vt. 616. But see *contra,* Cummings *v.* Arnold, 3 Met. 486. See also Smith *v.* Loomis, 74 Me. 503; Lee *v.* Hawks, 68 Miss. 669. *Conf.* Wiessner *v.* Ayer, 176 Mass. 425.

HICKMAN *v.* HAYNES.

In the Common Pleas, July 9, 1875.

[*Reported in Law Reports,* 10 *Common Pleas,* 598.]

The judgment of the court (Lord Coleridge, C. J., Grove, Archibald, and Lindley, JJ.) was delivered by

Lindley, J. This was an action for not accepting certain iron agreed to be sold by the plaintiff to the defendants. The contract for sale of the iron was in writing, and was required so to be by the 17th section of the Statute of Frauds. The bought-note was as follows: —

Tipton, 6th March, 1873. Bought of Alfred Hickman, Esq., one hundred tons of Grey Forge Mine pig iron, at £7 10*s.* per ton. Delivered at Tividale Street Mills, Tipton. Payment in cash, less 2½ discount, monthly. Delivery twenty-five tons this month, and twenty-five tons per month during April, May, and June next.

The Tividale Iron Company. J. P. Haynes.

Pursuant to this contract the plaintiff delivered and the defendants accepted and paid for seventy-five tons of the iron; but, owing to the circumstances stated below, the plaintiff did not deliver the last twenty-five tons, for the price of which the action is brought.

It appears from the evidence taken at the trial that, on the 2d of June, and again in the middle of June, the defendant Haynes saw the plaintiff, and verbally requested him to allow the delivery of the last twenty-five tons to stand over, and that the plaintiff verbally assented to this request; and accordingly nothing further was done by either side until the 1st of August, 1873, when plaintiff wrote to defendants as follows: "Permit me to call your attention to your contract with me for pig iron, of which twenty-five tons remain to be delivered. I have held them until now, as you requested, and shall be glad to know when you propose to take delivery. If it is not convenient for you to take the iron, I shall be glad to know if you will be willing to pay the difference in price, if I instruct Mr. Lewis to sell them."

This led to some correspondence, which was terminated by a letter written by the defendants on the 9th of August, asking for more time. The plaintiff again waited for a reasonable time, but without result. On the 20th of October, 1874, the writ was issued.

The case was sent for trial in the Dudley County Court, and was tried there on the 28th of May, 1875, when a verdict was found for the plaintiff, damages £25, with leave for the defendants to move for a nonsuit, or for a reduction of the damages. Pursuant to the leave thus reserved, a rule was obtained to show cause why a nonsuit should not be entered, on the ground that the parol agreement to postpone delivery of the iron was invalid under the Statute of Frauds, or why the damages should not be reduced to £21 17*s.* 6*d.*, or to £7 5*s.*, if the court should be of opinion that they ought to be assessed on the 30th of June, 1873, or on the 2d of June, 1873.

The declaration was framed upon the contract above set forth, and averred as a breach, that, although the defendants had accepted and paid for seventy-five tons, they would neither accept nor pay for the last twenty-five tons; alleging also that the defendants had exonerated the plaintiff from delivering the twenty-five tons at the Tividale Street Mills, as agreed.

Amongst other pleas, the defendants traversed the alleged exoneration, and also pleaded, thirdly, that the plaintiff was not ready and willing to deliver the said twenty-five tons according to the terms of the agreement; and, fifthly, that before breach the plaintiff discharged the defendants from further performance of the agreement.

In this state of the record, and upon the evidence above set forth, it was contended before us that there was in fact a new and substituted agreement for delivery and acceptance of the last twenty-five tons of iron at a time subsequent to that originally agreed upon, which was sufficient to exonerate the defendants from the further performance of the original agreement, but which, not being in writing, could not be enforced, by reason of the Statute of Frauds, and that no amendment of the declaration, therefore, would enable the plaintiff to maintain his action; and also that the plaintiff's verbal assent to postpone the delivery of the twenty-five tons until the 1st of August established conclusively that he was not ready and willing to deliver in June, according to the terms of the written contract, and therefore he was not in a condition to recover upon the original contract as set out in the declaration.

It is to be observed that there was no plea, in terms, of a new and substituted contract. The defendants' contention was based upon the fifth plea, *i.e.*, of a discharge before breach, relying upon the evidence also in support of the plea alleging absence of readiness and willingness to deliver pursuant to the written agreement. The argument, in substance, was, that the plaintiff was not in fact ready and willing to deliver the iron according to the written contract, and that in point of law it was immaterial that he would have delivered or been ready and willing to deliver the iron according to the written contract, had it not been for the previous verbal request of the defendants not to deliver it. It was frankly admitted by the defendants' counsel that this defence was quite beside the real merits of the case; but it was strenuously contended that, having regard to the Statute of Frauds, and to the decisions of Noble *v.* Ward, Law Rep. 1 Ex. 117; in error, Law Rep. 2 Ex. 135; Stead *v.* Dawber, 10 A. & E. 57; and Goss *v.* Lord Nugent, 5 B. & Ad. 58, the plaintiff could not maintain his action, and ought to be nonsuited.

The proposition that one party to a contract should thus discharge himself from his own obligations by inducing the other party to give him time for their performance, is, to say the least, very startling, and if well founded will enable the defendants in this case to make use of the Statute of Frauds, not to prevent a fraud upon themselves, but to commit a fraud upon the plaintiff. It need hardly be said that there must be some very plain enactment or strong authority to force the court to countenance such a doctrine.

The Statute of Frauds contains no enactment to the effect contended for. The utmost effect of the 17th section is to invalidate any verbal agreement for the sale of goods in certain cases; and, even if a verbal agreement for extending the time for the delivery of goods already agreed to be sold is within the statute, — as to which see per Martin, B., in Tyers *v.* Rosedale and Ferryhill Iron Co., Law Rep. 8 Ex. 305; in error, Law Rep. 10 Ex. 195, and Leather Cloth Co. *v.* Hieronimus, Law Rep. 10 Q. B. 140, — the plaintiff in this case is not attempting to enforce any such verbal agreement, but is suing on the original agreement, which was in writing.

The case of Noble *v.* Ward, *supra*, merely shows that a parol agreement to extend the time for performing a contract in writing, and required so to be by the Statute of Frauds, does not rescind, vary, or in any way affect such written contract, and cannot in point of law be substituted for it. In Stead *v.* Dawber, *supra*, there was a written agreement for the delivery of goods on a particular day, and a subsequent verbal agreement for their delivery on a later specified day; and the court came to the conclusion that the parties intended to substitute the later verbal agreement for the previous written agreement. But, in the case now before the court, there was no fresh agreement at all for the delivery of the twenty-five tons which can be regarded as having been substituted for the original written contract. There was nothing more than a waiver by the defendants of a delivery by the plaintiff in June of the last twenty-five tons of iron; and it should seem that in Stead *v.* Dawber the court would have been in favor of the plaintiff if they had come to the conclusion that there had been no substitution of one agreement for another. Marshall *v.* Lynn, 6 M. & W. 109, was a somewhat similar case decided on similar grounds.

Goss *v.* Lord Nugent, *supra*, turned on the 4th and not on the 17th section of the statute; but we do not think this important. The plaintiff had agreed in writing to sell certain property to the defendant, and to make a good title to the whole; but this the plaintiff was unable to do. He never could, therefore, have maintained an action on the original written contract, if nothing further had been done. But the defendant verbally agreed to waive his right to call for a good title to part of the land; and, having afterwards declined to complete the purchase, he was sued by the plaintiff, and it was held that the action did not lie. The ground of this decision was, that the plaintiff was in truth seeking to enforce an agreement relating to land, and which agreement was partly in writing and partly verbal, which by the statute he could not do. The court in this case also regarded the parties as having entered into a new verbal contract as to part of the property, and as having substituted this contract for the original written contract; and in this view of the case the plaintiff could not recover.

In Stowell *v.* Robinson, 3 Bing. (N. C.) 928, it was held that the time for performing a contract in writing for the sale of land could not be enlarged by parol. In that case the defendant set up the parol agreement in answer to the plaintiff's action for the recovery of his deposit, and, the court holding the parol agreement to be invalid, the plaintiff recovered.

The result of these cases appears to be that neither a plaintiff nor a defendant can at law avail himself of a parol agreement to vary or enlarge the time for performing a contract previously entered into in writing, and required so to be by the Statute of Frauds. But, so far as this principle has any application to the present case, it appears to us rather to preclude the defendants from setting up an agreement to enlarge the time for delivery in answer to the plaintiff's demand, than to prevent the plaintiff from suing on the original contract for a breach of it. There was, in truth, in this case no binding agreement to enlarge the time for delivery. The County Court judge finds that the plaintiff permitted the defendants to postpone, for their own convenience, the acceptance of the iron in dispute, and that the voluntary withholding delivery at the request of the defendants was usual in the ordinary course of dealings of a similar kind in the iron trade. This finding, in fact, shows that at any time in June either party could have changed his mind, and required the other to perform the contract according to its original terms: see Tyers *v.* Rosedale and Ferryhill Iron Co., Law Rep. 10 Ex. 195, as decided in error, reversing the decision below. Law Rep. 8 Ex. 305.

The distinction between a substitution of one agreement for another and a voluntary forbearance to delive. at the request of another, was pointed out and recognized in Ogle *v.* Lord Vane, Law Rep. 2 Q. B. 275; in error, Law Rep. 3 Q. B. 272. In that case the plaintiff sued the defendant for not delivering iron pursuant to a written contract, and the plaintiff sought to recover as damages the difference between the contract price of the iron and the market price, not at the time of the defendants' breach, but at a later time, the plaintiff having been induced to wait by the defendant, and having waited for his convenience. It was contended that the plaintiff was in fact suing for the breach of a new verbal agreement for delivery at a later date than that fixed by the original agreement; but the court held otherwise, and that, as the plaintiff had merely forborne to press the defendant, and had not bound himself by any fresh agreement, the plaintiff could sue on the original agreement, and obtain larger damages than he could have obtained if he had not waited to suit the defendant's convenience. Mr. Justice Blackburn (Law Rep. 2 Q. B. at p. 282) pointed out very clearly the distinction to which we are now adverting, and came to the conclusion that in Ogle *v.* Lord Vane there was no substitution of one contract for another, and that all that the parties did was this: "The plaintiff was willing to wait at the request of the defendant for the defendant's convenience, and he did wait for a long time, till February; but, if he had lost patience sooner, and refused to wait longer, he would have had a right to bring his action at once for the breach in July. It is clearly a case of voluntary waiting, and not of alteration in the contract; and the length of time can make no difference." In that case, the request for forbearance was made by the vendor after the contract had been broken: in this case the request for time was made by the purchasers both before and after the time for completing the contract had expired; but this distinction does not appear to us to be material: see Tyers *v.* Rosedale and Ferryhill Iron Co., *supra.*

In conclusion, we think that, although the plaintiff assented to the defendants' request not to deliver the twenty-five tons of iron in question in June, he was in truth ready and willing then to deliver them, and that the defendants are at all events estopped from averring the contrary. The plaintiff not having bound himself by any valid agreement to give further time, but having for the convenience of the defendants waited for a reasonable time after the letter of the 9th of August, to enable the defendants to perform the contract on their part, is entitled on the expiration of that time to treat the contract as broken by the defendants at the end of June, when in truth it was broken.

The question whether the damages ought to be estimated at £21 17*s.* 6*d.*, *i.e.*, according to the price of iron at that time, or at £25, *i.e.*, according to the price at the end of a reasonable time after the letter of the 9th of August, was admitted to be immaterial; but, on the principle of Ogle *v.* Lord Vane, *supra*, we think the plaintiff was entitled to have the damages assessed according to the price at the later date. For these reasons, therefore, we are of opinion that this rule to set aside the verdict, and to enter a nonsuit, or to reduce the damages, ought to be discharged. *Rule discharged.*[1]

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[1] See also Smiley *v.* Barker, 83 Fed. Rep. 684 (C. C. A.); Barton *v.* Gray, 57 Mich. 622, 636; Hasbrouck *v.* Tappen, 15 Johns. 260. *Conf.* Sanderson *v.* Graves, L. R. 10 Ex. 234.

GEORGE CUMMINGS AND OTHERS *v.* SMITH ARNOLD AND ANOTHER.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH TERM, 1842.

[*Reported in 3 Metcalf*, 486.]

ASSUMPSIT on the following agreement: "October 26th, 1838. This is to show that I agree to furnish and deliver to Cummings, Hildreth, & Co., of Boston, all the printing cloths which I make in my looms, which are on 35-inch cloths, and which make 150 pieces of cloth per week; the quality to be the same as those sold by H. Power to Cummings, Hildreth, & Co., on my account; the warp being 64 picks to the inch, the filling 60 picks or threads to the inch. These goods, to the amount of 150 pieces per week, I agree to deliver to Cummings, Hildreth, & Co., in Boston, up to March 1st, 1839, at eight and one quarter cents, say 8¼ yd., on eight months' credit. Smith Arnold & Co." The declaration averred that the plaintiffs had always been ready and desirous to receive and pay for said goods according to the terms of said agreement, yet that the defendants had not delivered and furnished the same.

The defendants filed the following specifications of defence: — "1. That it was agreed [by parol] between the plaintiffs and defendants at the time when the above contract was entered into, and after its execution and delivery, that the plaintiffs should give in payment for the goods satisfactory promissory notes, such as would be discounted at the bank where the defendants did business; which notes were not given as agreed, but were refused. 2. That after the making of the above agreement, a proposition was made by the plaintiffs to pay cash for the goods at five per cent discount: that Arnold, one of the defendants, to whom this proposition was made, then being in Boston, told the plaintiffs he thought the defendants should accept the offer, but wished to consult with his partner; for which purpose time was allowed him; that he went home and consulted his partner, and wrote immediately to the plaintiffs that they [the defendants] should accept the proposition; but that the plaintiffs afterwards refused to adhere to the bargain, as it was not closed at the time the proposition was made."

At the trial before Putnam, J., the defendants offered to prove the oral agreements mentioned in their specification, and that they were made on a legal and valid consideration. But the judge refused to admit the proof, and a verdict was returned for the plaintiffs. The defendants moved for a new trial.

This case was argued at the last March term.

B. Sumner, for the defendants.

Codman, for the plaintiffs.

Wilde, J. This case comes before us on exceptions to the rulings of the court at the trial, whereby the evidence offered by the defendants was rejected on the ground that the facts offered to be proved would not constitute a legal defence. The action is founded on a written contract, by which the defendants undertook to deliver to the plaintiffs at a stipulated price a certain quantity of cloths for printing, from time to time between the 26th day of October, 1838, and the first of March following.

The defendants admit that the written contract was not performed by them according to the terms of it; and they rely on two oral agreements made subsequently to the execution of the written contract, by the last of which it was agreed that the plaintiffs should pay cash for the goods to be sent to them by the defendants, — they discounting five per cent on the stipulated price whenever the goods sent should amount to the value of $1000, not before paid for; that under this last verbal agreement the defendants delivered 150 pieces of goods, and that the plaintiffs refused to perform said agreement on their part. The defendants also offered to prove that each of these verbal agreements was made on a legal and good consideration. The question is, whether these facts, if proved, would constitute a legal defence to the action.

The general rule is that no verbal agreements between the parties to a written contract, made before or at the time of the execution of such contract, are admissible to vary its terms or to affect its construction. All such verbal agreements are considered as varied by and merged in the written contract. But this rule does not apply to a subsequent oral agreement made on a new and valuable consideration before the breach of the contract. Such a subsequent oral agreement may enlarge the time of performance, or may vary any other terms of the contract, or may waive and discharge it altogether.[1]

But the plaintiff's counsel contends that, however the general principle may be as to the effect of a parol agreement on a previous written contract, it is not applicable to the present case, the parol agreement being void by the Statute of Frauds; and that to allow a parol agreement to be engrafted upon a written contract would let in all the inconveniences which were intended to be obviated by the statute. In considering this objection we have met with many conflicting decisions, but for which we should have had but little difficulty in disposing of the question raised. And notwithstanding the doubts excited by some of these decisions, we have been brought to a conclusion which coincides, as we think, with the true meaning of the statute. The language of the 4th section (1 Rev. Sts. c. 74), on which the question depends, is peculiar. It does not require that the note or memorandum in writing of the bargain should be signed by both the contracting parties, but only "by the party to be charged thereby or by some person thereunto by him lawfully authorized."

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[1] The court here stated authorities in support of this doctrine

"The principal design of the Statute of Frauds was," as Lord Ellenborough remarks in Cuff *v.* Penn, 1 M. & S. 26, "that parties should not have imposed on them burdensome contracts which they never made, and be fixed with goods which they never contemplated to purchase." The statute therefore requires a memorandum of the bargain to be in writing, that it may be made certain; but it does not undertake to regulate its performance. It does not say that such a contract shall not be varied by a subsequent oral agreement for a substituted performance. That is left to be decided by the rules and principles of law in relation to the admission of parol evidence to vary the terms of written contracts. We have no doubt therefore that accord and satisfaction by a substituted performance would be a good defence in this action. So if the plaintiffs had paid for the goods according to the oral agreements to pay cash or give security, and the defendants had thereupon completed the delivery of the goods contracted for, it would have been a good performance of the written contract. This has been prevented (if the defendants can prove what they offered to prove) by the plaintiffs' refusal to perform on their part a fair and valid contract. And it is a well-settled principle that, if two contracting parties are bound to do certain reciprocal acts simultaneously, the offer of one of the parties to perform the contract on his part, and the refusal of the other to comply with the contract on his part, will be equivalent to a tender and refusal; and in the present case we think it equivalent to an accord and satisfaction, which was prevented by the fault of the plaintiffs, who agreed for a valuable consideration — if what the defendants offered to show be true — to vary the terms of the written contract as to the time of payment, and afterwards refused to comply with their agreement. If the defendants on their part had refused to perform the verbal agreement, then indeed it could not be set up in defence of the present action; for the party who sets up an oral agreement for a substituted performance of a written contract is bound to prove that he has performed or has been ready to perform the oral agreement.

This distinction avoids the difficulty suggested in some of the cases cited, where it is said that to allow a party to sue partly on a written and partly on a verbal agreement would be in direct opposition to the requisitions of the statute; and it undoubtedly would be; but no party having a right of action can be compelled to sue in this form. He may always declare on the written contract; and unless the defendant can prove performance according to the terms of the contract or according to the agreement for a substituted performance, the plaintiff would be entitled to judgment. We think therefore that the evidence of the oral agreements offered at the trial should have been admitted; the same not being within the Statute of Frauds, and the evidence being admissible by the rules of law.

In support of this view of the case I shall not attempt to reconcile all the conflicting opinions which have been held in similar or nearly similar cases, some of which appear to have been decided on very subtle and refined distinctions. I will however refer to a few decisions which bear directly on the present case. The case of Cuff v. Penn, *supra*, is a strong authority in favor of the defendants, as the facts on which the decision in that case depended are in all respects substantially similar to those offered to be proved in this action. That was an action of *assumpsit* for not accepting a quantity of bacon, which by a written contract the defendant agreed to purchase of the plaintiff, to be delivered at certain fixed times. After a part of the bacon had been delivered the defendant requested the plaintiff, as the sale was dull, not to press the delivery of the residue; and the plaintiff assented. The defendant afterward refused to accept the residue, and set up the Statute of Frauds in defence; but the court held that there was a parol dispensation of the performance of the written contract as to the times of delivery, which was not affected by the Statute of Frauds. Lord Ellenborough says: "I think this case has been argued very much on a misunderstanding of the Statute of Frauds, and the question has been embarrassed by confounding two subjects quite distinct; namely, the provision of the statute, and the rule of law whereby a party is precluded from giving parol evidence to vary a written contract." "It is admitted," he adds, in another part of his opinion, "that there was an agreed substitution of other days than those originally specified for the performance of the contract; still the contract remains. Suppose a delivery of live hogs instead of bacon had been substituted and accepted: might not that have been given in evidence as accord and satisfaction? So here the parties have chosen to take a substituted performance."

The principle on which this was decided is laid down in several other cases, some of which have been already cited on the other point of defence.

At the argument of the case of Goss v. Lord Nugent, 5 Barn. & Adolph. 65, Parke, J., remarked that "in Cuff v. Penn, and some other cases relating to contracts for the sale of goods above £10, it has been held that the time in which the goods by the agreement in writing were to be delivered might be extended by a verbal agreement. But I never could understand the principle on which those cases proceeded; for the new contract to deliver within the extended time must be proved partly by writing and partly by oral evidence." But there is no necessity for the plaintiff to declare partly on the written and partly on the oral agreement. He may always, as before remarked, declare on the written contract; and the defendant will be bound to prove a performance according to the terms of it or according to the terms of a substituted performance; and performance in either way may be proved by parol evidence.

Lord Denman, who delivered the opinion of the court in Goss v. Lord Nugent, does not question the correctness of the decision in Cuff v. Penn, and his remarks on another branch of the Statute of Frauds seem to be confirmatory of the principle laid down by Lord Ellenborough in the latter case. "It is to be observed," he says, "that the statute does not say in distinct terms that all contracts or agreements concerning the sale of lands shall be in writing, and there is no clause which requires the dissolution of such contracts to be in writing." In that action however the plaintiff declared partly on the written and partly on the verbal contract, and on that ground it was rightfully enough decided that the action could not be maintained.

In Stowell *v.* Robinson, 3 Bing. N. R. 928, and 5 Scott, 196, it was held that the time for the performance of a written contract for the sale of lands could not be enlarged by a subsequent oral agreement, although that agreement was pleaded by the defendant as a bar to the action. The plea was that at the time stipulated for the performance of the written contract neither party was ready to complete the sale; and the time for the performance was agreed by the parties to be postponed. That decision seems to be founded on the doubt suggested by Parke, J., in Goss *v.* Lord Nugent, and upon the decision in that case, without noticing the distinction in the two cases. And it appears to us that the case of Stowell *v.* Robinson, was decided on a mistaken construction and application of the Statute of Frauds; and that the distinction between the contract of sale which is required to be in writing, and its subsequent performance as to which the statute is silent, was overlooked or not sufficiently considered by the court; otherwise the decision perhaps might have been different. We think there is no substantial difference, so far as it relates to the Statute of Frauds, between the plea in that case and the plea of accord and satisfaction, or a plea that the written contract had been totally dissolved before breach by an oral agreement; either of which pleas would have been a good and sufficient bar to the action. We are aware that the principle on which Stowell *v.* Robinson was decided is supported by other English cases cited; but the principle on which the case of Cuff *v.* Penn was decided is in our judgment more satisfactory, and better adapted to the administration of justice in this and similar cases.

It is to be observed in the present case that the oral agreements offered to be proved by the defendants did not vary the terms of the written contract as to its performance on their part; the only alteration was as to the time of payment by the plaintiffs. Such an alteration made on a good consideration and before any breach of the contract, may, we think, be proved, without any infringement of the Statute of Frauds or any principle of law. *New trial granted.*[1]

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[1] In Clark *v.* Fey, 121 N. Y. 470, the defendant contracted to purchase of plaintiffs 500 tons of old iron rails, at $37.50 per ton, to be shipped "from the other side January or February or March, seller's option." In an action to recover damages for breach of the contract it appeared that after the contract rails had arrived and were ready for delivery and within the permitted time of delivery, in a conversation between the vendee and P., the vendor's agent the vendee said that owing to the fall in price of old rails it would be very difficult for him to take "those rails," and he asked P. to be as easy as he could, and to carry "the rails and give him some rails later." P. told him he "would carry the rails for him and give him some rails a little further on in place of them." No rails were set apart for the vendee until in June; the rails then set apart

BIRD *v.* MUNROE.

SUPREME JUDICIAL COURT OF MAINE, MAY 29, 1877.

[*Reported in* 66 *Maine*, 337.]

PETERS, J. On March 2, 1874, at Rockland, in this State, the defendant contracted verbally with the plaintiffs for the purchase of a quantity of ice, to be delivered (by immediate shipments) to the defendant in New York. On March 10, 1874, or thereabouts, the defendant, by his want of readiness to receive a portion of the ice as he had agreed to, temporarily prevented the plaintiffs from performing the contract on their part according to the preparations made by them for the purpose. On March 24, 1874, the parties, then in New York, put their previous verbal contract into writing, antedating it as an original contract made at Rockland on March 2, 1874. On the same day (March 24), by consent of the defendant, the plaintiffs sold the same ice to another party, reserving their claim against the defendant for the damages sustained by them by the breach of the contract by the defendant on March 10th, or about that time. This action was commenced on April 11, 1874, counting on the contract as made on March 2, and declaring for damages sustained by the breach of contract on March 10, or thereabouts, and prior to March 24, 1874. Several objections are set up against the plaintiffs' right to recover.

The first objection is, that in some respects the allegations in the writ and the written proof do not concur. But we pass this point, as any imperfection in the writ may, either with or without terms, be corrected by amendment hereafter.

Then it is claimed for the defendant that, as matter of fact, the parties intended to make a new and original contract as of March 24, by their writing made on that day and antedated March 2, and that it was not their purpose thereby to give expression and efficacy to any unwritten contract made by them before that time. But we think a jury would be well warranted in coming to a different conclusion. Undoubtedly there are circumstances tending to throw some doubt upon the idea that both parties understood that a contract was fully entered into on March 2, 1874, but that doubt is much more than overcome when all the written and oral evidence is considered together. We think the writing

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were not shown to have been shipped in the contract months. The vendee refusing to accept them when tendered they were sold, and plaintiff sought to recover the difference between the contract and selling price. *Held*, that the parol arrangement was to be construed either as an agreement that the vendor having set apart and tendered the contract rails would "carry them" for the account and at the risk of the purchaser, or as an agreement that the original contract should be abandoned, and other and different rails should be delivered and accepted. If the former, plaintiffs were not entitled to recover, as it did not appear that they had carried for the vendee the contract rails and tendered them for final acceptance. If the latter, the alteration in the terms of the contract amounted to the making of a new contract, which, being by parol, was void under the Statute of Frauds.

made on the 24th March, with the explanations as to its origin, is to be considered precisely as if the parties on that day had signed a paper dated of that date, certifying and admitting that they had on the 2d day of March made a verbal contract, and stating in exact written terms just what such verbal contract was. Parol evidence is proper to show the situation of the parties and the circumstances under which the contract was made. It explains but does not alter the terms of the contract. The defendant himself invokes it to show that, according to his view, the paper bears an erroneous date. Such evidence merely discloses in this case such facts as are part of the *res gestæ.* Benjamin on Sales, § 213. Stoops *v.* Smith, 100 Mass. 63, 66; and cases there cited.

Then, the defendant next contends that, even if the writing signed by the parties was intended by them to operate retroactively as of the first named date, as a matter of law, it cannot be permitted to have that effect and meet the requirements of the Statute of Frauds. The position of the defendant is, that all which took place between the parties before the 24th of March was of the nature of negotiation and proposition only; and that there was no valid contract, such as is called for by the Statute of Frauds, before that day; and that the action is not maintainable, because the breach of contract is alleged to have occurred before that time. The plaintiffs, on the other hand, contend that the real contract was made verbally on the 2d of March, and that the written instrument is sufficient proof to make the verbal contract a valid one as of that date (March 2), although the written proof was not made out until twenty-two days after that time. Was the valid contract, therefore, made on March 2d or March the 24th? The point raised is, whether, in view of the Statute of Frauds, the writing in this case shall be considered as constituting the contract itself or, at any rate, any substantial portion of it, or whether it may be regarded as merely the necessary legal evidence by means of which the prior unwritten contract may be proved. In other words, is the writing the contract, or only evidence of it; we incline to the latter view.

The peculiar wording of the statute presents a strong argument for such a determination. The section reads: "No contract for the sale of any goods, wares, or merchandise, for thirty dollars or more, shall be valid, unless the purchaser accepts and receives part of the goods, or gives something in earnest to bind the bargain, or in part payment thereof, or some note or memorandum thereof is made and signed by the party to be charged thereby, or his agent." In the first place, the statute does not go to all contracts of sale, but only to those where the price is over a certain sum. Then, the requirement of the statute is in the alternative. The contract need not be evidenced by writing at all, provided "the purchaser accepts and receives a part of the goods, or gives something in earnest to bind the bargain or in part payment thereof." If any one of these circumstances will as effectually perfect the sale as a writing would, it is not easily seen how the writing can actually constitute the contract, merely because a writing happens to exist. It could not with any correctness be said, that anything given in earnest to bind a bargain was a substantial part of the bargain itself, or anything more than a particular mode of proof. Then, it is not the contract that is required to be in writing, but only "some note or memorandum thereof." This language supposes that the verbal bargain may be first made, and a memorandum of it given afterwards. It also implies that no set and formal agreement is called for. Chancellor Kent says "the instrument is liberally construed without regard to forms." The briefest possible forms of a bargain have been deemed sufficient in many cases. Certain important elements of a completed contract may be omitted altogether. For instance, in this State, the consideration for the promise is not required to be expressed in writing. Gilligham *v.* Boardman, 29 Maine, 79. Again, it is provided that the note or memorandum is sufficient, if signed only by the person sought to be charged. One party may be held thereby and the other not be. There may be a mutuality of contract but not of evidence or of remedy. Still, if the writing is to be regarded in all cases as constituting the contract, in many cases there would be but one contracting party.

Another idea gives weight to the argument for the position advocated by the plaintiffs; and that is, that such a construction of the statute upholds contracts according to the intention of parties thereto, while it, at the same time, fully subserves all the purposes for which the statute was created. It must be borne in mind that verbal bargains for the sale of personal property are good at common law. Nor are they made illegal by the statute. Parties can execute them if they mutually please to do so. The object of the statute is to prevent perjury and fraud. Of course, perjury and fraud cannot be wholly prevented; but, as said by Bigelow, J. (3 Gray, 331), "a memorandum in writing will be as effectual against perjury, although signed subsequently to the making of a verbal contract, as if it had been executed at the moment when the parties consummated their agreement by word of mouth." We think it would be more so. A person would be likely to commit himself in writing with more care and caution after time to take a second thought. The *locus penitentiæ* remains to him.

By no means are we to be understood as saying that all written instruments will satisfy the statute, by having the effect to make the contracts described in them valid from their first verbal inception. That must depend upon circumstances. In many, and, perhaps, most instances such a version of the transaction would not agree with the actual understanding of the parties. In many cases, undoubtedly, the written instrument is *per se* the contract of the parties. In many cases, as for instance, like the antedating of the deed in Egery *v.* Woodard, 56 Maine, 45, cited by the defendant, the contract (by deed) could not take effect before delivery; the law forbids it. So a will made by parol is absolutely void. But all these classes of cases differ from the case before us.

A distinction is attempted to be set up between the meaning to be given to R. S c. 111, § 4, where it is provided that no unwritten contract for the sale of goods "shall be valid," and that to be given to the several preceding sections where it is provided that upon certain other kinds of unwritten contracts "no action shall be maintained;" the position taken being that in the former case the contract is void, and in the other cases only voidable perhaps, or not enforceable by suit at law. But the distinction is without any essential difference, and is now so regarded by authors generally and in most of the decided cases. All the sections referred to rest upon precisely the same policy. Exactly the same object is aimed at in all. The difference of phraseology in the different sections of the original English statute, of which ours is a substantial copy, may perhaps be accounted for by the fact, as is generally conceded, that the authorship of the statute was the work of different hands. Although our statute (R. S. 1871, § 4) uses the words "no contract shall be valid," our previous statute used the phrase "shall be allowed to be good;" and the change was made when the statutes were revised in 1857, without any legislative intent to make an alteration in the sense of the section. (R. S. 1841, c. 136, § 4.) The two sets of phrases were undoubtedly deemed to be equivalent expressions. The words of the original English section are "shall not be allowed to be good," meaning, it is said, not good for the purpose of sustaining an action thereon without written proof. Browne, St. Frauds, §§ 115, 136, and notes to the sections; Benjamin's Sales, § 114; Townsend *v.* Hargraves, 118 Mass. 325; and cases there cited.

There are few decisions that bear directly upon the precise point which this case presents to us. From the nature of things, a state of facts involving the question would seldom exist. But we regard the case of Townsend *v.* Hargraves, above cited, as representing the principle very pointedly. It was there held that the Statute of Frauds affects the remedy only and not the validity of the contract; and that where there has been a completed oral contract of sale of goods, the acceptance and receipt of part of the goods by the purchaser takes the case out of the statute, although such acceptance and receipt are after the rest of the goods are destroyed by fire while in the hands of the seller or his agent. The date of the agreement rather than the date of the part acceptance was treated as the time when the contract was made; and the risk of the loss of the goods was cast upon the buyer. Vincent *v.* Germond, 11 Johns. 283, is to the same effect. We are not aware of any case where the question has been directly adjudicated adversely to these cases. Webster *v.* Zielly, 52 Barb. (N. Y.) 482, in the argument of the court, directly admits the same principle. The case of Leather Cloth Co. *v.* Hieronimus, L. R. 10 Q. B. 140, seems also to be an authority directly in point. Thompson *v.* Aiger, 12 Met. 428, 435, and Marsh *v.* Hyde, 3 Gray, 331, relied on by defendant, do not, in their results, oppose the idea of the above cases, although there may be some expressions in them inconsistent therewith. Altogether another question was before the court in the latter cases.

But there are a great many cases where, in construing the Statute of Frauds, the force and effect of the decisions go to sustain the view we take of this question, by the very strongest implication, — such as: That the statute does not apply where the contract has been executed on both sides; Bucknam *v.* Nash, 12 Maine, 474. That no person can take advantage of the statute but the parties to the contract, and their privies; Cowan *v.* Adams, 10 Maine, 374. That the memorandum may be made by a broker; Hinckley *v.* Arey, 27 Maine, 362. Or by an auctioneer; Cleaves *v.* Foss, 4 Maine, 1. That a sale of personal property is valid when there has been a delivery and acceptance of part, although the part be accepted several hours after the sale; Davis *v.* Moore, 13 Maine, 424. Or several days after; Bush *v.* Holmes, 53 Maine, 417. Or ever so long after; Browne St. Frauds, § 337, and cases there noted. That a creditor, receiving payments from his debtor without any direction as to their application, may apply them to a debt on which the Statute of Frauds does not allow an action to be maintained; Haynes *v.* Nice, 100 Mass. 327. That a contract made in France, and valid there without a writing, could not be enforced in England without one, upon the ground that the statute related to the mode of procedure and not to the validity of the contract; Leroux *v.* Brown, 12 C. B. 801; but this case has been questioned somewhat. That a witness may be guilty of perjury who falsely swears to a fact which may not be competent evidence by the Statute of Frauds, but which becomes material because not objected to by the party against whom it was offered and received; Howard *v.* Sexton, 4 Comstock, 157. That an agent who signs a memorandum need not have his authority at the time the contract is entered into, if his act is orally ratified afterwards; Maclean *v.* Dunn, 4 Bing. 722. That the identical agreement need not be signed, and that it is sufficient if it is acknowledged by any other instrument duly signed; Gale *v.* Nixon, 6 Cow. 445. That the recognition of the contract may be contained in a letter, or in several letters, if so connected by "written links" as to form sufficient evidence of the contract. That the letters may be addressed to a third person; Browne, St. Frauds, § 346; Fyson *v.* Kitton, 30 E. L. & Eq. 374; Gibson *v.* Holland, L. R. 1 C. P. 1. That an agent may write his own name instead of that of his principal if intending to bind his principal by it; Williams *v.* Bacon, 2 Gray, 387, 393, and citations there. That a proposal in writing, if accepted by the other party by parol, is a sufficient memorandum; Reuss *v.* Picksley, L. R. 1 Exc. 342. That where one party is bound by a note or memorandum the other party may be bound if he admits the writing by another writing by him subsequently signed; Dobelle *v.* Hutchinson, 3 A. & E. 355. That the written contract may be rescinded by parol, although many decisions are opposed to this proposition; Richardson *v.* Cooper, 25 Maine, 450. That equity will interfere to prevent a party making the statute an instrument of fraud; Ryan *v.* Dox, 34 N. Y. 307; Hassam *v.* Barrett, 115 Mass. 256, 258. That a contract verbally made may be maintained for certain purposes, notwithstanding the statute.

That a person who pays his money under it cannot recover it back if the other side is willing to perform; and he can recover if performance is refused; Chapman *v.* Rich, 63 Maine, 588, and cases cited. That a respondent in equity waives the statute as a defence unless set up in plea or answer; Adams *v.* Patrick, 30 Vt. 516. That it must be specially pleaded in an action at law; Middlesex Co. *v.* Osgood, 4 Gray, 447; Lawrence *v.* Chase, 54 Maine, 196. That the defendant may waive the protection of the statute and admit verbal evidence and become bound by it; Browne, St. Frauds, § 135.

It may be remarked, however, that in most courts a defendant may avail himself of a defence of the statute under the general issue. The different rule in Massachusetts and Maine grew out of the Practice Act in the one State and in the statute requiring the filing of specifications in the other.

It is clear from the foregoing cases, as well as from many more that might be cited, that the statute does not forbid parol contracts, but only precludes the bringing of actions to enforce them. As said in Thornton *v.* Kempster, 5 Taunt. 786, 788, "the Statute of Frauds throws a difficulty in the way of the evidence." In a case already cited, Jervis, C. J., said, "The effect of the section is not to avoid the contract, but to bar the remedy upon it, unless there be writing." See analogous case of McLellan *v.* McLellan, 65 Maine, 500.

But the defendant contends that this course of reasoning would make a memorandum sufficient if made after action brought, and that the authorities do not agree to that proposition. There has been some judicial inclination to favor the doctrine to that extent even, and there may be some logic in it. Still the current of decision requires that the writing must exist before action brought. And the reason for the requirement does not militate against the idea that a memorandum is only evidence of the contract. There is no actionable contract before memorandum obtained. The contract cannot be sued until it has been legally verified by writing; until then there is no cause of action, although there is a contract. The writing is a condition precedent to the right to sue. Willes, J., perhaps correctly describes it in Gibson *v.* Holland, *supra*, when he says, "the memorandum is in some way to stand in the place of a contract." He adds: "The courts have considered the intention of the legislature to be of a mixed character; to prevent persons from having actions brought against them so long as no written evidence was existing when the action was instituted." Browne, St. Frauds, § 338; Benjamin's Sales, § 159; Fricker *v.* Thomlinson, 1 Man. & Gr. 772; Bradford *v.* Spyker, 32 Ala. 134; Bill *v.* Bament, 9 M. & W. 36; Philbrook *v.* Belknap, 6 Vt. 383. In the last case it is said, "strictly speaking, the statute does not make the contract void, except for the purpose of sustaining an action upon it, to enforce it."

Action to stand for trial.

APPLETON, C. J., WALTON, DANFORTH, VIRGIN, and LIBBEY, JJ., concurred.

SUPPLEMENTARY CASES

ESTATE OF EDWIN R. COPE APPEAL OF HENRY T. COATES.

SUPREME COURT OF PENNSYLVANIA, 1899.

[*Reported in* 191 *Pa. St.* 589.]

OPINION BY MR. CHIEF JUSTICE STERRETT, May 23, 1899:

This appeal is from the decree of the court below disallowing appellants' claim for $8,037.55 for books and engravings sold by them to said decedent, except to the extent of $880 which represents the value of goods delivered at his home.

Mr. Cope, the decedent, was a gentleman of independent fortune and of literary and artistic tastes. For many years he had been an extensive purchaser of books and engravings from appellant. During the last three years of his life, his payments to them aggregated over $11,000. The nature of appellants' present claim, for balance disallowed by the orphans' court, will perhaps be best understood by referring to the testimony of witnesses examined in support thereof. Col. J. E. Barr, their salesman, testified, inter alia, as follows: "Mr. Cope came to the store every time, I think, that he came to town; made it a place where he always staid, and when any new invoices of prints came in, I would always tell him and he would come in and go over them, — look at them, — and if there was anything he liked he would say: 'Put them away for me,' 'I will take this,' or 'I will take that,' and I put them away in the drawers. Q. Were they put in general drawers or special drawers? A. Special drawers set apart for him, with nothing else in. Q. And drawers to which he had access? A. He and I; nobody else touched them. . . . Q. Would the prices be named? A. He would ask the price, and I would give it to him; mark it on the prints. . . . Q. These prints, after he bought them and the price agreed upon marked and put away in his drawers, and did he get them from time to time? A. If you will allow me to tell you, Mr. Cope was in the habit of making mats for his own prints, and making little biographical sketches on the back of each, and then put them away into portfolios and catalogue them, and in that way he would take them home as fast as he could do that, and put them away in proper portfolios; and in that way the prints in the store would accumulate faster than he could take them home.

He did not want them at home lying about, because they were fine prints, and he just took enough home, from time to time, to catalogue and mat them and put them away in the portfolios; and in the mean time invoices came from all parts of the world, and he would see them all and select what he wanted, and they were put away in these drawers. Q. And then, as he finally took them away, you sent a bill for them? A. Yes, sir. Q. You did not send a bill until he took them away? A. Oh, no. Q. He was a peculiar man, was he not? A. Yes, sir; he would make his own list, when he would take them home; he would bring the list, which he would hand to me and tell me to charge them up. Q. Were those put aside in those drawers for approval or actually sold? A. No; absolutely sold. I would not dare to take them out. Q. They were his? A. Yes, sir."

Appellants' bookkeeper testified that charges were made and bills rendered in the manner sworn to by Col. Barr, their salesman. He further testified: "Q. When you took account of stock each year, including these drawers, did you put that in your general stock, or how did you charge the amount in these drawers? A. It was charged up to Mr. Cope, so that we would not take it into stock each year. Q. On your book it would appear as charged each year? A. Yes, sir. By Mr. Thompson: It was a memorandum merely for the purpose of showing where the goods were in your account of stock; of course it was that? A. Showing where they were. Q. That is all? A. They were not belonging to us at all; they were not included in our stock. Q. But you never rendered any bill for them, of course? A. No."

On behalf of the appellee, evidence was offered to show that the decedent always paid his bills promptly, and at the time of his death left no other outstanding accounts, except for medicine and medical attendance. It was also attempted to be shown by a salesman of the publishing house of J. S. Lippincott & Company that decedent was in the habit of having books laid aside for inspection. This testimony was as follows: "Q. Was it not at times a habit of his to have set aside the books, that he would come back and confirm or disaffirm? A. No, sir. Q. He was always prompt in his payment? A. If he wanted a book, he would say, 'I will take it.' If I said to him, 'Perhaps you would like to look at it a different time,' he would say 'No,' he did not want it. He was a man that would make up his mind in a very little time if he wanted an article." This testimony on behalf of the appellee, so far as it has any bearing on the case, is corroborative of appellants' witnesses and tends to support their contention.

The learned auditing judge, who was sustained by the court in banc, held that there was no contract of sale, "because the minds of the parties did not come together in a common intention. In this we think he was mistaken. The evidence to support the auditing judge's conclusion is far from being satisfactory. In examination in chief of appellants' salesman, Mr. Barr, he was emphatic in his assertion of an unconditional sale, and this was reiterated by him on cross-examination. In endeavoring to strengthen appellee's line of defense, he was asked on cross-examination: "Q. Was it not your habit of showing him prints, and was it not his habit to look at them and then come back and, having concluded to take them, to order them? A. I never put these away until he told me to do so. Q. Did he not tell you to lay these aside? A. No, sir; I never laid any prints aside for Mr. Cope." The language employed by the decedent is entirely consistent with a consummated contract of sale. The conduct of appellants was uniform in treating the transaction as a sale. In every case, the selected engravings were marked with their respective prices, separated from the common stock and made accessible to the decedent and Mr. Barr alone, then charged to him, and never thereafter carried into the general stock. The learned auditing judge attached too much importance to the fact that the bills were not rendered until the goods were taken away. There is nothing in that circumstance that is inconsistent with an absolute sale, especially when we consider the uniform course of dealing, which the decided weight of the evidence shows the parties themselves adopted. The appellants were under no obligation to notify Mr. Cope of the charge. It would not have been in accord with their mutually recognized mode of dealing, and might have resulted in the loss of a valuable customer. If it had been sought to establish the contract of sale by the dealings of the parties alone without regard to the evidence of their mutual understanding in relation thereto, there might be some force in the position contended for by the appellee; but, the direct evidence of a sale and mutually understood mode of delivery, in drawers specially designated as receptacles for decedent's purchases, is positive and uncontradicted, except by the circumstances relied on by the appellee. Unfortunately for him, none of those circumstances are inconsistent with a sale.

It follows from what has been said that the assignments of error must be sustained.

Decree reversed at appellee's costs and ordered that the record be remitted to the court below with instructions to allow the residue of appellants' claim.

AUTOMATIC TIME–TABLE ADVERTISING CO. *v.* AUTOMATIC TIME–TABLE CO.

Supreme Judicial Court of Massachusetts, March 3, 1911.

[*Reported in* 208 *Mass.* 252.]

Action for breach of a contract, the substantial portions of which were as follows:

"Know all men by these presents, that the Automatic Time-Table Company, a corporation duly organized, having its principal place of business at Lowell in the County of Middlesex and Commonwealth of Massachusetts, in consideration of $4800.00, paid by the Automatic Time-Table Advertising Company, a corporation duly organized, and having its principal place of business at said Lowell, in said County and Commonwealth, the receipt whereof is hereby acknowledged, does hereby grant, sell, transfer and deliver unto the said Automatic Time-Table Advertising Company, the following goods, and chattels, viz., to wit:

"12 automatic time-table machines complete, together with all printed matter, time-tables, electro-plates, printed goods and advertising matter, and advertising contracts, relating to said machines which were sold, assigned and transferred to the said Automatic Time-Table Company by the said Automatic Time-Table Advertising Company under agreement, dated July 13, 1909. Said machines are described and located as follows.

"1 machine located at Merrimack Square, in Lowell, Mass.
1 " " in Lawrence, Mass.
1 " " " Haverhill, Mass.
1 " " " Salem, Mass.
1 " " " Lynn, Mass.
1 " " " Chelsea, Mass.
6 machines now standing in the shop of the Automatic Time-Table Company, 58 Middle Street, Lowell, Massachusetts, and numbered on door on battery side of case, respectively as follows: — 8, 9, 10, 11, 12 and 13.

"The machines above described as located in Merrimack Square, Lowell, Mass., Lawrence, Haverhill, Salem, Lynn and Chelsea, Mass., include all parts and appliances that are now enclosed within or fastened upon their respective cases, and the machines now located in the shop at 58 Middle Street include Gordon batteries and all other essential parts in new and first-class condition that are now used in connection with the above mentioned machines.

"$2400.00 of above consideration is allowed said Automatic Time-Table Advertising Company as a credit by value of demonstration. . . ."

The defendant owned the patents for the manufacture of such machines and no other person could manufacture or sell them. The plaintiff was engaged in the business of securing contracts for the advertising upon such clocks.

The facts shown by the evidence are stated briefly in the opinion. Upon August 8, 1909, an accidental fire greatly damaged the six machines standing in the defendant's premises, and a dispute then arose between the parties as to whether there had been such a sale of these six machines as would vest the title in the plaintiff and subject the plaintiff to the damage thus occasioned to the six machines.

The defendant asked the judge to rule that on these facts the plaintiff could not recover. The judge refused so to rule, and found a verdict for the plaintiff to which the defendant alleged exceptions.

Loring, J. The contract of July 16 was a contract for the sale of twelve specific machines and not a contract for the sale of twelve machines of a particular description. By its terms it purports to be a present sale, but it was a sale of "12 automatic time-table machines complete," and there was evidence that no one of the "6 machines now standing in the shop of the Automatic Time-Table Company" was complete.

The bill of exceptions is somewhat obscure on this point. But as we interpret it there was evidence that apart from the Gordon batteries no one of these six machines was complete. We speak of the parts of the machine other than the Gordon batteries because it seems to have been the undisputed fact that as matter of practice these batteries were not put into the machines until they were set up for use on the premises of the purchaser or licensee, and setting up these machines on the premises of the plaintiff was not part of the obligation of the vendor under the contract here in question. It appeared that that was to be paid for by the vendee in addition to the purchase price named in the written contract.

The contract does not say that the "12 automatic time-table machines" were complete, but it says that the defendant sells to the plaintiff "12 automatic time-table machines complete." Evidence that the six here in question were in fact incomplete was admissible as one of the circumstances under which the contract was made and so one of the circumstances in the light of which it was to be construed.

Since something had to be done to the machines to put them in a deliverable state and a different intention did not appear, the property in the six machines here in question did not pass on the execution of the contract. The transaction was governed by the sales act (St. 1908, c. 237), and it is there so provided in § 19, Rule 2. The rule was the same at common law. Wesoloski *v.* Wysoski, 186 Mass. 495, and cases cited.

The defendant contends that the cases of Glover *v.* Austin, 6 Pick. 209, Glover *v.* Hunnewell, 6 Pick. 222, Sumner *v.* Hamlet, 12 Pick. 76, Thorndike *v.* Bath, 114 Mass. 116, Mauger *v.* Crosby, 117 Mass. 330, and Whittle *v.* Phelps, 181 Mass. 317, are decisions to the contrary. Those are cases where it appeared that it was the intention of the parties to sell the chattel in its unfinished condition with an agreement by the seller to complete it; or, in the language of St. 1908, c. 237, § 19, those were cases where a different intention did appear.

The contract of July 16, therefore, was not a contract of present sale of six unfinished machines with an agreement on the part of the defendant to complete them, but it was a contract to complete the six unfinished machines which on completion were to become the property of the plaintiff.

The defendant has contended that the delivery of the six machines not in dispute passed the property in the six here in question, and that Damon *v.* Osborn, 1 Pick. 476, 481, Lee *v.* Kilburn, 3 Gray, 594, 598, and Rice *v.* Codman, 1 Allen, 377, are decisions to that effect. Those cases are not decisions to that effect, and the case of Foster *v.* Ropes, 111 Mass. 10, is a decision that that contention is wrong at common law. The rule of the common law is the rule under the sales act. The cases relied upon by the defendant do not help him. Damon *v.* Osborn was not a sale of specific goods. It was held there that goods bargained and sold would lie before a separation was made. See however Barrie *v.* Quinby, 206 Mass. 259. The sale in the case of Lee *v.* Kilburn was held to be a sale of specific goods where nothing remained to be done. It was held that as against a messenger in bankruptcy the title passed without delivery and it was said that: "The taking possession of part was in legal effect, the taking possession of the whole." In Rice *v.* Codman the fact that part of the specific goods sold had been taken away was spoken of as showing that the statute of frauds had been satisfied.

The next contention of the defendant is that the fire of August 8 brought this case within St. 1908, c. 237, § 8, cl. 2, and that the plaintiff had to elect between avoiding the whole contract for all twelve machines or paying the whole price for the six the title to which passed to it at the date of the contract. It is not necessary to consider what the result would have been in the case at bar if the case had been brought within St. 1908, c. 237, § 8, cl. 2. The bill of exceptions went no further than to state that the "fire greatly damaged the six machines standing in the defendant's premises," and the statute applies where the specific goods perished after the contract was made or so greatly deteriorated in quality as to be substantially changed in character.[1]

Exceptions overruled.

MURRAY *v.* MORRIS.

SUPREME COURT OF VERMONT, OCTOBER 2, 1917.

[*Reported in* 91 *Vt.* 541.]

MILES, J. Only two questions are raised in this case, viz.: First, had Townsend, Townsend & Co. any attachable interest in the die of the monument in question which was attached in the suit of Parry & Jones Co. on the 26th day of September, 1914, at the time the attachment was made; and second, was there anything in the case to submit to the jury?

From a careful examination of the entire proceedings in the case it appears that Townsend, Townsend & Co. are dealers in granite statues and monuments residing in New York City and having an agent residing in Barre, Vt.; that the plaintiff resides in Brazil, Ind.; that on the 4th day of May, 1914, the plaintiff ordered from Townsend, Townsend & Co. a monument, consisting of a die and some other parts and also a marker, all to be thereafter delivered f. o. b. Barre, Vt., to be shipped to Brazil, Ind. On June 19, 1914, Townsend, Townsend & Co. ordered the same monument and marker from the Central Granite Co. of Barre, Vt., to be "delivered f. o. b. cars at your station" to be shipped car load later, no place of shipment nor consignee being stated in the order. Subsequently and on September 23, 1914, the Central Granite Co. loaded the monument at their yard onto a car of the Central Vermont Railway Company, set by that company on the 22nd day of September, 1914, in the yard of the Central Granite Company upon the order of the local agent of Townsend, Townsend & Co., and shortly after the monument was loaded upon the car, the car with the monument and marker was taken by the railroad company to a siding in their yard about half a mile from the Central Granite Company's yard, where other granite material was to be loaded upon the car to complete the car load and while the car, with the monument upon it, was there standing, the defendant, a deputy sheriff, attached the die upon a writ in favor of Parry & Jones Co. *v.* Townsend, Townsend & Co. as their property. Before the die was attached, the local agent of Townsend, Townsend & Co. delivered to the billing agent of the Central Vermont Railway Company at Barre, Vt., a bill of lading of the monument and marker

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[1] The statement of facts is abbreviated and a portion of the opinion omitted.

to be shipped to the plaintiff at Brazil, Ind., in which Townsend, Townsend & Co. were designated as the shippers and the plaintiff as consignee. Included in this bill of lading was other granite, furnished by parties other than the Central Granite Co., afterwards loaded on the car with said monument and marker, to make out the car load. After the attachment and before September 30, 1914, this suit of replevin was brought, and on September 30, 1914, the car having been fully loaded, the monument and the die, with the other parts of the monument, were sent to the plaintiff at Brazil, Ind. After the car had been fully loaded and the die had been replevied and returned to the car, the billing clerk stamped upon the bill of lading with a rubber stamp the following:

"Central Vt. Ry. Co.——Received Sept. 30, 1914, Freight Office, Barre, Vt."

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material.

In due course of time the monument and marker with the die in question were received by the plaintiff at Brazil, Ind. After its receipt, the Central Granite Company received from the plaintiff a letter, stating that the job was not according to contract and that certain changes would have to be made in it before he would accept the work. Whether any changes were ever made in the monument and to what the complaint related does not appear in the case; but the monument was used by the plaintiff and the contract of purchase was never rescinded by him. The box inclosing the die was marked "T. T. & Co.," meaning Townsend, Townsend & Co., at the time it was loaded upon the car in the yard of the Central Granite Company.

"Ordinarily a delivery of goods by the seller to the carrier designated by the purchaser, or to one usually employed in the transportation of goods from the place of the seller to that of the purchaser, is a delivery to the purchaser." 35 Cyc., p. 193, par. 1; Benj. on Sales (4th Ed.), pars. 181 and 1040; Spencer v. Hale, 30 Vt. 314, 73 Am. Dec. 309; Strong et al. v. Dodds, 47 Vt. 348; Diversy v. Kellogg, 44 Ill. 114, 92 Am. Dec. 154; Hall & Loney v. Richardson, 16 Md. 397, 77 Am. Dec. 303; National Bank v. Dayton, 102 U. S. 59, 26 L. Ed. 77; Kilmer et al. v. Moneyweight Scale Co., 36 Ind. App. 568, 76 N. E. 271. No question is raised but that the Central Granite Company had title to the monument before it was loaded upon the car and that it parted with its title when the monument was thus loaded and that then title passed to either the plaintiff or Townsend, Townsend & Co. The plaintiff claims that the title passed to him and the defendant claims that it passed to Townsend, Townsend & Co. at that time.

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Under the general rule above stated when the monument was loaded upon the car and the bill of lading delivered by the local agent of Townsend, Townsend & Co. to the billing clerk of the railroad company, the title to the monument passed to the plaintiff subject only to stoppage *in transitu* and the right of rescission by

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riter, which, Held: never took place, under these facts.

the plaintiff if the monument failed to be in accordance with the order, neither of which rights were exercised in this case, unless something more appears in the case showing the contrary.

The defendant argues that the fact that the box inclosing the die was marked "T. T. & Co." shows that the delivery was to that company, but we think that this does not have the tendency claimed for it, in the light of the other facts in the case. It was quite proper to mark the box with something identifying it as the property sent by Townsend, Townsend & Co., the shipper, to the plaintiff, in view of the fact that it was sent with other granite material furnished by other parties.

The defendant further argues that the die was not received by the railroad company until the 30th day of September, 1914, because, on that date and after the car was fully loaded, the billing clerk of the railroad company stamped upon the bill of lading a statement that the carload was received on that date, the date on which the car was fully loaded. This fact cannot aid the defendant, for if Townsend, Townsend & Co. had any attachable interest in the monument it was because they acquired that interest at the time the monument was loaded upon the car and received by the railroad company; and if it was not received by the railroad company until September 30, 1914, then Townsend, Townsend & Co., had no attachable interest in the monument when it was attached on the 26th day of September, 1914. We think, however, that that entry upon the bill of lading by the common carrier did not overcome the actual fact that the monument had already been delivered to it.

The defendant further argues that the fact that the plaintiff wrote to the Central Granite Company finding fault in some particular not disclosed in the case and notifying the Central Granite Company that he should not accept the monument, shows that it was not the intention of the plaintiff and Townsend, Townsend & Co. that the monument should be delivered until the plaintiff actually accepted it. We think that this argument is not sound. The complaint was not made to Townsend, Townsend & Co., the party with whom the plaintiff made the trade, and nothing in the case appears showing that Townsend, Townsend & Co. ever knew anything about it; nor does it appear in the case that the monument was not in every respect as ordered, nor that anything was done after the complaint to change it; but the fact that the plaintiff kept it and used it for the purpose ordered would rather indicate that it was according to the contract.

The defendant cites several authorities in support of his contention, but an examination of the same leads us to the conclusion that they are not applicable to the facts in this case which, stated in brief, are these: The plaintiff ordered the monument in question from Townsend, Townsend & Co. to be delivered f. o. b.

on the cars, Barre, Vt., and Townsend, Townsend & Co. procured the Central Granite Company to fill that order which that company did on the 23rd day of September, 1914. When the Central Granite Company loaded the monument upon the cars nothing further remained for Townsend, Townsend & Co. to do under their contract with the plaintiff and the contract on their part was then fully performed and so far as anything appears in the case, Townsend, Townsend, & Co. then became entitled to payment for the monument. We think and so hold that when the monument was loaded upon the cars by the Central Granite Company and the bill of lading delivered to the carrier's billing agent, the title to the monument passed to the plaintiff, and that at the time of the attachment by the defendant Townsend, Townsend & Co. had no attachable interest in it. The defendant argues further that the case should have been submitted to the jury, but he brings to our attention no fact which he claims should have been submitted to them.

Judgment affirmed.

is case seems to be decided on the ground that the seller was liable for each of duty, for which buyer could recover damages. Then tort or egligence.

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MILLER v. HARVEY.

COURT OF APPEALS OF NEW YORK, MAY 22, 1917.

[*Reported in* 221 *N.Y.* 54.]

CARDOZO, J. The plaintiff sold to the defendant in the city of New York automobile tires which were to be sent by express to Allenhurst, New Jersey. The price, $95.43, was paid by the defendant in advance. The seller intrusted the tires to an express company without declaring their value. The waybill states that the value was asked and not given. By the contract of carriage the liability of the carrier was limited to $50, unless a greater value was "declared and paid for or agreed to be paid for at the time of shipment." The tires were lost in transit. The defendant notified the plaintiff of the loss and requested a duplicate shipment, which was made. The question to be determined is whether payment must be made again.

Rl 1. The general rule is that delivery to a carrier is delivery to the buyer (Sales of Goods Act, § 127, subd. 1, Pers. Prop. Law, as amended by L. 1911, ch. 571; Cons. Laws, ch. 41). But the rule has its exceptions (Sales of Goods Act, § 100, subd. 5; § 127, subds. 2 and 3). Only one of them will be considered. By section 127, subd. 2, of the Sales of Goods Act it is provided:

2' "Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages."

The statute is declaratory of the rule at common law. The seller must not sacrifice the buyer's right to claim indemnity from the carrier. That rule was declared more than a century ago in Clarke *v.* Hutchins (14 East, 475). In that case the carrier gave notice that it would not be answerable for any packages above £5 without special entry of value. The seller omitted the entry and was held to have assumed the risk. A more modern instance is a recent decision of the Supreme Court of the United States (Reid *v.* Fargo, 241 U. S. 544). An agent delivered an automobile to a carrier and accepted a bill of lading by which liability was limited to $100. The acceptance of such a limitation was held to be a breach of duty. There are other cases of like tenor (Buckman *v.* Levi, 3 Camp. 414; Stafford & Bro. *v.* Walter & Skelton, 67 Ill. 83; Lewis *v.* Imhof, 138 Mo. App. 370; Gordon *v.* Ward, 16 Mich. 360). To the same effect are the leading text books (Williston on Sales, §§ 278, 595; Benjamin on Sales [5th ed.], p. 739; 2 Mechem on Sales, 1183; Burdick on Sales, § 694).

Tested by these principles, the plaintiff's case must fail. He limited the carrier's liability to $50. He sacrificed the defendant's right of indemnity to the extent of almost one-half of the value of the shipment. He did this when full indemnity could have been procured by an additional payment of ten cents. That was not a reasonable protection of the interests of his principal. The plaintiff's argument, if sound, would require us to hold that the acceptance of a like limitation would be reasonable if the value had been $1,000. Precedent and reason forbid that conclusion. The seller who puts the buyer at the mercy of the carrier must procure the buyer's approval or assume the risk himself.

Cases such as Nelson *v.* Hudson River R. R. Co. (48 N. Y. 498), Shelton *v.* Merchants' Dispatch Transp. Co. (59 N. Y. 258), and Waldron *v.* Fargo (170 N. Y. 130), cited by the plaintiff, are beside the mark. They deal with controversies between the owner and the carrier. They hold that the principal is not at liberty to repudiate as against the carrier the terms accepted by the agent. They have no bearing upon the measure of diligence owing from the agent to the principal (Reid *v.* Fargo, *supra*). It is significant that whenever the plaintiff made shipments C. O. D., he declared the value to the carrier. His duty was to safeguard the defendant's interests as sedulously as his own.

The judgment should be affirmed with costs.

HISCOCK, Ch. J., CHASE, COLLIN, CUDDEBACK and HOGAN, JJ., concur; McLAUGHLIN, J., not sitting.

Judgment affirmed.

COMMERCIAL NATIONAL BANK OF NEW ORLEANS *v.* CANAL-LOUISIANA BANK & TRUST CO.

SUPREME COURT OF THE UNITED STATES, JANUARY 10, 1916.

[*Reported in* 239 *U.S.* 520.]

MR. JUSTICE HUGHES. This is a controversy arising in a bankruptcy proceeding. The Commercial National Bank of New Orleans petitioned the District Court for the recovery from the trustee in bankruptcy of certain bales of cotton alleged to have been held by the bankrupts, Dreuil & Company, for the account of the petitioner under trust receipts. The Canal-Louisiana Bank & Trust Company defended, presenting its reconventional demand based upon a claim of superior title. The District Court entered a decree in favor of the Canal-Louisiana Bank & Trust Company (205 Fed. Rep. 568), which was affirmed by the Circuit Court of Appeals. 211 Fed. Rep. 337.

The controversy arises from the following transactions which were had prior to the bankruptcy. On December 9, 1912, Dreuil & Company holding inland bills of lading for two lots of cotton (forty bales and sixty bales respectively) pledged the bills of lading with the Canal-Louisiana Bank to secure certain promissory notes for moneys advanced. On December 13, 1912, the bills of lading were withdrawn from the Canal-Louisiana Bank on trust receipts, as follows:

"Received of Canal Bank & Trust Company the bills of lading or other documents or securities as enumerated below, held by the said bank as collateral pledged to secure advances made to the undersigned, and in consideration thereof, the undersigned hereby agrees to pay over to the said bank or its assignees, and to specifically apply against the very same advances the proceeds of the sale of the property mentioned in the said documents; or to deliver to the said bank or its assignees the shipping documents or warehouse receipts representing the undermentioned goods within one day from the receipt thereof, this delivery being temporarily made the undersigned for convenience only, without novation of the original debt, or giving the undersigned any title thereto, except as trustee for the said bank, and except to receive the avails thereof or the documents therefor for account of the said bank."

Dreuil & Company, surrendering the bills of lading to the railroad company, obtained delivery of the cotton and sent it to a 'pickery,' where the lot of forty bales was remade into sixty, and the lot of sixty bales into ninety. Dreuil & Company then stored the cotton with a warehouseman, the Planters' Press, receiving two negotiable warehouse receipts which, on December 17, 1912, they pledged to the Commercial Bank as security for their notes. On December 20, 1912, and December 28, 1912, these warehouse receipts, respectively, were withdrawn by Dreuil & Company from the Commercial Bank on trust receipts similar in tenor to those which had been given, as above stated, to the Canal-Louisiana Bank. Dreuil & Company then obtained a delivery of the cotton from the Planters' Press; on December 31, 1912, they were adjudicated bankrupts and temporary receivers were appointed. It appears that sixty of the bales had been disposed of, but the remainder of the cotton, which had been sent by Dreuil & Company to a steamer for shipment, was recovered by the receivers and placed by them in the Planters' Press, warehouse receipts being issued therefor which passed into the possession of the trustee. Despite the changes mentioned, and remarkings (which we need not consider), the District Court found the identity of the cotton to be established, and there is no further controversy upon that point. Nor is it controverted that the Commercial Bank was a purchaser in good faith for value of the warehouse receipts negotiated to it.

We assume that under the jurisprudence of Louisiana the transaction between Dreuil & Company and the Canal-Louisiana Bank (described by the bank as a pledge) created rights in the bank in the nature of ownership for the purpose of securing its advances (Rev. Stat. of Louisiana, 2482; Civil Code, Arts. 3157, 3158, 3170, 3173; Fidelity & Deposit Co. *v.* Johnston, 117 Louisiana, 880, 889; Act 94 of 1912 (Uniform Bills of Lading Act), § 32; and that when the Canal-Louisiana Bank entrusted the bills of lading to Dreuil & Company for the purposes described in the trust receipts, given to that bank, it could still assert its title as against Dreuil & Company and their trustees in bankruptcy. See Clark *v.* Iselin, 21 Wall. 360, 368; *In re* E. Reboulin Fils & Co., 165 Fed. Rep. 245; Charavay *v.* York Silk Mfg. Co., 170 Fed. Rep. 819; *In re* Cattus, 183 Fed. Rep. 733; Century Throwing Co. *v.* Muller, 197 Fed. Rep. 252; *In re* Dunlap Carpet Co., 206 Fed. Rep. 726; Assets Realization Co. *v.* Sovereign Bank, 210 Fed. Rep. 156; Moors *v.* Kidder, 106 N. Y. 32; Drexel *v.* Pease, 133 N. Y. 129; Moors *v.* Wyman, 146 Massachusetts, 60; Moors *v.* Drury, 186 Massachusetts, 424; Brown *v.* Billington, 163 Pa. St. 76; Williston on Sales, § 437. No question is presented as to the effect, in the light of the Uniform Bills of Lading Act passed in Louisiana in 1912 (Act 94), of an attempted negotiation by Dreuil & Company of the bills of lading contrary to the terms of the trust receipts. See Roland M. Baker Co. *v.* Brown, 214 Massachusetts, 196, 203. The bills of lading were not negotiated; they served their purpose, being surrendered to the railroad company on the delivery of the goods to Dreuil & Company. The transactions with the 'pickery' are not material to the question to be decided. Dreuil & Company having obtained possession of the cotton, as was contemplated, placed it in store and the question is as to the effect of the negotiation of the warehouse receipts to the Commercial Bank.

It is a familiar rule that one who has no title to chattels cannot transfer title unless he has the owner's authority or the owner is estopped. See Civil Code (La.), Arts. 2452, 3142, 3145, 3146. It follows that, in the absence of circumstances creating an estoppel one without title cannot transfer it by the simple device of warehousing the goods and endorsing the receipts. But if the owner of the goods has permitted another to be clothed with the apparent ownership through the possession of warehouse receipts, negotiable in form, there is abundant ground for protecting a *bona fide* purchaser for value to whom the receipts have been negotiated. Pollard *v.* Reardon, 65 Fed. Rep. 848, 852; Williston on Sales, § 421. The effect of the negotiation of warehouse receipts is defined in the Uniform Warehouse Receipts Act, enacted in Louisiana by Act 221 of 1908.

[The Court here quoted sections 40, 41, 47 of the Act which are in substance like sections 32, 33, 38, of the Uniform Sales Act.]

It will be observed that 'one who takes by trespass or a finder is not included within the description of those who may negotiate.' (Report of Commissioners on Uniform State Laws, January 1, 1910, p. 204.) Aside from this, the intention is plain to facilitate the use of warehouse receipts as documents of title. Under § 40, the person who may negotiate the receipt is either the 'owner thereof,' or a 'person to whom the possession or custody of the receipt has been entrusted by the owner' if the receipt is in the form described. The warehouse receipt represents the goods, but the entrusting of the receipt, as stated, is more than the mere delivery of the goods; it is a representation that the one to whom the possession of the receipt has been so entrusted has the title to the goods. By § 47, the negotiation of the receipt to a purchaser for value without notice is not impaired by the fact that it is a breach of duty or that the owner of the receipt was induced 'by fraud, mistake or duress' to entrust the receipt to the person who negotiated it. And, under § 41, one to whom the negotiable receipt has been duly negotiated acquires such title to the goods as the person negotiating the receipt to him, or the depositor or person to whose order the goods were deliverable by the terms of the receipt, either had or 'had ability to convey to a purchaser in good faith for value.' The clear import of these provisions is that if the owner of the goods permits another to have the possession or custody of negotiable warehouse receipts running to the order of the latter, or to bearer, it is a representation of title upon which *bona fide* purchasers for value are entitled to rely, despite breaches of trust or violations of agreement on the part of the apparent owner.

It cannot be doubted that if Dreuil & Company had pledged to the Commercial Bank the bills of lading which they withdrew from the Canal-Louisiana Bank under the trust receipts, the former paying value in good faith would have had the superior right. This would have been directly within the terms of the Uniform Bills of Lading Act (La. Act 94, 1912, §§ 31, 32, 38, 39). Roland M. Baker Co. *v.* Brown, *supra*. See Hardie *v.* Vicksburg S. & P. Ry., 118 Louisiana, 254. It seems to be contended that the case is different with the warehouse receipts. But it cannot be said that it was not within the contemplation of the parties that Dreuil & Company, on obtaining the goods from the railroad company, should put them in warehouse and take the usual receipts. As we have stated, we are not concerned with what happened at the 'pickery,' as the case is precisely the same, so far as the Commercial Bank is concerned, as if the original bales had been warehoused (without remaking) as soon as received. It was not the placing of the cotton in warehouse in the usual course of business, but the negotiation of the receipts, that constituted the violation of Dreuil & Company's agreement with the Canal-Louisiana Bank. By the very terms of that agreement Dreuil & Company were to take the position of 'trustee' for the bank with authority to receive 'the avails' of the goods or 'the documents' therefor for account of the bank and being bound to apply the proceeds of sale to the bank's advances. And in taking documents of title, in ordinary course, pursuant to the agreement which was intended to facilitate the disposition of the cotton through Dreuil & Company, the latter were manifestly permitted to take such documents to their own order, as they took the bills of lading with which they were entrusted. To repeat, it was the *negotiation* of the receipts that constituted the breach of trust. But after the Canal-Louisiana Bank had allowed Dreuil & Company to be clothed with apparent ownership through possession of the receipts it cannot be heard to question the title of a *bona fide* purchaser for value to whom they had been negotiated. *In re* Richheimer, 221 Fed. Rep. 16.

It is said that under the law of Louisiana, as it stood prior to the enactment of the Uniform Warehouse Receipts Act, the Commercial Bank would not have taken title as against the Canal-Louisiana Bank (Stern Bros. *v.* Germania-National Bank, 34 La. Ann. 1119; Lallande *v.* His Creditors, 42 La. Ann. 705; Holton *v.* Hubbard, 49 La. Ann. 715; Insurance Co. *v.* Kiger, 103 U. S. 352; but see Hardie *v.* Vicksburg S. & P. Ry., *supra*); and it is urged that the new statute is but a step in the development of the law and that decisions under the former state statutes are safe guides to its construction. We do not find it necessary to review these decisions. It is apparent that if these Uniform Acts are construed in the several States adopting them according to former local views upon analogous subjects, we shall miss the desired uniformity and we shall erect upon the foundation of uniform language separate legal structures as distinct as were the former varying laws. It was to prevent this result that the Uniform Warehouse Receipts Act expressly provides (§ 57): "This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it." This rule of construction requires that in order to accomplish the beneficent object of unifying, so far as this is possible under our dual system, the commercial law of the country, there should be taken into consideration the fundamental purpose of the Uniform Act and that it should not be regarded merely as an offshoot of local law. The cardinal principle of the Act — which has been adopted in many States — is to give effect, within the limits stated, to the mercantile view of documents of title. There had been statutes in some of the States dealing with such documents, but there still remained diversity of legal rights under similar commercial transactions. We think that the principle of the Uniform Act should have recognition to the exclusion of any inconsistent doctrine which may have previously obtained in any of the States enacting it; and, in this view, we deem it to be clear that in the circumstances disclosed the Commercial Bank took title to the warehouse receipts and to the cotton in question.

Finally, it is insisted that whatever right the Commercial Bank might have had, if it had retained the warehouse receipts, it lost as against the Canal-Louisiana Bank by permitting Dreuil & Company to withdraw the documents under the trust receipts which they gave to the Commercial Bank; that is, that as the cotton came into the possession of Dreuil & Company the equities of the two banks are equal and the earlier equity should prevail. We think that this contention begs the question. The Commercial Bank did not lose its rights, by permitting the withdrawal of its warehouse receipts under the agreement to hold for its account, any more than the Canal-Louisiana Bank lost its rights merely by the withdrawal of the bills of lading under its trust receipts. It was because the Canal-Louisiana Bank clothed Dreuil & Company with the *indicia* of ownership that a *bona fide* purchaser for value was enabled to take title; and a similar result would have followed if, after the withdrawal of the warehouse receipts from the Commercial Bank, there had been a like negotiation by Dreuil & Company. But there was no subsequent negotiation, and the Commercial Bank in the absence of the intervention of a purchaser in good faith for value did not lose its rights by the agreement under which the cotton which it had duly acquired was to be held for its account. There is no equality of equities, for it was through the action of the Canal-Louisiana Bank and the apparent ownership it created in Dreuil & Company that the Commercial Bank was led to advance its money upon the faith of the documents of title.

The decree is reversed and the cause is remanded with direction to enter a decree in favor of the appellant.

It is so ordered.

ALDERMAN BROS. CO. *v.* WESTINGHOUSE AIR BRAKE CO.

SUPREME COURT OF CONNECTICUT, MARCH 12, 1918.

[*Reported in* 103 *Atlantic Rep.* 267.]

THE complaint alleges that the defendant sold to Jacob Swirsky of New Haven three carloads of brass chips containing 244,160 pounds at the rate of 15½ cents per pound; that the defendant sent the three carloads of metal to New Haven and bills of lading accompanied by sight drafts; that Swirsky assigned all his right, title, and interest to the plaintiff, who paid the drafts and now owns the goods; and that upon weighing the metal which reached New Haven there was found a shortage of 39,625 pounds, amounting, at 15½ cents a pound, to $6,141.87. The answer admits and alleges that the defendant "agreed to sell" to Swirsky certain brass chips as per a verbal contract entered into between Swirsky and the defendant "confirmed in defendant's letter to Swirsky on that day." The material parts of the letter, which was signed by the defendant, but not signed by Swirsky, are as follows:

"April 26, 1916. Mr. J. Swirsky — Dear Sir: We wish to confirm our verbal sale to you this day of the following material. Our accumulation of brass turnings (not less than 200 tons) at 15½ ¢. per lb. . . . All of the above prices are f. o. b. cars Wilmerding, Pa. Terms sight draft on arrival at destination."

The answer further alleges that pursuant to the contract the defendant delivered to the carrier at Wilmerding three carloads of brass chips weighing 244,160 pounds, consigned to the defendant care of J. Swirsky, and that sight drafts accompanying the bills of lading were sent to the defendant's agent in New Haven "notify Mr. J. Swirsky." The plaintiff's reply denied that the goods were delivered to the carrier "for shipment to J. Swirsky."

Upon these pleadings the parties went to trial, and, the fact of a considerable shortage at New Haven being established by uncontradicted testimony, the substantial question was whether the loss should fall on the plaintiff or on the defendant. Upon this question the court charged the jury, in substance, that if the loss occurred in transit without the fault of either party, the title at the time of the loss was in the defendant, and that therefore the loss must fall upon it.

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BEACH, J. If the verbal transaction of April 26th was a present sale or an unconditional contract to sell the whole of a specific accumulation of brass turnings, in a deliverable condition, at an agreed price per pound, then the title and risk had already passed to Swirsky before Exhibit G was written. Sales Act, § 19, rule 1, and section 22. In such a case the seller cannot reserve a title which has already passed to the buyer, and therefore the effect of drawing the bills of lading to the seller's order is merely to reserve the jus disponendi. If it should appear that the goods were sold by description or were not ascertained, the question of subsequent appropriation would come up, and under rule 4 of section 19, a presumption of unconditional appropriation would arise from the delivery of the goods to the carrier f. o. b. at Wilmerding, subject, however, to the provisions of section 20. If it should appear that at the time of the contract something remained to be done by the seller to put the goods in a deliverable condition, the title would not pass until that was done. Section 19, rule 2. Presumably they were in a deliverable condition when shipped, and if that is so a presumption arises that the title passed on or before delivery to the carrier f. o. b. Wilmerding, subject again to the provisions of section 20. Section 20 deals with the reservation of the right of possession of, or the property in, goods shipped to the buyer. It makes the distinction that if the bill of lading is drawn to the order of the buyer or his agent, and is retained by the seller or his agent to secure payment of the price, the seller reserves only the right of possession of the goods; but if the bill of lading is drawn to the order of the seller or his agent "the seller reserves the property in the goods." This last statement is, however, qualified by the next succeeding words "but if, except for the form of the bill of lading, the property would have passed to the buyer on the shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract." Manifestly, the intention is to make some kind of a distinction between a reservation of title with intent to remain the owner of the goods for all purposes, and a reservation of title for the sole purpose of securing payment of the price.

The legal effect of this distinction is pointed out in section 22:

"Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer . . . except that (a) where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract, and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of the delivery."

In this case the delivery of the goods to the carrier f. o. b. at Wilmerding was authorized by the buyer, and section 46 provides that:

"Where, in pursuance of a contract to sell or a sale, the seller is authorized . . . to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, is deemed to be a delivery of the goods to the buyer, except in the cases provided for in section 19, rule 5 (where the seller contracts to deliver the goods to the buyer or at a certain place, etc.), or unless a contrary intent appears."

There is error and a new trial is ordered.[1]

ROLAND M. BAKER COMPANY *v.* BROWN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, FEBRUARY 28, 1913.

[*Reported in* 214 *Mass.* 196.]

SHELDON, J. This case seems to have been dealt with, both at the trial and at the argument in this court, largely as if the plaintiff's rights depended upon the title which it acquired when the bill of lading for the goods in question, with the indorsements thereon, was delivered to it. If that were so, it might be found, as was found at the trial, that the plaintiff took the bill of lading with notice of the defendants' claim to the goods represented thereby and of the trust receipt which the defendants had taken from the Massachusetts Hide Company, and so was not a purchaser in good faith and without notice of the breach of duty of the Hide Company in violating the terms of that trust receipt. But that point is not decisive of the case. The plaintiff had, or there was evidence that it had, purchased the hides from the Columbia Leather Company; and, if so, the plaintiff, whatever notice or knowledge it may have had of the defendants' rights, yet acquired all the rights of its vendor. Murdock *v.* Chapman, 9 Gray, 156. Thompson *v.* Kenyon, 100 Mass. 108. And see the cases collected in 35 Cyc. 363.

The testimony was that the Columbia Company took these hides from the Massachusetts Hide Company in payment of a debt due to it from the Hide Company. The defendants had held this bill of lading, and the goods mentioned therein were to be delivered to their order, in consequence of their having issued to the Hide Company a letter of credit, upon which the hides had been purchased in Russia and shipped to Boston. The defendants had paid or caused to be paid the drafts drawn under their letter of credit for the price of the hides, and bills of lading for the hides had been issued in triplicate, all of which were originals and "one of which being accomplished, the others [were] to stand void." The defendants were accordingly the absolute owners of the hides. Forbes *v.* Boston & Lowell Railroad, 133 Mass. 154. Moors *v.* Wyman, 146 Mass. 60. Moors *v.* Bird, 190 Mass. 400. The defendants then, before the arrival of the hides, but after they had received the bills of lading, wrote upon the back of the first of the triplicate bills the indorsement signed by them, "Deliver to Massachusetts Hide Corporation," and on August 11 delivered it to a clerk of that company. This they did upon the representation of that company that it wished to arrange for the custom house entry in advance of the arrival of the ship, with the understanding and intention of both parties that the Hide Company should take the bill merely as the agent of the defendants, and without any design to pass to the Hide Company the title either to the bill of lading or to the goods which it represented, but with authority to sell the same to one Baker whom the Hide Company falsely represented that it had obtained as a purchaser thereof. At the same time with the bill of lading, the defendants handed to the Hide Company a "trust receipt," to be properly filled in and signed and returned to the defendants. This was done, and the trust receipt was returned to the defendants a few days later signed by the Hide Company and by its treasurer. By this receipt, the signers acknowledged that they had received from the defendants the hides "in trust to deliver the same to R. M. Baker, who have [*sic*] purchased the same and to obtain from the purchaser the proceeds of the sale of the same," and to deliver immediately such proceeds to the defendants. This trust receipt provided also that the defendants might at any time cancel the trust and take possession of the goods or the proceeds thereof.

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[1] A portion only of the opinion is printed.

By this transaction, under the common law as declared by our decisions, the title to the hides remained in the defendants; the Hide Company had no power to dispose of them in any other way than by a sale to Baker; and no one else could by a purchase from the Hide Company or by any dealings with it acquire a title to the hides which would be good against the defendants. The bill of lading merely represented the goods themselves; the Hide Company had no greater right, and could pass to any purchaser other than Baker no greater right, than if its possession with this limited authority had been of the goods themselves instead of the bill of lading which was their representative. Stollenwerck *v.* Thacher, 115 Mass. 224, 227. Moors *v.* Wyman, 146 Mass. 60. Cox *v.* Central Vermont Railroad, 170 Mass. 129, 136. Commercial National Bank *v.* Bemis, 177 Mass. 95, 98. Moors *v.* Bird, 190 Mass. 400, 408. Collateral Loan Co. *v.* Sallinger, 195 Mass. 135. See to the same effect Brown *v.* Billington, 163 Penn. 76; Western National Bank *v.* York Silk Manuf. Co. 225 Penn. Sgt. 422. Moors *v.* Kidder, 106 N. Y. 32. Soltau *v.* Gerdau, 119 N. Y. 380.

But before any of these transactions took place our uniform bills of lading act, St. 1910, c. 214, had been passed. Section 5 of that act provides that "a bill in which it is stated that the goods are consigned or destined to the order of any person named in such bill, is a negotiable or order bill." By § 29, "A negotiable bill may be negotiated by the indorsement of the person to whose order the goods are deliverable by the tenor of the bill. Such indorsement may be in blank or to a specified person. If indorsed to a specified person, it may be negotiated again by the indorsement of such person in blank or to another specified person." By § 32, any one to whom a negotiable bill has duly been negotiated acquires thereby "such title to the goods as the person negotiating the bill to him had, or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the consignee and consignor had, or had power to convey to a purchaser in good faith for value." By § 38, "the validity of the negotiation of a bill is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the bill was deprived of the possession of the same by fraud, accident, mistake, duress or conversion, if the person to whom the bill was negotiated, or a person to whom the bill was subsequently negotiated, gave value therefor, in good faith, without notice of the breach of duty, or fraud, accident, mistake, duress or conversion." And § 39 further adds that "where a person having sold, mortgaged or pledged goods which are in a carrier's possession and for which a negotiable bill has been issued, or having sold, mortgaged or pledged the negotiable bill representing such goods, continues in possession of the negotiable bill, the subsequent negotiation thereof by that person under any sale, pledge or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, shall have the same effect as if the first purchaser of the goods or bill had expressly authorized the subsequent negotiations."

The effect of the statute has been to change fundamentally the rights of parties to transactions within its purview. In the present case, if the statute applies to it, when the defendants delivered their bill of lading to the Hide Company, with their unconditional and unlimited indorsement thereon, they entrusted their property to the honesty of that company and relinquished their right to set up their title against any one who might in good faith, for value, and without notice of the duty which rested upon the Hide Company, purchase from that company the goods described in the bill and take from that company a delivery of the bill itself duly indorsed by it. The previous decisions of this court, by which the defendants were protected against the consequences of their agent's breach of duty, have been abrogated and nullified by the statute. As is said in Williston on Sales, § 437, the statute "renders unsafe what has doubtless been a common practice of bankers who advance money on documents of title — the entrusting of the documents for a special purpose to the pledgor of them or the proposed buyer of the goods." The Columbia Company seems from the findings of the judge to have made, or at any rate it could be found to have made and there is no finding that it did not make, its purchase from the Hide Company in good faith and without notice of any limitation upon the authority or any breach of duty of the Hide Company. It gave value for its purchase. The statute provides (§ 53) that "an antecedent or pre-existing obligation, whether for money or not, constitutes value where a bill is taken either in satisfaction thereof or as security therefor." If the statute applies to this case, the plaintiff's exceptions must be sustained. The case then must be governed by the decisions which either were made upon statutes resembling more or less closely the one which we are considering, or independently of statutes have adopted the rule thereof instead of the one laid down in our former decisions. See for example Tiedman *v.* Knox, 53 Md. 612; Hutchings, Sealy & Co. *v.* Missouri, Kansas & Texas Railway, 84 Kans. 479; Pollard *v.* Reardon, 65 Fed. Rep. 848; Munroe *v.* Philadelphia Warehouse Co. 75 Fed. Rep. 545; Commercial Bank *v.* Armsby Co. 120 Ga. 74; Pease *v.* Gloahec, L. R. 1 P. C. 219.

This bill of lading was a foreign contract. The goods were foreign goods, shipped from Russia. The bill of lading contained the stipulation that "any claims or question between the owners of the goods and ship-owners shall be determined by the English law." It has been found as a fact, on evidence which warranted the finding, that a transfer of a bill of lading to an indorsee for a special purpose by the English law passes no title to the goods except for such special purpose. Nor can we consider upon this question any English decision which was not put in evidence at the trial. Miller *v.* Aldrich, 202 Mass. 109. Even without the clause which we have quoted from the bill of lading, the statutory law of this Commonwealth could not be made to govern the rights and obligations of the carrier of these goods under the foreign contract. With that stipulation, those rights and obligations must be determined by the law of England, and our statutes have no bearing thereon. But no question for or against the carrier is raised. The rights of the parties before us depend upon their contracts with each other, and all those contracts were made here and are governed by our laws. Everything done by either party has been done here, and it is only their rights against each other by reason of what has been done here that are now in question. The law of the place where the defendants made their indorsement is the law which must determine the result of their action. Alcock *v.* Smith, [1892] 1 Ch. 238, 255, 263, 266, 269. The same rule is applied to the transfer of foreign notes, checks or bills of exchange by indorsement, and the contract of indorsement is governed by the law of the place where that is made. Glidden *v.* Chamberlin, 167 Mass. 486, 494. Embiricos *v.* Anglo-Austrian Bank, [1905] 1 K. B. 677. McLean, J., in Nathan *v.* Louisiana, 8 How. 73, 82. So the rights, as between themselves, of the parties to a domestic transfer of shares in a foreign corporation are governed by the domestic law, though their rights againt the corporation may depend upon the foreign law. Williams *v.* Colonial Bank, 38 Ch. D. 388; affirmed on appeal, *sub nom.* Colonial Bank *v.* Cady, 15 App. Cas. 267.

But it is said that the statute is unconstitutional, because it is a regulation of foreign and interstate commerce, and so encroaches upon the power of Congress under the Constitution of the United States, art. 1, § 8. If the statute were construed, as under its broad wording possibly it might be, as designed to control the nature and effect of bills of lading issued in foreign countries and in other States, there would be great force in this contention. Wabash, St. Louis & Pacific Railway *v.* Illinois, 118 U. S. 557. Commonwealth *v.* Housatonic Railroad, 143 Mass. 264. Commonwealth *v.* Caldwell, 190 Mass. 355. Opinion of the Justices, 211 Mass. 605. But the statute is not to be so construed as to make it unconstitutional if that can be avoided; and it is naturally, as to the validity, construction and effect of bills of lading themselves, to be limited to documents issued within this Commonwealth. And contracts made here as to goods brought hither either from abroad or from other States are not to be withdrawn from the control of this Commonwealth. The rights of these parties under their domestic indorsements of the foreign bill of lading which are here in question are in our opinion within the control of the Legislature, so far at least as concerns their relations with each other, although the rule may be different as to their rights and obligations toward the foreign shipper or the carrier. Construing the statute as affecting domestic contracts only, we see no ground for declaring it unconstitutional. See Nathan *v.* Louisiana, 8 How. 73; Paul *v.* Virginia, 8 Wall. 168; Sherlock *v.* Alling, 93 U. S. 99, 102, 105; Plumley *v.* Massachusetts, 155 U. S. 461; Commonwealth *v.* Huntley, 156 Mass. 236; Commonwealth *v.* Danziger, 176 Mass. 290; Vermilye *v.* Western Union Telegraph Co. 207 Mass. 401.

It follows from what has been said that the Columbia Company by its purchase from the Hide Company and the indorsement and delivery of the bill of lading acquired as against the defendants a good title to the hides, and that title passed to the plaintiff by its purchase from the Columbia Company. The act of the defendants in obtaining the hides from the carrier by means of the second bill of lading was, as to the plaintiff, wrongful and, having been done under a claim of right, constituted a conversion, for which they became liable to the plaintiff; and no demand was necessary before bringing the action. Hunt *v.* Boston, 183 Mass. 303. Geneva Wagon Co. *v.* Smith, 188 Mass. 202.

Nor can the defendants be heard to assert that the first bill of lading had become a spent document, upon the ground that before the plaintiff received that bill the carrier had delivered the hides to the defendants upon the second original bill of lading, which had remained in their possession. It may be that the carrier was justified in making this delivery, and that the plaintiff could not have maintained any action against the carrier therefor. Glyn Mills, Currie & Co. *v.* East & West India Docks Co. 7 App. Cas. 591. But it was none the less, as to all parties claiming under the first bill, which the defendants had indorsed and allowed to be put into circulation, a delivery wrongfully obtained by the defendants. See William T. Hardie & Co. *v.* Vicksburg, Shreveport & Pacific Railway, 118 La. 254; Peters *v.* Elliott, 78 Ill. 321.

Exceptions sustained.[1]

In re BETTMAN-JOHNSON CO.
PETITION OF GOLDMAN, SACHS & CO.

CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, MAY 7, 1918.

[*Reported in* 250 *Fed. Rep.* 657.]

SATER, District Judge. The plaintiffs, Goldman, Sachs & Co., assert by intervention the right, by virtue of the unverified and unfiled trust receipt held by them, to be paid the full purchase price of cherries imported from Italy by the defendant, the Bettman-Johnson Company, now bankrupt, for use in its manufacturing business. The referee, Charles T. Greve, in an exhaustive and learned opinion, denied their claimed right to priority of payment and ruled that, in view of the broad scope of the Ohio conditional sales act (section 8568, Ohio General Code), their position is that of a general creditor only. The case is here on a challenge to the correctness of the judgment of the District Court affirming the referee.

The defendant, desiring cherries in brine for its manufacturing business, obtained, on April 24, 1913, from the plaintiffs a letter of credit, by the terms of which the defendant's agent was authorized to draw on their correspondent bank at Naples, Italy, on account of the defendant, for any sum or sums not exceeding in all 100,000 lire, for cherries to be shipped in bond to Cincinnati. The bill of lading was to be issued to the order of and forwarded to the plaintiffs along with the consular invoice, pure food certificate, and marine insurance to be effected by the defendant. All drafts, the remaining bills of lading, abstracts of invoices, and weigher's certificates were to be presented to the drawee. The plaintiffs obligated themselves to honor, when presented by the drawee, all such bills, drawn in compliance with the terms of the letter of credit.

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[1] In Atchison, Topeka & Santa Fe Railway Co. *v.* Harold, 241 U. S. 371, the court held unconstitutional a Kansas decision which held that the innocent holder of a bill of lading was invested with rights not available to the shipper, and that such a holder might charge the carrier with delay for which the shipper could not have held him liable.

The court said: "Whether in the absence of legislation by Congress the attributing to an interstate bill of lading of the exceptional and local characteristic applied by the court below in conflict with the general commercial rule constituted a direct burden on interstate commerce and was therefore void need not now be considered. This is so because irrespective of that question and indeed without stopping to consider the general provisions of the Act to Regulate Commerce it is not disputable that what is known as the Carmack Amendment to the Act to Regulate Commerce (Act of June 29, 1906, c. 3591, § 7, 34 Stat. 593) was an assertion of the power of Congress over the subject of interstate shipments, the duty to issue bills of lading and the responsibilities thereunder which in the nature of things excluded state action. Adams Express Co. *v.* Croninger, 226 U. S. 491, 505–506; Missouri, Kan. & Tex. Ry. *v.* Harriman Bros., 227 U. S. 657, 671–672; Boston & Maine R. R. *v.* Hooker, 233 U. S. 97, 110; Atchison, Topeka & Santa Fe Ry. *v.* Robinson, 233 U. S. 173, 180; Cleveland & St. Louis Ry. *v.* Dettlebach, 239 U. S. 588; Georgia, Florida & Alabama Ry. *v.* Blish Milling Co., 241 U. S. 190."

In June, 1913, the defendant purchased in Italy through its agent, and shipped in bond to Cincinnati to the order of the plaintiffs, 373 barrels of cherries in brine, in payment for which the agent gave a four-months draft on the Naples bank, which draft was by such bank duly accepted. The bills of lading were made to the order of the plaintiffs, to whom the cherries were shipped, and to whom one bill of lading, with a consular invoice and pure food certificate, were forwarded. The remaining bills of lading, with abstracts of invoices and weigher's certificates, were attached to the draft. Marine insurance, with loss payable to the plaintiffs, was effected by the defendant. On or about June 20 the plaintiffs indorsed and surrendered to the defendant the bill of lading covering the cherries, at which time the plaintiffs delivered and the defendant received them. As a part of the same transaction the defendant executed and delivered to plaintiffs at Cincinnati a trust receipt.

[The receipt acknowledged that the Bettman-Johnson Co. had received the cherries and agreed to hold them in trust; to keep them or their proceeds separate and capable of identification with liberty, however, to manufacture and sell the cherries. The bankers were given power, at any time, to cancel the trust and to resume possession. The plaintiffs did not verify and file the trust receipt in the office of the Recorder of the County in which the defendant resided and had his principal place of business. The cherries remained in the possession of the defendant until the appointment of a Receiver for it by the State Court on July 17, 1913.

The Receiver refused a demand made by the plaintiffs for surrender of the cherries.

On August 16th, a petition in bankruptcy was filed and a receiver appointed under the Bankruptcy Statute. Further demand was twice made upon the receiver appointed by the Bankruptcy Court. These demands were refused and, subsequently, under an agreement, the cherries were manufactured and sold, and a sum set apart to cover the plaintiffs' claim if they were entitled to maintain it.]

In view of the proper demand made by the plaintiffs on the receiver appointed by the state court for the possession of the cherries, and the two subsequent appropriate demands on the receiver in bankruptcy, the plaintiffs' rights, if they were entitled to recover the cherries in specie, were not prejudiced by their treatment requisite to their marketing, or by the subsequent sale of them when processed, or by the intermingling of them with others by the receivers. Such rights must be regarded as fixed as of the date of the appointment of the receiver by the state court, and to be the same as if the cherries were susceptible of delivery in the original barrels in which they were first received by the defendant. Smith *v.* Township of Au Gres, 150 Fed. 257, 80 C. C. A. 145, 9 L. R. A. (N. S.) 876; Smith *v.* Mottley, 150 Fed. 266, 80 C. C. A. 154; Erie R. Co. *v.* Dial, 140 Fed. 689, 72 C. C. A. 183; Board of Com'rs *v.* Strawn, 157 Fed. 49, 84 C. C. A. 553, 15 L. R. A. (N. S.) 1100; Brennan *v.* Tillinghast, 201 Fed. 609, 120 C. C. A. 37 — all of which cases were decided by this court. See, also, *In re* E. Reboulin Fils & Co. (D. C.) 165 Fed. 245.

Trust receipts vary in form, but the one here involved is typical. Their use, by making available to merchants and manufacturers of limited means the credit of banking capital, is well calculated to facilitate and enlarge the business of foreign importation. Much difficulty would be encountered in carrying on our foreign commerce, were not bankers thus able to lend to importers the aid of capital, credit, business facilities, and foreign agencies. Contracts of the nature of that in question are entitled to, and have received from the courts, a support as liberal as the statutes will permit. When founded upon and conducted in good faith, they are entirely legitimate, and are to be upheld as against general creditors unless there be some material noncompliance with the local law. *In re* Cattus, 183 Fed. 733, 735, 106 C. C. A. 171 (C. C. A. 2); In re Richheimer, 221 Fed. 16, 22, 23, 1356 C. C. A. 542 (C. C. A. 7).

The solution of the problem before us requires (1) the determination of the character of the transaction embodied in the letter of credit, the terms of its acceptance and the trust receipt, and (2) the applicability, if any, of the Ohio law thereto. The position of the plaintiffs is that such transaction is devoid of all the elements of a pledge, mortgage, or conditional sale; that it made the cherries and their proceeds their property, subject only to an implied equitable obligation on their part to transfer the title and possession to the defendant upon payment of the draft issued under the letter of credit and of any other indebtedness owing to them by the defendant; and that it constituted a bailment, pure and simple, with liberty on the part of the defendant to sell the cherries for defendant's account or to process and sell the same without expense to them, subject to the requirement, however, that the proceeds be first applied to the satisfaction of the defendant's debt. A right superior to that of the general creditors is therefore claimed. The trustee in bankruptcy asserts that the transaction was either a conditional sale, or so much in the nature of a conditional sale as to fall within the provisions of the Ohio statute, which requires the vendor, in order to maintain a prior right over creditors to the property sold, to verify the contract of sale and file it with the county recorder of the county in which the vendee resides, if a resident of the state, and that, having failed thus to verify and file the contract of sale, the reservation of title in the plaintiffs is void as to lien creditors, and consequently void as to the trustee in bankruptcy, by virtue of the amendment of Act July 1, 1898, c. 541, § 47a (2), 30 Stat. 557, by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1916, § 9631), which provides that the trustee, "as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon."

Whatever the extent and character of plaintiffs' title to and ownership of the cherries may have been, it is clear that it was not their purpose to engage in the business of importing and selling cherries, either before or after they were prepared for market. Unlike the ordinary buyer, they did not in person or through any agent of theirs participate in the selection of the goods, or in fixing the purchase price, or assume any risk as to their shipment or inferiority (if any) in quality or character, or any expense incurred for marine or subsequent insurance, or in transporting, caring for, processing, and selling them. They did not prescribe their selling price or manner of sale, and were not to receive any part of the profits or bear any part of the loss resulting from their disposition. They advanced the purchase price at defendant's instance to the original vendor, on the condition that the title should pass directly to and remain in them as security for their protection until such fixed price and their stipulated commission should be paid; their advance being made "upon the security afforded by title to the goods until this liability had been discharged." Century Throwing Co. *v.* Muller, 197 Fed. 252, 258, 116 C. C. A. 614 (C. C. A. 3); In re Richheimer, 221 Fed. 16, 22, 136 C. C. A. 542 (C. C. A. 7). Their retention of title and ownership was not, however, to interfere with the defendant's processing and disposing of the goods in the regular channels of trade. They reserved the right at any time, for their better protection, to resume possession of the goods in their original or changed form and of the proceeds arising from their sale, but the defendant did not have the right to return the goods or any portion of them. The defendant was at liberty to meet its financial obligation to plaintiffs at any time, and, whenever it did so, the title to the goods was to pass absolutely to it. This, it is true, is not expressed in the contract; but it necessarily follows that when the defendant satisfied its indebtedness to the plaintiffs, they retained no vestige of claim to the goods or any part of them, in whatever form existing.

The courts have not agreed in their characterization of the title vested in the holder of a trust receipt, but it is quite generally recognized as a special form of "security title and no more," demanded by the exigencies of importation transactions. Charavay *v.* York Silk Co. (C. C.) 170 Fed. 819, 824; In re Dunlap Carpet Co. (D. C.) 206 Fed. 726, 731; In re Richheimer, 221 Fed. 22, 136 C. C. A. 542 (C. C. A. 7). The definitions given have taken color from the particular facts of the cases considered and the state of the local law. We do not deem it necessary to analyze and distinguish the reported cases, or attempt a precise definition of the banker's title acquired in such transactions, for the reason that, in view of the contractual relations of the parties, if the transaction under consideration does not disclose all of the elements of a conditional sale, it is at least so far in the nature of a conditional sale as to fall within the terms of the Ohio statute. Nor need we concern ourselves about the less comprehensive conditional sales acts of other states to which our attention has been directed, and with reference to which similar transactions have been considered. The acceptance of the terms and conditions of the letter of credit, the execution and delivery of the trust receipt to the plaintiffs, and the delivery of the goods to the defendant all occurred in Ohio. The title to them did not pass upon their delivery. They were received in that state for processing, and were to remain there until sold in the regular course of business. They were found there when the state receiver was appointed and when bankruptcy proceedings intervened. The transaction is therefore governed by the applicable law of that state. Potter Mfg. Co. *v.* Arthur, 220 Fed. 843, 136 C. C. A. 589, Ann. Cas. 1916A, 1268 (C. C. A. 6); Bryant *v.* Swofford Bros., 214 U. S. 278, 279, 290, 291, 29 Sup. Ct. 614, 53 L. Ed. 997.

The pertinent statutory provisions are embraced in section 8568 of the General Code, which is as follows:

"When personal property is sold to a person to be paid for in whole or in part in installments, or is leased, rented, hired or *delivered* to another on condition that it will belong to the person purchasing, leasing, renting, hiring, or *receiving* it, when the amount paid is a certain sum, or the value of the property, the title to it to remain in the vendor, lessor, renter, hirer or deliverer thereof, until such sum or the value of the property or any part thereof has been paid, such condition, in regard to the title so remaining until payment, shall be void as to all subsequent purchasers and mortgages [mortgagees] in good faith, and creditors unless the conditions are evidenced by writing, signed by the purchaser, lessee, renter, hirer or *receiver* thereof, and also a statement thereon, under oath, made by the person so selling, leasing, or delivering the property, his agent or attorney, of the amount of the claim, or a true copy thereof, with an affidavit that it is a copy, be deposited with the county recorder of the county where the person signing the instrument resides at the time of its execution, if a resident of the state, and if not such resident, then with the county recorder of the county in which the property is situated at the time of the execution of the instrument."

We have italicized the controlling words. This is the initial case of its kind under the local statute, and yet we are not without helpful adjudications. In a trust receipt transaction the banker acquires the title for a particular customer — the importer — by advancing the purchase price for him to the foreign vendor without expectation of reward other than an almost nominal commission for the services rendered. The vendor in the ordinary conditional sales contract is other than a banker and has by the expenditure of his funds acquired the ownership of the article sold without reference to any particular purchaser and contemplates an actual profit to himself in its disposal. With the exception noted, the heretofore mentioned elements of the transaction under review are present in many sales permissible and actually conducted under the statute. Whatever the stipulations in the contract may be and however much the conditional character of the sale may be disguised, the court will inquire into the real nature of the transaction, that the purchaser may not be deprived of the benefit of the statutory provisions (Speyer & Co. *v.* Baker, 59 Ohio St. 25, 51 N. E. 442; Arbuckle *v.* Kirkpatrick 98 Tenn. 221, 39 S. W. 3, 36 L. R. A. 285, 60 Am. St. Rep. 854), and, it may be added, that innocent purchasers and creditors who have fastened upon the property may be protected against the vendor's secret lien. The title, whether it be that of the banker or of the vendor acting strictly within the terms of the statute, is a "security title." In Register Co. *v.* Cervone, 76 Ohio St. 12, 24, 80 N. E. 1033, 1035, which arose under the act in question, the doctrine was approved that:

"The reservation of the title is but as security for the purchase price, and if the property is recovered by the seller, he must deal with it as security, and with reference to the equitable rights of the purchaser."

And this court, in interpreting the same act, held in Re National Cash Register Co., 174 Fed. 579, 581, 98 C. C. A. 425, 427:

"In equity the reserved title of the vendor is regarded as in the nature of a security for the payment of the price."

See, also, Simkins, Contracts and Sales, 939; Williston, Sales, § 579; Ross-Mehan Co. *v.* Pascagoula Ice Co., 72 Miss. 608, 615, 18 South, 364; Parks *v.* O'Connor, 70 Tex. 377, 8 S. W. 104.

It was not within the contemplation of the plaintiffs and the defendants that the payment for the cherries should be made in installments; nor is it necessary under the statute, as claimed by the plaintiffs, that the purchase price in transactions falling within its terms should be thus paid. The first clause of the section relates to sales of that character, but it is clear that under the succeeding clause there is no restriction on, or mention of, the manner in which payment may be made for personal property that "is leased, rented, hired or *deliv-*

ered to another on condition that it will belong to the person purchasing, leasing, renting, hiring, or *receiving* it, when the amount paid is a certain sum or the value of the property." The plaintiffs delivered to the defendant and the defendant received from them the cherries on condition that they should belong to the defendant whenever a specified sum — the purchase price to the foreign vendor and the plaintiffs' commission — was paid by the defendant. In Schlitt *v.* Store Fixture Co., 22 Ohio Cir. Ct. R. (N. S.) 168, 171, which correctly interprets the law, it was held that:

"Under this statute, it is not necessary that payments for the property purchased shall be made in installments. The statute includes not only sales made to be paid for in installments, but includes all contracts where the property sold is delivered to another on condition that the same shall belong to the person receiving such property whenever the amount paid shall be a certain sum, or shall be the value of such property; the title to the same to remain in the deliverer of such property until such sum shall have been paid. A careful reading of the section clearly shows that property sold and delivered by one to another, the title remaining in the deliverer until the receiver shall have paid a fixed sum, or the value of the property, is within the terms of the statute."

Section 8570, Ohio General Code, provides that the vendor of personal property such as was made the subject of the contract here considered, shall not retake the same without tendering or refunding to the purchaser, lessee, renter, or hirer thereof, or the party receiving it from the vendor, the money paid by the vendor (if it be in excess of 25 per cent. of the purchase price), after deducting therefrom a reasonable compensation for the use of such property which in no case shall exceed 50 per cent. of the amount paid, unless the property has been broken or actually damaged, in which event a reasonable compensation for such breakage or damage shall also be allowed. The plaintiffs assert that the remedy accorded by such section is exclusive, and that the statute therefore cannot apply to the instant case for the reason that bankers, situated as they are, would be required to refund to the vendee a portion of the purchase price paid (if he has paid more than 25 per cent. of such price), which refund, if made, as well as any portion of the bankers' advancement which may not be realized by their sale of the goods, whether a refund be required or not, would be entirely lost to them. The contention made is fallacious. The vendor is not remitted, in case of default in payment by the vendee, solely to a retaking of the property and to a refund, on the condition specified, of a portion of the purchase price. He may elect to recover a judgment at law on the unpaid installments of the purchase price and cause the goods and any other property of the vendee to be seized and sold in execution. Albright *v.* Meredith, 58 Ohio St. 194, 50 N. E. 719. See, also, Button *v.* Trader, 75 Mich. 295, 42 N. W. 831; Whitney *v.* Abbott, 191 Mass. 59, 77 N. E. 524;

Smith *v.* Barber, 153 Ind. 322, 53 N. E. 1014. He may resume possession of the property, not as his own, without forfeiting or claiming to forfeit the vendee's right to pay any unsatisfied portion of the price and thereby perfect such vendee's ownership, but merely to increase his (the vendor's) security and resell on account of the vendee. Williston, Sales, § 579; Columbia Law Review, 1915, p. 434; Miller *v.* Steen, 30 Cal. 402, 89 Am. Dec. 124; Tufts *v.* D'Arcambal, 85 Mich. 185, 48 N. W. 497, 12 L. R. A. 446, 24 Am. St. Rep. 79. If the proceeds of its sale be insufficient to satisfy the vendor's claim, he may in appropriate manner pursue the vendee for the residue. The vendor has the further remedy of foreclosure of his equitable lien. This mode of procedure was suggested as possibly permissible in Albright *v.* Meredith, 58 Ohio St. at page 201, 50 N. E. 719, and was sustained by this court in Re National Cash Register Co., *supra*, in which the grounds on which rest the right to an equitable lien and to a foreclosure of the same are stated. On the existence of such a lien, note also Jones on Liens, § 41; 20 Harvard Law Review, 371, note; Smith *v.* Barber, 153 Ind. at page 330, 53 N. E. 1014; Walker *v.* Brown, 165 U. S. 654, 664, 665, 17 Sup. Ct. 453, 41 L. Ed. 865. If the remedy provided by section 8570 were exclusive, the plaintiffs would not be required to refund any part of the purchase price, for the reason no part of it has been paid.

The rule had always prevailed in Ohio that, when chattels were sold and delivered to be paid for in installments, the title to remain in the vendor until the purchase price was fully paid, the vendor on the vendee's default, might retake the goods from him or any person having possession of them (Register Co. *v.* Crevone, 76 Ohio St. at page 20, 80 N. E. 1033), and thus the vendee, although but an insignificant portion of the purchase price remained unpaid, lost both his money and the goods (Weil *v.* State, 46 Ohio St. 450, 454, 21 N. E. 643; Sanders *v.* Keber, 28 Ohio St. 630; Sage *v.* Sleutz, 23 Ohio St. 1; Call *v.* Seymour, 40 Ohio St. 670). One of the purposes of the enactment of the conditional sales act (82 O. L. p. 238, passed May 4, 1885) was to ameliorate the hardship of the previously existing rule in favor of persons of limited means who are required to purchase on the installment plan. In Speyer & Co. *v.* Baker, 59 Ohio St. at page 25, 51 N. E. 444, in discussing this feature of the law, it was said:

"Purchasers on this plan are usually persons of small means, and unable to pay except in installments; and such sales are, partly on that account, made at prices in excess of those charged in other cases. Payment of part of the installments may amount to more than the actual worth of the property; and, on account of the unconscionable advantage which the vendor would otherwise have by taking the property and retaining the money paid, the Legislature deemed it proper to adopt the equitable rule of adjustment prescribed by the statute."

See, also, Register Co. *v.* Cervone, 76 Ohio St. at page 25, 80 N. E. 1033, and Caldwell *v.* Singer Mfg. Co., 7 Ohio Cir. Ct. R. 460.

Under the statute the vendee, by making payment of part of the purchase price, acquires an interest in the property which he may sell or mortgage and which the vendor at his peril is bound to respect. Albright *v.* Meredith; Register Co. *v.* Cervone. In addition to affording measurable relief to purchasers on the installment plan, the Legislature, for the protection of third persons, who may deal with the vendee, against the secret claim and lien of the vendor, brought all conditional sales within the terms of the early established recording act by requiring them to be verified and filed in the appropriate recorder's office. The recording act recognizes that the business of the country is largely transacted on the basis of credit and that there should somewhere be found of record a disclosure of the state of title to real and chattel property and the extent of liens, if any, against the same. Its design is to prevent the practice of fraud upon subsequent purchasers and incumbrancers (Stansell *v.* Roberts, 13 Ohio, 148, 152, 42 Am. Dec. 193), to protect creditors against secret liens on the property of their debtors (Boyer *v.* Knowlton Co., 85 Ohio St. 104, 117, 97 N. E. 137, 38 L. R. A. [N. S.] 224), and "puts at rest all the vexed questions as to procedure, and enables all persons certainly to know whether the property of persons to whom they extend credit is incumbered or not, without being involved in vexed questions of prior equities and notice." Holliday *v.* Franklin Bank, 16 Ohio, 533, 539; Fosdick *v.* Barr, 3 Ohio St. 471, 474; Bloom *v.* Noggle, 4 Ohio St. 45, 54. The statutory provisions requiring the verification and filing of chattel mortgages and conditional sales contracts are the same. Instruments of both classes are good as between the parties to them, whether there be a compliance with the statute in the respects named or not; but, as against subsequent purchasers of property described in a chattel mortgage or a conditional sales contract and creditors who have fastened upon the property by some specific lien, neither of such instruments, if either unfiled or unverified, is valid. Wilson *v.* Leslie, 20 Ohio, 161; York Mfg. Co. *v.* Cassell, 201 U. S. 344, 351, 26 Sup. Ct. 481, 50 L. Ed. 782; Boyer *v.* Howland, 11 Ohio Cir. Ct. R. (N. S.) 564; Boyer *v.* Knowlton Co., 85 Ohio St. at page 113, 97 N. E. 137, 38 L. R. A. (N. S.) 224; Cass *v.* Rothman, 42 Ohio St. 380.

Under the Ohio rule, as the trust receipt was neither verified nor filed in the recorder's office, the effect of the appointment of a receiver by the state court and his seizure of the defendant's property was to fasten the claims of creditors upon it and to give that officer control over it for the benefit of creditors as effectually as the creditors would have held it by attachment or levy. Cheney *v.* Maumee Cycle Co. 64 Ohio St. 205, 214, 215, 60 N. E. 207. The status of the trustee in bankruptcy under section 47a (2) of the Bankruptcy Act, as amended June 25, 1910, is not unlike that of the receiver appointed by the state court. He became and is vested, as to the cherries covered by the trust receipt in whatever form existing, and as to their proceeds, with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon. The plaintiffs have no priority over, but are entitled to share with, the defendant's general creditors.

The judgment of the District Court is affirmed.

PEOPLE'S NATIONAL BANK *v.* MULHOLLAND.

Supreme Judicial Court of Massachusetts, June 21, 1916, September 13, 1917.

[*Reported in* 224 *Mass.* 448, *and* 228 *Mass.* 152.]

Pierce, J. Before the summer of 1911 the defendant Mulholland and one Cornelius J. Coughlin were copartners under the name and style of E. F. Mulholland and Company, and were engaged in the business of importing hides which they either sold in the raw state or had them tanned into leather and then sold. In the summer of 1911 the copartnership was dissolved, and thereafter Coughlin continued the business until his death on September 24, 1911. The defendant Ellen T. Coughlin was appointed the administratrix of his estate, which has been represented insolvent.

On March 22, 1910, the firm received from one S. G. Kaufman of Germany a bill of lading with a draft for the delivery upon payment of ninety-two bales of hides. Coughlin, on behalf of the firm, arranged with the plaintiff to furnish the money to pay the draft. Before the payment was made, Coughlin executed and delivered to the plaintiff the collateral promissory note of the firm for the amount of the draft. With the delivery of the note he also delivered a trust receipt of the firm, in the form set out in the bill. [The receipt acknowledged that the firm had received certain specified hides with liberty to sell or to manufacture them, keeping the hides or their proceeds separate. The receipt further stated that the proceeds were to be applied against the note of the firm and any other indebtedness due to the plaintiff; and that the plaintiff reserved the power to cancel, at any time, the trust and to take possession of the goods, or their manufactured products, or their proceeds.]

At the time of Coughlin's death, the skins described in the trust receipt had either been sold or tanned into leather. The skins that remained unsold and the money received from those sold were so mixed with other skins and money of the firm as to render them not susceptible of separation and identification. The question is whether this fund (money and leather) should be awarded to the bank upon its claim under the trust receipt.

There are no facts found by the master to warrant a finding or inference of fact that the plaintiff purchased the hides of Kaufman on behalf of the firm, that it took title to itself as security for its advancement or that it received the bill of lading and draft as agent for the seller. The case at bar is, therefore, not within or governed by Stollenwerck *v.* Thacher, 115 Mass. 224, Fifth National Bank of Chicago *v.* Bayley, 115 Mass. 228, Newcomb *v.* Boston & Lowell Railroad, 115 Mass. 230, Moors *v.* Wyman, 146 Mass. 60, Moors *v.* Bird, 190 Mass. 400, Roland M. Baker Co. *v.* Brown, 214 Mass. 196.

With the payment of the draft the legal title to the hides passed from the seller to the firm. The trust receipt, before the passing of the title to the firm, was inoperative to vest any legal title in the plaintiff, or after the passing of title to the firm to deprive it of title. It could not operate as a pledge, because the plaintiff never had possession of the hides and because the firm had and retained possession to manage and use them as collateral security for its debt to the plaintiff. Walker *v.* Staples, 5 Allen, 34. Thompson *v.* Dolliver, 132 Mass. 103. Copeland *v.* Barnes, 147 Mass. 388. Harding *v.* Eldridge, 186 Mass. 39. Gamson *v.* Pritchard, 210 Mass. 296.

If the trust receipt was valid as a mortgage as between the plaintiff and the firm, it was nevertheless invalid as against the creditors of Coughlin's insolvent estate because it was not recorded, and because by the express terms of the statute "Unless the property mortgaged has been delivered to and retained by the mortgagee, the mortgage shall not be valid against a person other than the parties thereto." R. L. c. 198, § 1. Goodrich *v.* Dore, 194 Mass. 493. See Harrison *v.* J. J. Warren Co. 183 Mass. 123; Wall *v.* Provident Institution for Savings, 6 Allen, 320; Parker *v.* Flagg, 127 Mass. 28.

It follows that the decree must be reversed in so far as it establishes a trust upon the money and leather in the posssesion of the administratrix, and must be modified by striking out so much thereof as provides for the allowance to the defendant Mulholland of a credit arising from the payment to the plaintiff of the money and leather charged with a trust in the decree.

Decree accordingly.

RUGG, C. J. The supplemental report of the master plainly shows that the plaintiff purchased the hides in its own name and interest for the ultimate use of the firm, directly from the foreign seller, and paid for them. It therefore had the legal title to the hides and rightly dealt with them as owner in its relations with the firm, and was not a mortgagee or pledgee. The trust receipt which was employed by the plaintiff in its transaction with the firm is a well known instrument of commerce whereby the banker advancing the money on an importation takes title directly to himself and as owner delivers the goods to the dealer in whose behalf he is acting secondarily and to whom the title ultimately is to go when the primary right of the banker has been satisfied, the title remaining in the banker until the price is paid to him. The validity of such a trust receipt has been upheld in numerous of our decisions, most of which are collected in 224 Mass. at page 451. Moors *v.* Drury, 186 Mass. 424. Commercial National Bank *v.* Canal-Louisiana Bank & Trust Co. 239 U. S. 520, 524. Century Throwing Co. *v.* Muller, 116 C. C. A. 614. *In re* Cattus, 106 C. C. A. 171. *In re* Coe, 106 C. C. A. 181.

Perhaps it is a fair inference that the managing partner of the firm, Coughlin, could at all times during his life have sorted out the hides covered by the trust receipt and that, if he had lived, he could have made the separation whenever required. But it was his and the firm's duty under the terms of the trust receipt to keep the hides at all times, both in their raw and manufactured state, "separate and capable of identification." That duty was not performed by one person alone being sufficiently familiar with the goods to be able to make a separation; but it required such a segregation or susceptibility to recognition that any one familiar with the trade would be able to select the property covered by the trust receipt, so that the plaintiff might with reasonable effort repossess itself of its property at any moment. There was a breach of that duty by the commingling with other hides so that the possibility of picking out of the mass the property of the plaintiff was gone.

It is not necessary to determine that there was any moral turpitude involved in such commingling. There is no ground for the inference that it was done with the knowledge or consent of the plaintiff or that it arose through accident or mistake, or the operation of a superior force. It was done with a conscious purpose. It was at the lowest intentional or through want of proper care. It was done in disregard of their obligation to the plaintiff. It was in this sense a wilful intermixing. It was a breach of a fiduciary duty owed to the plaintiff and an unlawful invasion of its property rights. The commingling having been done through the fault of the firm and being a wrong against the plaintiff, the burden of separating and tracing further its own property does not rest upon the plaintiff. Where at common law through no fault of the owner there has been a negligent commingling of his property with that of another, so that it cannot be distinguished, it is held to be unjust to put the loss on the innocent and careful owner. It ought to fall rather "on him whose carelessness or folly or misfortune" has caused the indiscriminate intermixture. A commingling which flows from carelessness or breach of obligation belongs to the same class as one caused by intentional misconduct. Ryder *v.* Hathaway, 21 Pick. 298, 306. Willard *v.* Rice, 11 Met.

493. Smith *v.* Sanborn, 6 Gray, 134. Adams *v.* Wildes, 107 Mass. 123, 125. Stearns *v.* Herrick, 132 Mass. 114. Union Naval Stores Co. *v.* United States, 240 U. S. 284, 290. See Westinghouse Electric & Manuf. Co. *v.* Wagner Electric & Manuf. Co. 225 U. S. 604, 619, 622. See Ann. Cas. 1913 E 665. The rule was stated by Chancellor Kent in Hart *v.* Ten Eyck, 2 Johns. Ch. 62, 108, in these words: "If a party having charge of the property of others, so confounds it with his own, that the line of distinction cannot be traced, all the inconvenience of the confusion is thrown upon the party who produces it, and it is for him to distinguish his own property, or lose it." The equitable doctrine as to trusts is as was stated in Lowe *v.* Jones, 192 Mass. 94, 101, and requires "the identification of the trust property as passing into some other specific property or fund, as distinguished from the general assets."

It is plain that if the hides all had remained in one mixed lot of leather and none had been sold, there has been a sufficient tracing of the hides of the plaintiff into that commingled lot to permit it to establish a lien upon the lot for its claim. At common law under the rule applicable to commingled goods it could have held the entire lot to the satisfaction of its claim. It can hold that which remains of that lot. One, who without justification and in breach of fiduciary obligation has commingled his own property with that of another with which he has been entrusted, must at his peril return to the owner that which thus has been wrongfully appropriated. Hittinger Fruit Co. *v.* Cambridge, 218 Mass. 220, 226. Spence *v.* Union Marine Ins. Co. Ltd. L. R. 3 C. P. 427, 437. Since the amount received from sales of the mixed lot by the A. J. Foster Company constitutes a separate deposit, it stands on the same footing. The amount received from sales out of the mixed lot by the firm being still on deposit as part of a larger fund, it is impressed with a like trust for the benefit of the plaintiff. Hewitt *v.* Hayes, 205 Mass. 356. Portuguese Fraternity *v.* Liberty Trust Co. 215 Mass. 27. National Bank *v.* Insurance Co. 104 U. S. 54. Peters *v.* Bain, 133 U. S. 670, 694. Harris *v.* Truman, 7 Q. B. D. 340, 358.

The facts in the case at bar illustrate the converse of the principle applied in Lowe *v.* Jones, 192 Mass. 94, to the effect that where the proceeds of a fund cannot be traced no trust can be established. Here the property of the plaintiff is traced directly. It goes much further than a mere general enrichment of the estate of the firm arising from the conversion of property belonging to the plaintiff. Therefore its rights are established.[1]

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[1] A portion of the opinion is omitted.

LOVELL *v.* NEWMAN.

CIRCUIT COURT OF APPEALS FOR THE 5TH CIRCUIT, JANUARY 2, 1912.

[*Reported in* 192 *Fed. Rep.* 753.]

MAXEY, District Judge. The transactions eventuating in the present litigation originated in contracts made December, 1909, and January, 1910, by the bankrupts, through their broker, Gavirati, with the spinners for the purchase and delivery of certain cotton. The validity of the contracts is not questioned. They called for the shipment by the bankrupts of specified quantities of cotton of specified grades under through bills of lading to Genoa. The cotton was to be shipped in January and February, 1910. Insurance and freight were to be paid by the bankrupts, and the spinners were to make payment of the cotton by means of drafts to be drawn on certain designated bankers. No cotton was shipped by the bankrupts during the months of January and February. They, however, drew drafts on the bankers designated in the contracts for the price of the cotton and attached certificates of insurance, invoices, and forged bills of lading purporting to have been issued by the railroad company. By referring to the statement of the case, it will be seen that these bills of lading, concocted by John W. Knight as the managing partner of the firm, were issued pursuant to the directions of the contract, and that the bills, the drafts, the certificates of insurance, and the invoices identified the cotton purporting to have been shipped by certain marks composed of four letters. For example, one set of documents, including the draft, referred to cotton marked "TSST," and so with the others, each set denoting a like combination, but with different letters. It will be further noticed that there was a substantial correspondence in all of these documents, thus clearly showing that it was the deliberate purpose of the bankrupts to obtain money from the spinners by the fraudulent artifice thus devised. And this purpose was fully accomplished. The drafts were duly paid by the bankers of the spinners and the forged bills of lading were surrendered to the latter. The result was that the bankrupts obtained the money, and the spinners got the spurious bills of lading. In so far as the spinners and their bankers were concerned in the transaction, their conduct was perfectly honest and straightforward. Relying upon the good faith of the bankrupts, they acted upon the presumption that the bills of lading were genuine. They were ignorant of the fraud perpetrated upon them, and paid the drafts in the assurance that the cotton had been shipped in compliance with the terms of their contracts and as indicated in the bills of lading.

What then occurred? After the bankrupts had received pay for the cotton supposed by the shippers to be en route to its destination, the bankrupts in March and April — from March 16th to April 11th — a few weeks only after it should have been shipped under their contracts, made shipment of 1400 bales via the Cotioniera Steamship Line to Genoa. For these shipments genuine through bills of lading were obtained from the railroad company at Decatur and Selma, Ala., and the cotton was transported to New Orleans, and there delivered to and put aboard the steamship Ingelfingen of the Cotoniera Line. The cotton was delivered to the steamship and taken aboard prior to the date of the restraining order, to wit, May 3, 1910. In this connection a comparison of the forged with the genuine bills of lading will prove instructive. In both the cotton was to be shipped by the Cotoniera Line to Genoa. In both the marks of the cotton were identical. In both Gavirati, the broker, was to be notified. In both the same weights precisely were inserted. In both the forms used by the railroad company were similar, and the genuine bills were issued by the same agent whose name was used in the forged bills. It is evident there was a purpose to conform the genuine bills to those that were forged. What were the purpose and intent actuating the bankrupts? They knew that the forged bills had gone forward and were presumably in the possession of the spinners, since the drafts had been paid and they had received the money. They knew that the genuine bills, so carefully designed to correspond with those that were spurious, would not be necessary to insure the delivery of the cotton to the spinners. And with this knowledge their plain purpose was to suppress the genuine bills and permit the cotton to proceed to its destination under the forged bills, and thus prevent exposure of the fraud with consequences disastrous to themselves. In view of these facts who were the real owners of the cotton?

It is insisted by the trustee that, since the genuine bills of lading were made to the order of the bankrupts, they retained the title to and the jus disponendi of the cotton. It is true that the bills were executed as claimed, and that they were indorsed in blank and delivered to the trustee on May 26th. But on April 16th the bills were all in possession of the bankrupts and unindorsed. The cotton had then, at the date last mentioned, been delivered to the railroad company under through bills of lading for transportation to Genoa. At that date in whom did the title reside? The trustee answers in the bankrupts by virtue of the bills of lading executed to their order and remaining in their possession. But we have seen that, while a bill of lading is strong evidence of an intention to reserve to the shipper the jus disponendi of the property, yet such intention is always open to explanation, although the bill may have passed into the hands of an innocent purchaser for value. In the present case there are no intervening rights of third parties; the contest being between the bankrupts and their trustee on the one hand and the spinners on the other. In the absence of the bankruptcy of the parties, what would have been the attitude of the bankrupts? Could they have recovered the cotton or its value from the spinners? They had once been paid full value, and it would be shocking to the sense of justice to suppose that they could have enforced a second payment. If parties by their own fraudulent conduct may be estopped, the application of the doctrine would effectually cut them off from asserting that they had not delivered the cotton in pursuance of their solemn contracts. But we may go further. We are clearly of the opinion that, under the facts of this case, the delivery of the cotton to the carrier vested the ownership in the spinners, upon the theory that it was the intention of the bankrupts to appropriate it to the contracts. The court below properly so held in the following finding:

"That by marking and shipping the cotton, as above set out, Knight, Yancey & Co. intended to appropriate and did appropriate it to the fulfillment of the eight contracts of sale, and that by delivering it to the carrier they perfected delivery to the buyers under the terms of the contracts."

The case of Idaho, 93 U. S. 575, 23 L. Ed. 978, upon this question, is pertinent and material.[1]

RYLANCE v. THE JAMES WALKER CO.

Court of Appeal of Maryland, December 13, 1916.

[*Reported in* 129 *Md.* 475.]

Thomas, J. In December, 1911, the appellee, The James Walker Company, of Baltimore, sent to the appellant, James A. Rylance, of London, England, an order for forty-seven coils of Hoth's Russian Bolt Rope at $13.50 per hundred pounds. In September, 1912, the appellant shipped to the appellee a different kind of rope and drew a draft on the appellee for the price, which the appellee paid in advance of the arrival of the rope. When the rope shipped arrived in Baltimore the appellee discovered that it was not the rope ordered, and immediately wrote the appellant accordingly, and stated that as the appellee had paid the draft in advance of the arrival of the rope, it would charge the amount of the draft against him, and hold the rope subject to his order pending receipt of shipping orders from him. The appellant in reply requested the appellee to dispose of the rope for him, and after further correspondence, the appellee wrote the appellant in April, 1913, that it had not been able to dispose of the rope for him, and that while it did not mind holding the rope for him until he, the appellant, could dispose of it, the appellee would like to have a check for the amount of the draft paid by it.

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[1] A portion of the opinion is omitted.

On September 2nd, 1913, the appellee sent the appellant another order for seventy coils of Bolt Rope, to be shipped as soon as possible, "and in the usual way." At the same time the appellee again requested shipping instructions for the rope shipped to it in the fall of 1912, and which the appellee was holding for the appellant. The rope specified in the order of September 2nd, 1913, was shipped by the appellant to the appellee about the 5th of November, 1913, via steamship *Potomac,* and arrived in Baltimore about the 23rd of December following. The appellant had the bill of lading made out to his "order," and sent the same, properly endorsed by him, with a draft for the price of the rope attached, to Hambleton & Company, Baltimore bankers, with directions "to turn over the bill of lading" to the appellee upon payment of the draft. When the draft arrived, Hambleton & Company presented the same, with the bill of lading attached, to the appellee and requested it to pay the draft and take delivery of the rope. The appellee refused to pay the draft unless the appellant would allow it to deduct therefrom the amount of the draft which the appellee had paid for the shipment made in 1912. The appellant declined to allow the deduction and refused to deliver the bill of lading. When the rope arrived in Baltimore, the appellee was notified, and the rope was unloaded and after remaining on the dock for a few days, was stored by the dock authorities, without any order from either the appellant or appellee, "in a U. S. Bonded Warehouse" where it was subsequently, about February 13th, 1914, destroyed by a fire. The agreed statement of facts states: "Neither plaintiff nor defendant exercised any acts of ownership over the rope after its arrival in Baltimore."

The real question in the case is, who is to stand the loss caused by the destruction of the rope by fire?

It appears from the agreed statement of facts, and from the invoice offered in evidence by the plaintiff that the goods were to be delivered to the defendant in Baltimore and that the freight was to be paid by the plaintiff. It would seem, therefore, clear that under rules four and five and section 41 the plaintiff by the terms of the appropriation of the goods to the contract reserved the property therein. Under rule five the property in the goods did not pass to the buyer upon delivery of the goods to the carrier, and as under the bill of lading the goods were deliverable to the order of the seller, he thereby reserved both the property and right of possession. The agreed statement of facts states that "in order to secure the performance by the defendant of its obligations under the contract, the plaintiff had the bill of lading for said rope made out to the plaintiff's order and sent the same properly endorsed by the plaintiff with a draft for the purchase price of said rope attached, to Hambleton & Company . . . with instructions to turn over the bill of lading to the defendant upon payment of the draft," but it nowhere states that that was the *only purpose* of the appellant in having the bill of lading made out in the way it was. Where under the rules referred to the form of the bill of lading is not the *only* evidence of the intention of the seller to reserve the property in the goods, the form of the bill of lading can not be interpreted as intended only for the purpose of securing performance of the contract. Hopkins *v.* Cowen, 90 Md. 152.

[The court here quoted sections 17, 18, 19, 20 and 22.]

As we have said, the seller retained both the possession of, and property in the goods, and there is no evidence to show that he reserved the property *merely* to secure performance of the contract by the buyer. But the appellant contends that the tender of the bill of lading to the appellee was equivalent to the tender of the rope itself; that the appellee by refusing to pay the draft for the purchase price of the rope unless he was allowed to deduct therefrom the amount of the draft he paid the appellant in 1912 broke the contract, and that the loss caused by the fire would not have occurred but for such default of the appellee. He insists that the contract of 1912 and the contract of 1913 are distinct, separate and independent, and that the breach of the contract of 1912 by the appellant, did not warrant a breach by the appellee of the contract sued on in this case. He cites many authorities in support of this contention, and the further contention that a debtor can not apply a set-off in reduction of his debt and tender the residue, and that "unless otherwise agreed, the contract price must be paid *in cash*." 28 Am. & E. Enc. of Law, 18; 22 Am. & E. Enc. of Law, 576; Machen on Sales (Vol. 2), sec. 1437; Leven *v.* Smith, 1 Denio (N. Y.), 571; 3 Elliott on Contracts, sec. 1926; 35 Cyc. 264.

It is said in *Williston on Sales*, p. 465, that the situation for which sub-section (b) of section 43 provides "is rather for a delay or temporary fault, which is not, and perhaps can not be, treated as sufficient breach to terminate the bargain." That would seem to be the correct interpretation of the sub-section referred to, for it refers simply to a *delay* of the delivery of the goods through the fault of either the buyer or seller, and not to such a refusal to accept delivery of, or to pay for the goods as amounts to a breach of the contract. Here the contention of the appellant is that the appellee by refusing to pay the draft broke the contract, and it can hardly be said under the circumstances that he simply delayed the delivery.

In Foley *v.* Mason, 6 Md. 37, the Court said: "Conceding that both the sale and delivery in this case were *conditional* upon payment in cash, that *the alleged usage* was clearly established, and that this transaction took place in reference to that usage, still we regard the offer of the defendants to pay for the goods in the plaintiff's own over-due paper, to be a virtual compliance with the condition, and for all practical purposes was equivalent to a tender of *payment in cash.* A *cash* payment, in ordinary parlance, is understood in contradistinction to a *credit payment,* and there is no more reason for supposing that the *first* is to be made in *money,* than that a deferred or credit payment is, when due. Each payment must be made in the same way. The only difference, as before remarked, is that one must be made at the time of sale or delivery, the other when the credit has expired."

We are not required in this case to determine whether the appellee was justified in refusing to pay for the goods for the reason assigned by him. Assuming that the offer of the appellant to deliver the bill of lading in question was under the circumstances an offer to deliver the goods, and that the conduct of the appellee was in legal effect a refusal to accept the same and a breach of his contract with the appellant, the established rule in this State is that where a vendee declines to take the property and pay for it the vendor has the choice of three remedies: (1) He may store or retain the property for the vendee, and sue for the contract price. (2) He may keep the goods as his own, and recover the excess of the contract price over and above the market price of the goods at the time and place of delivery; or (3) he may sell them at the vendee's risk, and sue the vendee for the difference between the contract price and the price obtained at said sale. Regester *v.* Regester, 104 Md. 1; Swartz *v.* Realty Co., 106 Md. 290; Tyng & Company *v.* Woodward, 121 Md. 422. In Tyng & Company *v.* Woodward, *supra,* CHIEF JUDGE BOYD said: "The plaintiff could store the goods for the defendant and sue for the contract price, or it could keep the goods as its own and sue for the difference between the contract price and the market price, or he could resell them at the vendee's risk, and sue for the difference between the contract price and the resale price." The same rule is recognized in *Williston on Sales,* sec. 555; Dustan *v.* McAndrew, 44 N. Y. 72; Ames *v.* Moir *et al.* (Ill.), 22 N. E. 535; Putnam *v.* Glidden, 159 Mass. 47, 34 N. E. 81; Moore *v.* Potter (N. Y.), 50 N. E. 271; Ackerman *v.* Rubens, 167 N. Y. 405, 53 L. R. A. 867. These several remedies of the vendor are also provided for by the provisions of the *Uniform Sales Act.*

In the case at bar the vendor of the goods in question did not resort to any of the remedies open to him, but while reserving the property in, and the right to the possession of the goods, and refusing to deliver them to the vendee, except upon payment of the contract price, left them on the dock without making any effort to provide for their care or safety. The appellee could not take charge of the goods, and if the appellant had stored them for the appellee they might not have been destroyed by fire. The appellee should not therefore be required to suffer the loss of which his breach of the contract was not the proximate cause, and there was no error in the rejection of the plaintiff's second and third prayers.

Judgment affirmed, with costs.[1]

TOLERTON & STETSON CO. *v.* ANGLO-CALIFORNIA BANK, LTD. APPELLANTS.

SUPREME COURT OF IOWA, JANUARY 17, 1901.

[*Reported in* 112 *Iowa*, 706.]

PLAINTIFF is a corporation engaged in the wholesale grocery business at Sioux City, Iowa. Defendant is a banking corporation whose principal place of business is in San Francisco, Cal. During the summer of 1897 plaintiff purchased a car of canned goods from the California Canneries Company, of San Francisco, under a warranty that the goods should be equal in quality to certain samples shown. The Canneries Company delivered said goods to a railway company at San Francisco, taking a bill of lading therefor, in which defendant bank was named as consignee at Sioux City. This bill of lading was by defendant bank attached to a draft in its favor drawn by the Canneries Company on plaintiff for the price of said goods. The car of goods came in the course of transit into possession of the Sioux City & Pacific Railroad Company, and was by it delivered to plaintiff, who paid to said railroad company the price of said merchandise, which sum was paid over by the latter to defendant bank. Plaintiff relied on the warranty in receiving the goods, and thereafter found such goods inferior in quality to the samples. Plaintiff notified the Canneries Company of the breach of warranty, but nothing was done by the latter to rectify matters.

WATERMAN, J. The facts, so far as we have to consider them, under the issue upon which we make the case hinge, may be accepted as set out by plaintiff. There was a sale of these goods with a warranty, which was broken. Defendant was the payee of the draft drawn by the Canneries Company on plaintiff for the price, with the bill of lading attached, and as such received payment of the full purchase price. The question to be determined is whether defendant is now liable in damages for the breach of the Canneries Company's warranty. It must be confessed that the theory of its liability is fully supported by the case of Landa *v.* Lattin, 19 Tex. Civ. App. 246 (46 S. W. Rep. 48), and that the doctrine of that case has been adopted and followed by the supreme court of North Carolina in Finch *v.* Gregg, 126 N. C. 176 (35 S. E. Rep. 251), decided since the trial below. If we were prepared to yield our assent to the line of reasoning pursued in these cases, we should have to affirm this judgment. These decisions proceed upon the theory that the assignee stands in all respects in the shoes of his assignor, and to this broad doctrine we cannot agree. While the rights of such an assignee are to be measured by those of his assignor, his liability is not necessarily the same.

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[1] A portion of the opinion is omitted.

Defendant bank could not have compelled payment by plaintiff of any greater sum than could have been collected by the Canneries Company, but on what theory can we say it is liable on a contract of warranty which it never made? The rule of the *Landa Case* is founded on the thought that the transfer of the draft and bill of lading to the bank amounted to a sale of the goods, and that the bank as a purchaser undertook to deliver the goods and carry out the Canneries Company's contract with plaintiff, and because of these facts it necessarily assumed the contract of warranty, although it may have been in fact ignorant that any warranty was made. We do not think, even as the proposition is thus stated, the premises justify the conclusion. But the premises are not correct. The transaction between the Canneries Company and defendant was not and could not be a sale of the goods, for they had already been sold to plaintiff, and it was the intention of all parties that such sale to plaintiff should be consummated by delivery. What was in fact done by the assignment of the draft and bill of lading was to transfer to the bank the Canneries Company's right to the price, and to give it the possession of the goods as security. Manifestly, while the bank could collect no more than its assignor would have been entitled to, the character of its engagement was not such as to impose upon it any liability to the buyer which it did not expressly assume. One who purchases an account against another takes it subject to defenses, but not to affirmative claims of the debtor on some collateral agreement with the original creditor. The two cases cited stand alone in holding the purchaser of a draft with the bill of lading attached liable on a warranty made by the assignor, and the line of reasoning pursued to reach this conclusion is so at variance with well-established elementary principles of law that we decline to accept the rule they announce.

II. If there is any liability on defendant's part to plaintiff, it must be on the ground that it has received money which it cannot equitably retain. The Canneries Company could have collected only the price of the goods, less the damages for breach of warranty. More than this has been paid to defendant. If plaintiff has any standing here, it is to recover this excess paid, on the theory just stated. But the draft given the bank was negotiable, and it is a well-established rule of law, that, after the holder of a negotiable draft with bill of lading attached has secured an acceptance of such draft from the drawee and consignee, he is unaffected by any equities originally existing between such consignee and the seller of the goods. In such a case the liability of the drawee becomes fixed to the payee. Arkin *v.* Owens, 140 Mass. 144 (3 N. E. Rep. 25); Flournoy *v.* Bank, 78 Ga. 222 (2 S. E. Rep. 547); Nowak *v.* Stone Co., 78 Ill. 307; Law *v.* Brinker, 6 Colo. 555; Vanstrum *v.* Liljengren, 37 Minn. 191 (33 N. W. Rep. 555); Hays *v.* Hathorn, 74 N. Y. 486; Shafer *v.* Bronenberg, 42 Ind., 89; Randolph Commercial Paper, 1876. It is said in the first of these cases: "The payee of an accepted bill holds the same relation to the acceptor that an indorsee of a note holds to the maker." Under this rule, the plaintiff, after an acceptance of the draft, could not have set up against the bank any claim for breach of warranty made by the Canneries Company, and if this is the effect of an acceptance, it certainly is of a payment.

There was no matter of mutual mistake in this transaction between plaintiff and defendant. The latter had a right, as against the Canneries Company, to collect the full amount due on the draft from the drawee. The mistake, if any, was as to a matter between plaintiff and the drawer of the draft.

It is said in plaintiff's behalf that there is no evidence that the bank was the owner of the draft. But we think differently. It alleged such ownership in its answer, and to establish the allegation exhibited a draft payable to its order, with a bill of lading attached, showing a shipment of the goods consigned to the bank. The rule is well established that possession of a note or bill is *prima facie* evidence of ownership for value. Stoddard *v.* Burton, 41 Iowa, 582; Lawson, Presumptive Evidence 94; 2 Randolph Commercial Paper, 717. On the whole, we are convinced the judgment of the trial court is erroneous. Plaintiff's remedy is against the Canneries Company. It has now no enforceable claim against the bank.

Reversed.

THE AGRI MANUFACTURING CO. *v.* ATLANTIC FERTILIZER CO.

COURT OF APPEAL OF MARYLAND, MAY 17, 1916.

[*Reported in* 129 *Md.* 42.]

URNER, J. A carload of ground tankage for use in the manufacture of fertilizer, was sold and shipped by the appellant, the Agri Manufacturing Company, to the appellee, the Atlantic Fertilizer Company, and was destroyed by fire before being removed from the car, and while awaiting official analysis and weighing at the appellee's works. The question raised by this suit is whether the loss thus occasioned should be borne by the vendor or by the vendee, neither of whom was at fault in regard to the destruction of the property. The terms of the agreement relating to the sale are set forth in a letter from the appellant to the appellee under date of October 21, 1913, as follows:

"Gentlemen: This will serve to confirm sale to you of about four hundred (400) tons of our regular production of Ground Tankage for approximate equal monthly shipments for months of January, February, March and April, 1914, at \$2.67½ per unit for ammonia per ton of 2,000 lbs. cif. your works, Curtis Bay, Md. Delivered weights and sampling by Stallings, analysis by Wiley & Co., at seller's expense. Bags to be furnished by buyer as far as possible; if furnished by sellers they are to be returned promptly at bûyer's expense.

"Terms, ¾ cash upon presentation of pro forma invoice and B/L, balance upon completion of weights and analysis.

"These goods are sold upon the representation by sellers that the availability of the nitrogen they contain will show at least 70% by a permanganate method. In the event buyers should have any goods analyzed for available nitrogen, an official sample to be used, and they should prove to contain less than the 70% availability above mentioned, the expenses of said analysis shall be paid by sellers and buyers shall have the privilege of refusing said goods.

"In all disputes, the sampling and weighing of Stallings and the analysis of Wiley & Co. to govern."

In the course of the deliveries under this contract a carload of ground tankage, estimated to contain about thirty tons, was shipped, on April 20, 1914, over the line of the Baltimore and Ohio Railroad, from Mt. Claire, Baltimore, to the appellee's factory at Curtis Bay. The car reached the siding of the Atlantic Fertilizer Company on the afternoon of Friday, April 24th, and upon an order issued by the superintendent of the company it was placed in position the following day for unloading. Notice was sent by the company to Mr. Stallings and to Messrs. Wiley and Company to be at its works on Monday morning, April 27th, to weigh and analyze the contents of the car as provided by the agreement. On the intervening Sunday a fire occurred at the appellee's plant and the flames consumed the carload of fertilizer in question as it stood on the siding adjacent to the factory. The bill of lading for the shipment, in which the Atlantic Fertilizer Company was named as consignee, had been previously delivered to it by the sales manager of the vendor company, together with a *pro forma* invoice, upon which he received a payment of \$661.00 representing three-fourths of the estimated value of the material on the basis of the ammonia content assumed by the contract of sale. In this suit the vendor seeks to recover from the vendee a balance of \$240.86 for the shipment referred to, and the sum of \$203.88 on account of a carload which was delivered after the fire and upon which also a three-fourths payment was made on presentation of the bill of lading and *pro forma* invoice.

The defendant filed general issue pleas to the declaration, and in addition interposed a plea of set-off claiming recovery from the plaintiff of the amount advanced on the carload destroyed, less the sum alleged and admitted to be due on the second car, and plus the freight charges of $7.95 paid by the vendee on the two consignments. There was no dispute as to the correctness of the figures upon which the opposing claims were based, and it was conceded in effect that if the plaintiff company was entitled to recover, the verdict in its favor should be for the sum of $444.74, otherwise the finding should be for the defendant, on its claim of set-off, to the amount of $461.62. At the close of the plaintiff's case the trial Court granted an instruction to the jury that there was no legally sufficient evidence to support a verdict for the plaintiff and that they should find in favor of the defendant for the sum just indicated. From the judgment entered upon the verdict thus directed the plaintiff has appealed.

The principles which must control the decision of the question raised by exception to the instruction to which we have referred are embodied in the Uniform Sales Act, whose provisions were enacted as part of the statute law of this State.

[The court here quoted sections 22, 8, and 19.]

In the case before us the seller contracted to deliver 400 tons of fertilizer, of the kind and quality described, at the buyer's works. The term "cif. your works," as used in the agreement, is shown by the testimony to mean that the seller should pay the cost, including freight, incurred in the transportation. The material shipped and destroyed by the fire was appropriated by the seller to the contract, but as it was the duty of the seller, under the terms of the sale, to make delivery at the buyer's factory, and to pay the freight on the shipment, the rule last quoted precludes any question as to the transfer of the title before the delivery at the designated place was accomplished. It is, therefore, unnecessary to consider what, in the absence of such a stipulation, is the ordinary effect upon the title of delivering goods to a common carrier and of consigning them to the buyer upon a bill of lading issued in his name, and of the payment of part of the purchase money. Whether the title to the specific carload of fertilizer under inquiry passed to the buyer as soon as it reached the place of destination depends upon the question as to whether the parties to the sale intended the transfer of the title to occur at that point of time or to be deferred to a later period. The intention of the parties is the controlling factor in the determination of such an issue. This is the plain import of the provisions we have reproduced from the Uniform Sales Act, which simply declare in this respect the settled rule of the common law. Lucas *v.* Taylor, 105 Md. 107.

Upon the question of intention in regard to the time when the title should pass we have nothing in the record of any special significance beyond the written terms of the sale. There were no acts of the parties reflecting upon this subject except such as the agreement evidently contemplated. The issue to be decided is therefore one of law and involves the inquiry as to whether there are any conditions of the contract which had the effect of postponing the transfer of the title to the defendant beyond the time of the arrival of the shipment at its plant. It is clear that this effect would not necessarily be produced by the provision for weighing and analysis to ascertain the quantity of the material and the units of ammonia it contained for the purpose of correctly determining the amount of the price. The decision of this Court in the case of Farmers' Phosphate Co. *v.* Gill, 69 Md. 537, is conclusive upon this point. Numerous cases in harmony with that ruling are cited in a note to Deadwyler *v.* Karow, (Ga.), 19 L. R. A. (N. S.) 197, upon the subject of the effect on sales of the destruction of the property after actual or constructive delivery, preventing the ascertainment of the price according to the terms of the contract.

The sale was made, however, upon the representation that the ground tankage contained 70% of available nitrogen, and it was stipulated that if the buyer should "have any of the goods analyzed" for that element, using an official sample, and the nitrogen availability should prove to be less than that specified, the buyer should have "the privilege of refusing said goods." It appears from the record that the practice in reference to the shipments under this contract was to first make the tests to ascertain the units of ammonia per ton, from which results also it could be approximately determined whether there was 70% or more of available nitrogen present, and the Atlantic Fertilizer Company would then decide whether it wanted a further nitrogen test made by the permanganate method. The representation as to the availability of nitrogen was treated by the parties as being sufficiently material to entitle the buyer to refuse any shipment which was found to be deficient in that respect when the fertilizer was weighed and analyzed on delivery. The test provided in this connection was not to be made, and hence the buyer's conditional right of rejection could not be exercised, until after the shipment to be examined had reached its destination and had become subject to the buyer's control pending the process of unloading and weighing and making the analysis. Consequently, the fact that a particular carload had arrived on the buyer's siding and had been placed by its order in a position to have the cargo discharged, can have no important bearing upon the question as to the effect upon the title of the provision in reference to testing and rejection. The decisive inquiry is whether the right to refuse the shipment if a stipulated analysis at the time of delivery demonstrates that it does not conform to the contract, is consistent with the theory that the title has already passed to the purchaser. A refusal is a rejection of something proposed or tendered. It is a declination to accept. *Webster's New International Dictionary.* As applied to an offer of property under a contract of sale, the right to *refuse* the property obviously implies that the title has not yet passed. When the parties to the sale in this case agreed that the buyer should have the privilege of refusing any consignment of fertilizer which proved upon official analysis at the time of delivery to be deficient in respect to the quality warranted, they are necessarily presumed to have understood and intended that the title should vest in the purchaser only in the event that the analysis should verify the warranty, or the right to require such a test should be waived. These were made alternative conditions precedent to the acceptance of the property.

It was said by this Court in Enterprise Mfg. Co. *v.* Oppenheim, 114 Md. 399, by way of quotation from Pope *v.* Allis, 115 U. S. 363: "When the subject matter of the sale is not in existence, or not ascertained at the time of the contract, an undertaking that it shall, when existing, or ascertained, possess certain qualities, is not a mere warranty, but a condition, the performance of which is precedent to any obligation upon the vendee under the contract, because, the existence of these qualities, being part of the description of the things sold, becomes essential to its identity, and the vendee can not be obliged to receive and pay for a thing different from that for which he contracted."

The Uniform Sales Act provides, by section 68 (1): "Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract."

A sale on terms permitting rejection of the goods if they do not pass a prescribed test of quality is somewhat analogous to a sale on trial, in reference to which the Uniform Sales Act provides, in section 40 Rule 3 (2): "Where goods are delivered to the buyer on approval, or on trial, or on satisfaction, or other similar terms, the property therein passes to the buyer: (*a*) When he signifies his approval or acceptance to the seller, or does any other act adopting the transaction; (*b*) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then if a time has been fixed for the return of the goods, on the expiration of such time, and if no time has been fixed, on the expiration of a reasonable time." This provision was applied in Rice *v.* Dinsmore, 124 Md. 276.

In Farmers' Phosphate Co. *v.* Gill, *supra,* where an agreement that a shipment of rock phosphate should be weighed and its quality tested upon arrival at the buyer's works was held not to defer the passing of the title until these acts were performed, it was pointed out that the buyers were given by the contract "no right to reject the rock if it did not come up to the prescribed standard," but were simply allowed in that event a proportionate abatement of the price.

The absolute right conferred upon the buyer in this instance to *refuse* the material delivered if it did not meet the test agreed upon is a conclusive indication that the title was not intended to pass to the buyer until the customary opportunity for making the test was afforded. There is nothing in the evidence tending to show that there was any undue delay on the part of the buyer in arranging for the weighing and analyzing of the contents of the car on the occasion in question, and as the property was destroyed without fault of either party before the buyer's unqualified right to test, and his conditional right to refuse, the shipment could be exercised, we must hold that the instruction of the trial Court placing the loss on the seller was properly granted.

Since the issue here decided is controlled by the intention of the parties as disclosed by the special agreement and facts in the case, it would be of no advantage to review the various cases cited in argument which apply the same general rules of law but are concerned with materially different conditions.

The conclusion we have stated indicates also our approval of the rejection of prayers offered by the plaintiff proposing to submit the issue to the jury upon theories which are inconsistent with the principle of our decision and the views we have expressed.

Judgment affirmed, with costs.[1]

NORTHERN GRAIN COMPANY, Appellant *v.* WIFFLER, *et al.*, Respondents.

Court of Appeals of New York, March 19, 1918.

[*Reported in* 223 *N. Y.* 139.]

Hiscock, Ch. J. This appeal involves a consideration of the right of stoppage in transitu of goods sold on credit and shipped by a common carrier. The question of the existence of the right is to be determined upon an agreed statement of facts.

Plaintiff sold to one Wiffler on credit a carload of oats which were shipped to the latter over the line of the defendant railroad company. A bill of lading covering the shipment was forwarded with a draft for the purchase price of the oats and upon acceptance by the vendee of the draft the bill of lading was delivered to him. He presented the same at the office of the defendant railroad company where it was received and marked "cancelled by delivery."

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[1] A portion of the opinion is omitted.

"Thereupon" the vendee examined and was dissatisfied with the condition of the oats and "thereupon" withdrew the bill of lading from the railroad company, caused the words "cancelled by delivery" to be stricken from the face of the bill and "thereupon" returned it to the plaintiff with the statement that he refused to accept the oats or take delivery thereof by reason of their condition and that he rejected the same.

Nothing more was done by which there is claimed to have been accomplished a delivery to or acceptance by the vendee of the oats. These, after remaining in a car in the possession of the railroad company for six months, were sold at public auction to satisfy its lien for transportation charges and the surplus of the proceeds over such charges was held by the railroad company and is the subject of the present controversy.

The draft which had been accepted by the vendee was not paid at maturity and an action was commenced against him thereon by the vendor and a judgment recovered which has never been satisfied. In such action the vendee alleged that "the draft was given by defendant in payment of a certain carload of oats which plaintiff sold to the defendant and that the same were good, marketable and useable (thus written in the agreed statement), and that when defendant received said carload the same were old and musty, and could not be sold and used, and were of no value whatsoever, and for that reason the note was given without consideration." Intermediate the commencement of this action and entry of judgment the vendee made an assignment for the benefit of creditors to the defendant Dana and thereafter plaintiff surrendered to the defendant railroad company for cancellation the bill of lading before mentioned and served upon it notice asserting the exercise of its right of stoppage in transitu of said oats, claiming that the latter had never been delivered to the vendee.

In the arguments addressed to us there is of course no dispute about the general principles applicable to the exercise of the right of stoppage in transitu and no serious question is presented but that under these principles plaintiff had the right to stop delivery of the oats to its non-paying insolvent vendee provided they still remained in the possession of the carrier under its original contract of transportation and had not been delivered either actually or constructively. It is true that some little attempt is made by respondents' counsel to argue the proposition that the surplus proceeds of the oats do not stand in the place of the latter, but we do not regard this as worth discussion. Some attention also has been paid to the fact that plaintiff recovered a judgment against its vendee for the purchase price of the oats, but this circumstance does not seem to be of importance. It may be conceded that by recovery of such judgment the title to the oats passed to the vendee and that under ordinary conditions the latter would have been entitled to take possession of them. This, however, does not defeat the right which plaintiff is now seeking to exercise. There has been at times debate whether the exercise of a right of stoppage in transitu was the assertion of a right in the nature of a lien against property whereof another held title or amounted to a rescission of a contract. The preponderance of authority, we think, sustains the former theory. (Babcock *v.* Bonnell, 80 N. Y. 244; Coleman *v.* N. Y., N. H. & H. R. R. Co., 215 Mass. 45, 49.) But however this may have been, it is now provided by section 134 of article 5 of the Personal Property Law (Cons. Laws, ch. 41, amd. L. 1911, ch. 571), relating to sales of goods, that "Subject to the provisions of this article, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such has . . . (*b*) In case of the insolvency of the buyer, a right of stopping the goods in transitu after he has parted with the possession of them."

Thus we come to the question, stripped of accidental conditions, whether plaintiff could and did successfully exercise the right asserted by it. The tests by which to decide this question are especially found in two sections of the statute already referred to. Section 138 provides: "Subject to the provisions of this article, when the buyer of goods is or becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transitu, that is to say, he may resume possession of the goods at any time while they are in transit, . . ." Section 139 then tells when goods are to be considered in transit within the meaning of the prior section. It says that they are thus in transit —

"(*a*) From the time when they are delivered to a carrier by land or water, . . . until the buyer, . . . takes delivery of them from such carrier . . .;

"(*b*) If the goods are rejected by the buyer, and the carrier . . . continues in possession of them, even if the seller has refused to receive them back."

And throwing some light on the interpretation of the clauses stating when goods are in transit it likewise states when they are to be regarded as not in transit. The same section already quoted from enacts that they are not in transit. "If, after the arrival of the goods at the appointed destination, the carrier . . . acknowledges to the buyer . . . that he holds the goods on his behalf and continues in possession of them as bailee for the buyer . . . ."

The only debatable question under the tests thus prescribed is the one whether the goods had been delivered by the carrier to the vendee. It seems to us that they had not been. The facts determinative of that question have already been stated and need not be repeated. Referring back to them, it may be conceded that if the vendee after taking his bill of lading to the carrier and permitting it to be marked "cancelled by delivery" had stopped, there would have been a constructive delivery. Also, if he had allowed the matter to rest in that situation for a substantial time before doing anything to recall this act it might be necessary to submit to the jury the question whether a delivery had not been so consummated that it could not thereafter be avoided. But he pursued neither of these courses. After the stamping of the bill of lading he "thereupon," that is, immediately, examined the oats and made what, if then permissible, was a clear and decisive refusal of acceptance of them from the buyer and of delivery from the carrier. It is only by separating these steps and regarding them as divisible and distinct transactions that a delivery can be made out. We do not think they ought to be thus separated, but that they were so closely connected in point of time and otherwise that they should be given the effect of one connected transaction. This being done it is clear that there was no delivery.

We think that the subsequent history of the shipment confirms this view. It remained in the physical possession of the carrier for months. There is no suggestion of any agreement under which it was thus held by the latter as agent for bailee for the vendee. On the other hand that which was done by the carrier, and so far as appears without objection or question by the parties, shows that the former was holding the oats under its original contract of shipment. As has been stated, it sold the oats for the purpose of satisfying its lien for freight charges and this it could not have done if by delivery it had surrendered its possession as carrier. (Bigelow *v.* Heaton, 4 Den. 496; Penn. Steel Co. *v.* Ga. R. R. & Banking Co., 94 Ga. 636.) While in our opinion the facts which we have discussed lead necessarily and under simple principles to the conclusion which we have adopted, general support for that conclusion may be found if necessary in the discussion of the subject of stoppage in transitu contained in Brewer Lumber Co. *v.* B. & A. R. R. Co. (179 Mass. 228); Coleman *v.* N. Y., N. H. & H. R. R. Co. (215 Mass. 45); Bolton *v.* L. & Y. Ry. Co. (L. R. 1 C. P. 431); Matter of McLaren (L. R. 11 Ch. D. 68).

In accordance with these views the judgment should be reversed and judgment directed in favor of plaintiff against the defendant, New York Central and Hudson River Railroad Company, for the sum of $287.85, with any interest received thereon by said railroad company, together with further judgment against the defendant Dana as trustee for its disbursements incurred in this court and in the Appellate Division.

CHASE, HOGAN and CRANE, JJ., concur; COLLIN and CUDDEBACK, JJ., concur in result; McLAUGHLIN, J., not sitting.

Judgment accordingly.

THE ABE STEIN COMPANY, RESPONDENTS *v.* ROBERTSON, APPELLANT.

COURT OF APPEALS OF NEW YORK, MAY 10, 1901.

[*Reported in* 167 *N. Y.* 101.]

MARTIN, J. The action was to recover damages for the breach of a contract between the parties for the purchase and sale of a quantity of goat skins. The agreement was made through brokers and evidenced by a bought-and-sold note dated May 24, 1895, modified by a letter dated the thirty-first of the same month

The note was as follows:

NEW YORK, May 24th, 1895.

"Sold for account of Messrs. L. F. Robertson & Son, to the Abe Stein Company. About 85,000 Tein-sin goat skins, firsts, 1⅝ to 2 lbs. avg., expected to arrive from China, at 22 cts. per lb. Goods to be shipped immediately by steamer or steamers to New York. About ⅔ of lot to be medium black haired skins, and the remainer ⅓ white or gray haired skins, of which 40 per cent. medium hair, 60 per cent. medium to long hair. Skins to be of the usual good quality of this province; any question of quality to be decided by selling brokers, and their decision to be final and binding on both parties. Terms net cash and to be taken from the wharf.

"JOHN ANDRESEN & SON, *Brokers.*"

The modification by letter was the addition of the usual condition of "no arrival, no sale."

Subsequently the defendant notified the brokers of the arrival of a portion of the goods, which were inspected by them in the presence of both parties, whereupon they determined that the goods tendered were not of the kind nor quality described in the contract. As subsequent shipments were received, they were also examined in the same way, and the same conclusion was reached in regard to them. Upon such determinations the plaintiff refused to receive the goods shipped, and brought this action for damages sustained by the failure of the defendant to deliver the goods contracted for.

The goods were shipped by the defendant from China by steamers to New York, were tendered to the plaintiff in fulfillment of his contract, and were obviously intended to be furnished under the agreement. In other words, the parties agreed that the goods had arrived, and the question whether they were of the quality required by the contract was presented and determined in the manner therein provided.

As there was no serious question as to the amount of damages, the court ordered a verdict for the amount proved, for which a judgment was entered, with costs.

An analysis of the contract discloses that the defendant agreed to sell about eighty-five thousand goat skins, of the kind, weight, description, quality and for the price set out therein. It also shows that the goods were expected to arrive from China; that the defendant agreed that they should be shipped immediately by steamer or steamers to New York; that any question of quality should be decided by the selling brokers, and that their decision should be final and binding upon both parties. When the goods were inspected by them, the question whether they were such as the contract required was to be and was conclusively settled by the decision of the selling brokers, and could not be litigated in the absence of any claim or suggestion of fraud, mistake or collusion.

The appellant insists that the contract was conditional, not only as to its performance, but as to its effect, and that the provisions "expected to arrive from China" and "no arrival, no sale," were in effect an agreement that if the goods referred to in the contract, when they arrived, were not of the quality prescribed, the contract was at an end and the plaintiff could recover nothing for its breach. Doubtless the effect of those provisions was to relieve the defendant from any breach of the contract occasioned by the non-arrival of the goods, provided it was not caused by fault of the seller. There are also other cases relied upon by the appellant where the existence of a right of recovery is conditional upon the arrival of goods of the quality specified in the agreement. But no such condition existed in this case, as there was an express agreement upon the part of the seller to make shipment of the goods particularly specified in the contract.

This contract was clearly executory, and the title was not intended to pass until the goods arrived and were delivered. (Benedict *v.* Field, 16 N. Y. 595, 597; Anderson *v.* Read, 106 N. Y. 333.) But the principle that if the goods specified and described in the contract do not arrive, a condition which terminates the contract exists and the seller is not liable, has no application where the contract contains either a warranty that the shipment has been made, or an express agreement upon the part of the seller to make shipment of goods described. In the latter case the contract is an existing and continuing one, and its provisions as to the quality of the goods are not only conditions precedent to any obligation upon the part of the buyer to accept them, but where the seller fails to ship goods of the quality required, the buyer is also entitled to such damages as he sustains by reason of such failure. (Clark *v.* Fey, 121 N. Y. 470; Eppens, Smith & Wiemann Co. *v.* Littlejohn, 27 App. Div. 22; S. C., 164 N. Y. 187.) In these cases it was held that where a seller had agreed to ship goods, and their failure to arrive resulted from his omission to ship them, the failure was caused by the fault of the seller and did not operate to relieve him from his contract.

In this case, as the contract required the defendant to ship the goods described therein immediately by steamer or steamers to New York, he was bound not only to ship goods at the time and in the manner directed, but was likewise bound to ship goods of the quality required, and upon his failure to do so he was liable for a breach of the contract.

The parties expressly agreed that the question of quality was to be conclusively determined by the brokers. That was the only question about which there was any controversy in this case. The undisputed evidence is that the brokers decided that the goods were not of the quality required by the contract, and as there was no fraud or collusion upon their part their decision concluded the parties upon that question.

The conclusion we have reached in this case is: 1. That the terms "expected to arrive" and "no arrival, no sale," apply only to the risks or perils of navigation or transportation. 2. That the goods which the defendant intended to deliver and which he tendered to the plaintiff in performance of his contract having been determined in the manner provided therein, not to be of the quality which he contracted to sell, the plaintiff was not bound to accept them. 3. It having been proved by undisputed evidence that the goods which the defendant shipped in pursuance of his contract arrived, and it having been conclusively established in the manner pointed out in the contract that they were not of the quality required, the plaintiff was entitled to recover such damages as he sustained by the defendant's failure to deliver goods of the quality described in the agreement. 4. Under these circumstances, with the additional one that there was no dispute as to the amount of damages sustained, the court properly directed a verdict, and the judgment should be affirmed, with costs.

Parker, Ch. J., O'Brien, Bartlett, Vann, Landon and Cullen, JJ., concur.

Judgment affirmed.

BRISTOL TRAMWAYS Etc. CARRIAGE CO. *v.* FIAT MOTORS, Ltd.

In the Court of Appeal, July 20, 1919.

[*Reported in* 1910 2 *K. B.* 831.]

On February 14, 1906, the plaintiffs entered into a contract for the purchase of a Fiat motor omnibus by a letter of that date as follows: "Please supply us with the 24/40 h.p. Fiat omnibus complete with body tyres lamps &c. complete for the road, which we inspected, at the price of 850*l.*" By a second letter of the same date, addressed to the defendants and signed by the manager of the plaintiff company, the plaintiffs contracted as follows: "Please supply us with six 24/40 h.p. Fiat omnibus chassis without tyres at the price of 650*l.* each, three for delivery in April and three in May."

These orders were duly accepted by the defendants by a letter of February 16. During the trial an amendment in the pleadings was allowed for the purpose of raising the question of a verbal warranty at an interview between the plaintiffs and the defendants' manager. There was some delay in the delivery of the chassis, and the plaintiffs alleged that the omnibus and chassis, when delivered, were so unfit and unsatisfactory that after making every effort to keep them running they had been compelled to lay them up until they could be reconstructed. The present action was therefore brought, claiming damages for delay in the delivery, expenses for repairs and renewals, estimated cost of reconstruction, and time lost by breakdowns.

Cozens-Hardy M.R. This is an action in which the plaintiffs claim damages in respect of seven Fiat motor omnibuses sold by the defendants to the plaintiffs. The learned judge, Lawrance J., who tried this case without a jury, has held that the omnibuses as delivered were not fit to perform the duty required of them, and that the plaintiffs made fully known to the defendants the particular purpose for which the omnibuses were required, and that they relied upon the defendants' skill and judgment in the matter.

The case really turns upon s. 14 of the Sale of Goods Act, 1893. I rather deprecate the citation of earlier decisions such as Chanter *v.* Hopkins, 4 M. & W. 399, or Shepherd *v.* Pybus, 3 Man. & G. 868. The object and intent of the statute of 1893 was, no doubt, simply to codify the unwritten law applicable to the sale of goods, but in so far as there is an express statutory enactment, that alone must be looked at and must govern the rights of the parties, even though the section may to some extent have altered the prior common law.

Turning to s. 14, it is plain that the defendants were told that the omnibuses were required for heavy passenger traffic at Bristol. I am disposed to think that such a statement of purpose suffices to shew that the buyer relied upon the seller's skill or judgment without any further evidence on the point, but, however that may be, I think there was in the present case ample evidence that the plaintiffs did rely upon the defendants' skill or judgment. This being so, there were an implied condition that the omnibuses should be reasonably fit for the declared purpose, unless the defendants can rely upon the proviso at the end of sub-s. 1 of s. 14.

That proviso is as follows: "Provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose." Now the orders in the present case are in writing. The first was for a 24 to 40 horse power Fiat motor omnibus complete, which had been run from London to Edinburgh, and which the representatives of the plaintiffs saw for a short time. The other order was for six 24 to 40 horse power Fiat motor omnibus chassis. In my opinion neither of these orders falls within the proviso. It was not a contract for the sale of a specified article under its patent name, nor was it under its trade name.

It is to me plain from the evidence that at the time when these contracts were entered into a Fiat omnibus was not a trade name. It no doubt meant an article sold by the defendants, an English company, and manufactured by an Italian company having intimate business relations with the English company, but the whole design and structure and arrangement of the Fiat omnibus was a matter of uncertainty according as the makers might from time to time consider improvements to be desirable. The defects in the omnibuses sold were apparently due to their being too slightly built, and being suitable for touring purposes rather than for heavy traffic. The term "trade name" applies to a case such as that which was before us a few days ago where "Anti-formin" was sold to brewers.

I think, therefore, that on the findings of fact by the learned judge there was an implied condition that the goods should be reasonably fit for the purpose. I also think that the case may be brought within sub-s. 2, namely, that there was an implied condition that the goods should be of merchantable quality. In the face of Mr. Preen's report of October 25, 1907, which comes from the defendants' custody, I cannot doubt that the goods sold were not of merchantable quality within the fair meaning of those words, and I see no reason to doubt the finding of the learned judge that the slight inspection by the representatives of the plaintiffs of one of the complete omnibuses was not of such a nature as sufficed to disclose the defects.

In my opinion there is no ground for interfering with the judgment of the learned judge, and the appeal must be dismissed with costs. [1]

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[1] The statement of facts is abbreviated, and concurring opinions of Farwell, L.J. and Kennedy, L. J. are omitted.

WARD *v.* GREAT ATLANTIC & PACIFIC TEA CO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS,
SEPTEMBER 11, 1918.

[*Reported in* 231 *Mass.* 90.]

THIS was an action of tort, and the facts as stated in the opinion were reported for the decision of the Appellate Court.

RUGG, C. J. The defendant conducts a retail grocery store at Ipswich. It had for sale at this store beans in sealed all tin cans, bearing this label: "Grandmother's Brand A & P Beans & Pork with Sauce, contents 2 lbs. 1 oz." "Remove contents of this can as soon as opened and place in earthenware dish." "The Great Atlantic & Pacific Tea Co. Incorporated, Distributors, Jersey City, N. J., U. S. A." These cans of beans were purchased by the defendant from the Thomas Canning Company of Grand Rapids, Michigan, after canning. It furnished the labels which were affixed to the cans by the manufacturer. The defendant had no supervision of the process of canning and no knowledge or means of knowledge that any foreign substance was in the cans. Such cans are always sold to the public in a sealed condition. The Thomas Canning Company is an independent reputable manufacturer of canned goods and in its processes employed all modern methods to prevent the presence of foreign substances in its products. Its goods were widely distributed and were considered to be of good quality by the wholesale and retail stores which handled them. On or about March 16, 1917, the defendant through the manager of its Ipswich store sold to the plaintiff one of these sealed cans of beans. At no time after the sealing of the can until it was opened by the plaintiff was there visible indication that the contents were in any way defective or that the can contained any foreign substance. The can contained baked beans, among which was a small pebble. The plaintiff was ignorant of its presence and, while eating the beans, broke his tooth on the pebble and later, on account of this injury, was obliged to have the tooth extracted.

The case comes before us by report on a case stated. No point is open as to the form of action or pleadings. The only question is whether the plaintiff can recover in any form of action. Smith *v.* Carney, 127 Mass. 179. Brettun *v.* Fox, 100 Mass. 234.

The transaction between the plaintiff and the defendant as to the can of beans necessarily involved a purchase of food to be eaten. That need not be stated in precise words. It was an underlying and essential condition of the contract, implied without expression. It arose from the nature of the goods, the size of the purchase and the terms of the label. It is provided by the sales act, St. 1908, c. 237, § 15 (1): "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose." That provision governs the relations of the parties in the case at bar. In this respect the statute is in substance, so far as concerns a dealer such as the defendant, simply a codification of the common law. It was said in Farrell *v.* Manhattan Market Co., 198 Mass. 271, 279, 280, 281, a case arising before the sales act, "Finally, provisions may be ordered by the purchaser in person in the dealer's shop, in such a way that it is made known to the dealer that his knowledge and skill are relied on to supply wholesome food, and, if they are so ordered, he is liable if they are not fit to be eaten. . . . If the sale is by a dealer and the selection of food is left to him, it is an implied term or condition of the sale that the provisions sold shall be fit for food whether supplied under a pre-existing contract . . . or in response to an order not given in person . . . or even when the order is given in person in the dealer's shop, provided . . . that the selection is left for the dealer. . . . But, even when the sale is by a dealer, if the provisions are selected by the buyer and the selection is not left to the judgment and skill of the dealer, the general rule applies and the dealer is not liable (in the absence of knowledge by the dealer that the provisions are unsound) if the provisions are not fit for food." The opinion in that case contains an exhaustive review of the authorities. See, also, in this connection, Race *v.* Krum, 222 N. Y. 410, 414, and Cook *v.* Darling, 160 Mich. 475, 481; Parks *v.* C. C. Yost Pie Co. 93 Kans. 334, 337, and L. R. A. 1917 F, note 472 to 475.

That statement of the law, which is but an amplification so far as relates to the case at bar, of the terms of the sales act, governs the facts here presented. The defendant was a dealer, the plaintiff a buyer at retail. There arises inevitably the implication that the plaintiff made known to the defendant that he was purchasing the beans for consumption as food and that he was relying, because from the character of the transaction he was bound to rely, upon the skill of the defendant in selecting the can which was offered to him.

It is not expressly stated in the agreed facts that the defendant selected the can for delivery to the plaintiff, or that the latter relied upon the skill and judgment of the defendant in selecting the can for delivery. But that he did so rely seems an almost irresistible inference from the facts stated. The cans in the defendant's stock were all alike in label and in general appearance. The cans were sealed. Their contents could not in the nature of things be open to inspection before the sale. There could be no intelligent selection based upon any observation by the purchaser. There is no room for the exercise of individual sagacity in picking out a particular can. The customer at a retail store is ordinarily bound to rely upon the skill and experience of the seller in determining the kind of canned goods which he will purchase, unless he demands goods of a definite brand or trade name. The situation is quite different from the choice of a fowl or a piece of meat from a larger stock, all open to inspection, where there is opportunity for the exercise of an independent judgment by both the buyer and the seller, and where, therefore, the fact as to the one who makes the selection is of significance, as in the Farrell case. The case at bar must be treated on the footing, as matter of necessary inference arising from the relation of the parties, so far as that is material in view of the other facts, that the plaintiff relied upon the knowledge and trade wisdom of the defendant in purchasing the can of beans. In the absence of an express statement to the contrary, this must be regarded as a necessary inference from the relation of the parties.

There appears to us to be no sound reason for engrafting an exception on the general rule, because the subject of the sale is canned goods, not open to the immediate inspection of the dealer, who is not the manufacturer, any more than of the buyer. It doubtless still remains true that the dealer is in a better position to know and ascertain the reliability and responsibility of the manufacturer than is the retail purchaser. But the principle stated in Farrell *v.* Manhattan Market Co. 198 Mass. 271, is a general one. It has long been established. Simply because it may work apparent hardship in certain instances is no reason for changing it to fit particular cases. It is a salutary principle. It has become wrought into the fabric of the law as the result of long experience. It may be assumed that the affairs of mankind have become adjusted to it. It has recently been adopted by the Legislature in codifying the law as to sales. It imposes liability, in the absence of an express contract between the parties governing the subject. It places responsibility upon the party to the contract best able to protect himself against original wrong of this kind, and to recoup himself in case of loss, because he knows or comes in touch with the manufacturer. In the case at bar the plaintiff had no means of ascertaining the manufacturer from inspection of the goods bought. The retail purchaser in cases of this sort ordinarily would be at some disadvantage if his only remedy were against the manufacturer.

It was said by Farwell, L. J., in the course of a judgment in the Court of Appeal in Jackson *v.* Watson & Sons, [1909] 2 K. B. 193, at page 202, "The plaintiff sues for breach of contract of warranty of fitness for human food of certain tinned salmon supplied to and eaten by himself and his wife, and there is not (and indeed since Frost *v.* Aylesbury Dairy Co. [1905, 1 K. B. 608] there could not well be) any question as to the sufficiency of his cause of action: the only question is as to the damages." The Frost case related to a sale of milk by a retail dealer. Both cases arose under the English sale of goods act, § 14 (1), quoted at length in Farrell *v.* Manhattan Market Co., 198 Mass. 271, at pages 278, 279, which does not differ in any particular material to the present case from § 15 (1) of our sales act. It is manifest, therefore, that the English courts hold that under the sale of goods act there is no distinction between canned goods and goods not canned and open to inspection, so far as concerns the implied warranty of fitness in sales of food to the ultimate consumer. Decisions of this character, in view of the fact that the English sale of goods act was enacted before our own, and of the close similarity of the pertinent section of each act, are entitled to consideration. See McNicol's Case, 215 Mass. 497, 499. Decisions of an inferior court in Illinois are precisely to the same effect, namely, that in sales by a retail dealer to a consumer canned goods are on the same footing as other foods, Sloan *v.* F. W. Woolworth Co. 193 Ill. App. 620, Chapman *v.* Roggenkamp, 182 Ill. App. 117, being based upon Wiedeman *v.* Keller, 171 Ill. 93.

There is nothing in Winsor *v.* Lombard, 18 Pick. 57, inconsistent with the conclusion here reached. That was a sale of goods by description by one dealer to another dealer. Both parties were taken to rely upon the description of the goods sold which was founded on an inspection and branding under inspection laws. Apparently it was a sale of specified goods under a trade name such as is now covered by § 15 (4) of the sales act, and where there is no implied warranty of fitness for any particular purpose. It is pointed out in the opinion in that case, at page 62, that it was not intended to apply to sale of food at retail for immediate use. It is to be noted that Walden *v.* Wheeler, 153 Ky. 181, and Bigelow *v.* Maine Central Railroad, 110 Maine, 105, 110, each arose at common law and not under a sales act. But if and so far as they are inconsistent with the conclusion here reached, we cannot follow them.

No discussion is required to demonstrate that canned beans and pork are not fit for consumption if they contain a pebble of sufficient size to break a tooth. It is matter of common knowledge that pebbles often are found in raw and uncleaned beans. In domestic use, careful sorting is required to free them from such substance. It is or may be found lack of due care for one to prepare beans for eating with pebbles still among them. See Watson *v.* Augusta Brewing Co., 124 Ga. 121.

It follows that the plaintiff is entitled to recover, and since it is agreed that his damages are $350, judgment may be entered in his favor for that sum.

So ordered.[1]

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[1] Crosby, J. delivered a dissenting opinion.

FRIEND *v.* CHILDS DINING HALL COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS,
SEPTEMBER 11, 1918.

[*Reported in* 231 *Mass.* 65.]

THIS was an action of tort or contract in which the trial court reported the facts as stated in the opinion for the determination of the Appellate Court.

RUGG, C. J. The plaintiff introduced evidence tending to show that the defendant kept a restaurant in Boston, which she entered and ordered from a waitress of the defendant from its menu, "New York baked beans and corned beef." This food was served to her and she sat at a table to eat it. She further testified, "I started to eat the food and there were two or three dark pieces which I thought were hard beans, that is, baked more than the others, and I put two in my mouth and bit down hard on them, and . . . I was hurt. . . . I took those things out of my mouth and found they were stones." There was no further evidence that the plaintiff had anything to do with the selection of the beans. She gave no instructions respecting the food other than to order it. There was no evidence or express warranty or that the defendant knew of the presence of the stones in the food. There was evidence of injury to the plaintiff. At the close of the evidence the plaintiff elected to rely upon a count for breach of an implied warranty of fitness to eat in a contract for food to be eaten on the premises of the defendant. The defendant introduced no evidence. The question is whether the plaintiff was entitled to go to the jury.

There is strong ground for holding that the contract made between one who keeps a restaurant and one who resorts there for food to be served and eaten on the premises is a sale of food. The evidence in Commonwealth *v.* Worcester, 126 Mass. 256, was that on two or three different occasions people resorted to the defendant's dwelling house and there were served with meals; with these and and as a part thereof intoxicating liquors were provided. The price paid was single, including both food and drink. The complaint was for keeping a tenement used for the illegal sale and illegal keeping for sale of intoxicating liquors. It was held that "The purchase of a meal includes all the articles that go to make up the meal. It is wholly immaterial that no specific price is attached to those articles separately. If the meal included intoxicating liquors, the purchase of the meal would be a purchase of the liquors. It would be immaterial that other articles were included in the purchase, and all were charged in one collective price." That decision rests entirely upon common law principles as to sales and

St. 1875, c. 99, § 17, then in force (now R. L. c. 100, § 64), making delivery of intoxicating liquor under certain circumstances *prima facie* evidence of sale, was not adverted to and very likely was not applicable to the facts there presented. Precisely the same point was held in State *v.* Lotti, 72 Vt. 115. The defendant in Commonwealth *v.* Warren, 160 Mass. 533, was charged with selling milk not of good standard quality contrary to St. 1886, c. 318, § 2. The evidence was that a guest at the inn of the defendant conducted on the American plan was served as a part of his breakfast, for which he paid a single price, with a glass of milk not of the quality required by the statute. It was said in the course of the opinion holding that the defendant might be found guilty, "The milk bought by the witness Kelly was purchased by and delivered to him as a part of his breakfast, and was just as much a sale as if a specific price had been put upon it, or it had been bought and paid for by itself." Similar decisions have been made by other courts. In People *v.* Clair, 221 N. Y. 108, it was held that the serving of partridges by a hotelkeeper to guests who paid for board and room at the rate of $2 per day, was a sale as matter of law in violation of a statute which provided that such game should "not be sold, offered for sale, or possessed for sale for food purposes." A similar decision was rendered in Commonwealth *v.* Phoenix Hotel Co. 157 Ky. 180, with reference to the possession of quail by an innkeeper with intent to serve to his guests in violation of a statute which prohibited the sale of such birds. It there was said at page 185, "The guest at the hotel or restaurant who is served with quail for compensation as certainly purchases it and the proprietor of the hotel or restaurant as certainly exposes it for sale and sells it as if it were purchased for compensation from a dealer who had it for sale and was carried home by the purchaser to be served on his table." It was decided in Commonwealth *v.* Miller, 131 Penn. St. 118, that where the keeper of a restaurant served oleomargarine with a meal to a guest who was charged and paid fifty cents for the meal, there was a sale within the terms of a statute which prohibited the sale of oleomargarine.

In view of these decisions it would be difficult for this court to hold that the transaction arising from a contract to serve to a guest food to be eaten by him upon the premises of the keeper of an eating house is not a sale. If it is a sale, then plainly it is governed by the sales act, St. 1908, c. 237, § 15 (1), which is in these words: "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, whether he be the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose." It is manifest that at least it might be inferred from the relations of the parties, that the guest who asks to be served food upon the premises of one who is the keeper of a restaurant makes known as the particular purpose for which the food is required that it is then and there to be eaten, and that he relies upon the latter's skill or judgment in the selection and preparation of the food. Hence there would be an implied warranty that it was reasonably fit for such purpose.

If the transaction is a sale, the rule is the same apart from the sales act. That was settled after great consideration in Farrell *v.* Manhattan Market Co., 198 Mass. 271, a case decided before the sales act took effect. It there was held, page 284, that the English rule as to implied condition of soundness in the sale of food by a dealer prevails here. That rule was stated at pages 280, 281, in these words: "The rule now established in England is that, in the sale of an article of food by one not a dealer, there is no implied condition or warranty that it is fit to be eaten. . . . Since the sale of goods act, if the sale is made by one not a dealer, there is no liability, by force of § 14. If the sale is by a dealer and the selection of food is left to him, it is an implied term or condition of the sale that the provisions sold shall be fit for food whether supplied under a pre-existing contract, . . . or in response to an order not given in person, . . . or even when the order is given in person in the dealer's shop, provided, . . . that the selection is left to the dealer."

But there is authority to the effect that, when food is furnished to a guest by the keeper of a restaurant or inn, the transaction does not constitute a sale, that the title to the food does not pass, that the customer may consume so much as he pleases, but that he cannot carry away of the portion ordered that which he does not eat, or give or sell it to another; and that the charge made is not for the food alone, but includes the service rendered and the providing of a place in which to eat. It is stated in Beale on Innkeepers, § 169, "The title to food never passes as a result of an ordinary transaction of supplying food to a guest; or, as it was quaintly put in an old case, 'he does not sell but utters his provision.'" Parker *v.* Flint, 12 Mod. 254.

Therefore it seems desirable to consider somewhat the relation of the guest to a keeper of a place where food is served for immediate consumption. It is ancient law that when one resorts to a tavern, inn or eating place there for a consideration to be served with food for immediate consumption, and is received as a guest by the keeper, a duty is implied that the food shall be fit to eat. It has been said that "if a man goes into a tavern for refreshment, and corrupt drink or meat is there sold to him, which occasions his sickness, an action clearly lies against the tavern-keeper . . . an action lies against him without express warranty, for it is a warranty in law." Keilwey's Rep. 91. Burnby *v.* Bollett, 16 M. & W. 644, 646, 647, 654, where are the references to numerous older cases. "A taverner or vintner was bound as such to sell wholesome food and drink." Ames Lectures on Legal History, page 137, citing also cases from the year books. "If a man sell victuals which is corrupt, without warranty, an action lies, because it is against the Commonwealth." Roswel *v.* Vaughan, Cro. Jac. 196, 197. To the same effect in substance are 1 Roll. Abr. 95, 1 Fitz-Herbert's Natura Brevium, 94 C note, supposed to be by Lord Chief Justice Hale, and 1 Bl. Com. 430, 3 Bl. Com. 166. See Williston on Sales, § 241, note 82; Farrell *v.* Manhattan Market Co. 198 Mass. 271, 275. The relation between guest and host in a public house is one of contract. It seemingly is the result of those early authorities that it was an implied term or condition of that contract that the food and drink furnished should not be harmful, but appropriate for eating.

There are numerous other illustrations in the law of contracts of an implied condition that the thing sold is merchantable. See, for example, Murchie *v.* Cornell, 155 Mass. 60, 63; Leavitt *v.* Fiberloid Co. 196 Mass. 440, 451, 453; Inter-State Grocer Co. *v.* George William Bentley Co. 214 Mass. 227, 231. Food for immediate use which is not fit to eat is not merchantable as food. This rule was held in Farrell *v.* Manhattan Market Co. 198 Mass. 271, to be applicable to cases where a purchaser buys from a dealer food at retail for immediate use. That rule now prevails generally in this country. Flessher *v.* Carstens Packing Co. 93 Wash. 48, 54. Zielinski *v.* Potter, 195 Mich. 90. Catani *v.* Swift & Co. 251 Penn. St. 52, 54. Nelson *v.* Armour Packing Co. 76 Ark. 352. Askam *v.* Platt, 85 Conn. 448. Race *v.* Krum, 222 N. Y. 410, 414. Osgood *v.* Lewis, 2 Har. & Gill, 495, 520. Dulaney *v.* Jones, 100 Miss. 835, 840. Parks *v.* C. C. Yost Pie Co. 93 Kans. 334, 337. See however, Crigger *v.* Coca-Cola Bottling Co. 132 Tenn. 545, 552, and Green *v.* Ashland Water Co. 101 Wis. 258, 263-265.

The authorities already cited appear to show that by the common law of England it was an implied term of the contract that the guest should be furnished wholesome food by the proprietor of a public eating house to which he resorted for refreshment.

The historical review, the principles discussed and the ground of decision in Frost *v.* Aylesbury Dairy Co. Ltd. [1905] 1 K. B. 608, 613, 614, (although that case arose under the sale of goods act,) afford basis for the conclusion that it has continued to be the law of England to the present. At all events there is nothing to indicate that this common law rule was changed in England before the emigration of our ancestors to the new world. Hence that principle was brought over with them and has become a part of our heritage. This is so whether the origin of that law was general custom or statutory enactment. Crocker *v.* Justices of Superior Court, 208 Mass. 162, 166, 167. There is no adjudication or dictum of this court (so far as we are aware) which indicates that the principle has not heretofore and does not now prevail here. The implication in Emerson *v.* Brigham, 10 Mass. 197, 200, 201, from the use of the word "victuals," which commonly refers to food ready to eat, and "victualler," which usually is the synonym of publican and means one who serves food or drink prepared for consumption on the premises, Tyson *v.* Smith, 9 Ad. & El. 406, 423, is that this principle was then in the mind of the court. The question has not been raised in any of our recent decisions in actions against those who serve food for immediate consumption, on their premises. Bishop *v.* Webster, 139 Mass. 411. Crocker *v.* Baltimore Dairy Lunch Co. 214 Mass. 177. Wilson *v.* J. G. & B. S Ferguson Co. 214 Mass. 265. Gearing *v.* Berkson, 223 Mass. 257. Some of these rest on negligence, and others on Farrell *v.* Manhattan Market Co. 198 Mass. 271. The exhaustive review of cases in the Farrell opinion demonstrated that it was the law both of England and of this Commonwealth that in the absence of statute it was an implied term of every sale of provisions by a dealer for immediate use, where the selection was not made by the buyer, that the food was fit for consumption. The principles there discussed and the result there reached appear to be equally applicable to the case at bar. It would be an incongruity in the law amounting at least to an inconsistency to hold with reference to many keepers or restaurants who conduct the business both of supplying food to guests and of putting up lunches to be carried elsewhere and not eaten on the premises, that, in case of want of wholesomeness, there is liability to the purchaser of a lunch to be carried away founded on an implied condition of the contract, but that liability to the guest who eats a lunch at a table on the premises rests solely on negligence. The guest of a keeper of an eating house or of an innkeeper is quite as helpless to protect himself against deleterious food or drink as is the purchaser of a fowl from a provision dealer. The opportunity for the innkeeper or restaurant keeper, who prepares and serves food to his guest, to discover and provide against deleterious food is at least as ample as is that of the retail dealer in foodstuffs. The evil consequences in the one case are of the same general character as in the other. Both concern the health and physical comfort and safety of human beings.

On principle and on authority it seems to us that the liability of the proprietor of an eating house to his guest for serving bad food rests on an implied term of the contract and does not sound exclusively in tort, although of course he may be held for negligence if that is proved. Without repeating the reasoning of Farrell *v.* Manhattan Market Co. 198 Mass. 271, we are of opinion that, on sound legal principles, it bears with equal force upon the facts here presented. Even if there were no common law authority, (which there is, as already pointed out,) it would not be practicable to establish a distinction upon this point which could be supported in reason, between the liability of a retail dealer in meat for immediate consumption and of a victualler who serves food to guests to be eaten forthwith at his own table. Every argument which supports liability of the former tends to sustain liability of the latter with at least equal cogency. They appear to us to rest upon the same footing in principle.

The tendency of recent decisions has been to extend liability of the manufacturer of foods to persons injured by their harmful nature although they purchase from a dealer and have no contractual relation with the manufacturer. Haley *v.* Swift & Co. 152 Wis. 570. Tomlinson *v.* Armour & Co. 46 Vroom, 748. Watson *v.* Augusta Brewing Co. 124 Ga. 121. Berger *v.* Standard Oil Co. 126 Ky. 155. Parks *v.* C. C. Yost Pie Co. 93 Kans. 334, 337. Catani *v.* Swift & Co. 251 Penn. St. 52, 56. Mazetti *v.* Armour & Co. 75 Wash. 622. Jackson Coca Cola Bottling Co. *v.* Chapman, 106 Miss. 864. See Ketterer *v.* Armour & Co. 160 C. C. A. 111; 247 Fed. Rep. 921. That tendency points in the direction of stricter liability of those who provide food.

The conclusion here reached is in harmony with Bark *v.* Dixson, 115 Minn. 172, Race *v.* Krum, 222 N. Y. 410 and Doyle *v.* Fuerst & Kraemer, *Ltd.* 129 La. 838. It ought to be said, however, that none of those decisions discuss the principles here relied on as the basis of our judgment. The results reached and the grounds of decision stated in those cases would seem to require the conclusion here reached. It is the precise point decided in Leahy *v.* Essex Co. 164 App. Div. (N. Y.) 903; *S. C.* 148 N. Y. Supp. 1063.

Apparently the larger number of decisions by courts of this country hold that the liability of the innholder and restaurant keeper for furnishing deleterious food rests upon negligence. The earliest adjudication to that point is Sheffer *v.* Willoughby, 163 Ill. 518. The opinion in that case is brief and contains no reference to the fundamental conceptions of liability by dealers in food, and does not advert to the responsibility of innkeepers, victuallers and vintners at common law. That case was referred to but not adopted in Crocker *v.* Baltimore Dairy Lunch Co. 214 Mass. 177, 179. It has been followed in Travis *v.* Louisville & Nashville Railroad, 183 Ala. 415, 424, Greenwood Cafe *v.* Lovinggood, 197 Ala. 34, Merrill *v.* Hodson, 88 Conn. 314, 321, and Valeri *v.* Pullman Co. 218 Fed. Rep. 519. No allusion is made in any of these decisions to the common law authorities and principles to which reference has been made and upon which this judgment in part rests. We feel constrained not to adopt their conclusions, so far as they are inconsistent with the reasoning of this opinion. The decision in Bigelow *v.* Maine Central Railroad, 110 Maine, 105, goes upon a different ground and that here discussed is expressly left open at page 111.

It has been urged that public policy demands that the standard imposed upon a restaurant keeper ought to be that of reasonable care, and nothing more. Earnest argument is made to the effect that otherwise the opportunity for groundless litigation will be fostered. These considerations, when given their full weight, do not appear to us to overbalance the reasons which have been stated.

The baked beans served to the plaintiff with the stones of the size of and resembling beans might have been found to be not reasonably fit to be eaten. A foreign substance of that sort, with its possibilities for harm to teeth, may have been determined by the jury not proper to be served in food.

It has been argued that it should have been ruled as matter of law that the plaintiff was not in the exercise of due care, and on that ground could not prevail. Due care is not a term of the law of contract, but of torts. This is an action of contract. The obligation resting upon the defendant and accruing to the plaintiff arose out of the contract.

The defendant has urged that, if liability be treated as arising either out of a sale or a breach of contract, the plaintiff fails to show requisite examination on her own part, and that reasonable inspection would have revealed the existing defect in the food, and that under such circumstances as matter of law there can be no recovery. Whatever may be the merit of these contentions under appropriate conditions, they are not pertinent to the facts disclosed on this record. If these contentions in favor of the plaintiff are assumed to be sound, and if further it be assumed that § 15 (3) of the sales act is applicable, to the effect that there is "no implied warranty as regards defects which such examination ought to have revealed," nevertheless it was a question of fact whether rational investigation was made by the plaintiff respecting the character of the food set before her and whether the noxious nature of the thing which caused the harm reasonably ought to have been discovered.

Our conclusion is that, whether the transaction established on the evidence between the plaintiff and the defendant be treated as a sale of food, or as a contract for entertainment where the defendant simply "utters his provision" (to use the neat phrase of Parker *v.* Flint, 12 Mod. 254, employed more than two centuries ago) for the benefit of the plaintiff, there was a case to be submitted to the jury.

In accordance with the terms of the report and with leave reserved with the consent of the jury, pursuant to St. 1915, c. 185, amending R. L. c. 173, § 120, a verdict is to be entered for the plaintiff for $150.

So ordered.[1]

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[1] Crosby, J. delivered a dissenting opinion.

GERLI & CO. *v.* MISTLETOE SILK MILLS.

Court of Errors and Appeals of New Jersey, June 16, 1910.

[*Reported in* 80 *N. J. Law* 128.]

Trenchard, J. This is an action for the purchase price of a bale of raw silk delivered by the plaintiff to the defendant.

The defence is that it was sold as "best classical Italian silk for single weaving" and did not answer that description.

The defendant counterclaimed for profits lost and for expenses incurred in the attempt to weave the silk and recovered a verdict. Thereupon the plaintiff was allowed this rule to show cause why the verdict should not be set aside.

At the trial at the Hudson Circuit, no loss of profits was proved, but there was evidence that the defendant had incurred expenses to the amount of $224.81. The purchase price of the silk was $872.22, and it was undisputed that it was worth $721.30 as waste.

The defendant claimed that it had rescinded the contract and offered to return the goods and held them subject to the plaintiff's order.

The verdict was for $224.81, the exact amount of the expenses incurred by the defendant in attempting to weave the silk. It is clear, therefore, that the jury took the view that the contract had been rescinded.

The charge of the learned trial judge did not permit the jury to allow for damages for breach of the contract in case they found it had been rescinded. Such a charge would have been erroneous in law. Under the Sales act (*Pamph.* L. 1907, p. 337 § 69 (1) *d*), in case of a rescission of a contract to sell or a sale, the buyer is entitled to recover the price or any part thereof which has been paid; and this remedy is made exclusive by paragraph (2) of the same section. It is a logical consequence that where the purchase price has not been paid, the buyer's only remedy in case of rescission is to withhold the price. Such is the view of the learned author of our Sales act (*Willis. S.*, § 612) and the rule recently expressed in one of our sister states. Houser & Haines Manufacturing Co. *v.* McKay, 53 Wash. 337; 23 Harv. L. Rev. 141. The verdict, therefore, cannot be sustained and the rule must be made absolute.

Since the case must be tried again, it may serve a useful purpose to call attention to the questions which seem likely to arise.

The first question for the jury will, of course, be whether the contract was for "best classical Italian silk for single weaving." If it was not, there seems to be no defence. If it was, the question is, Did the silk delivered comply with the contract? If it did, the plaintiff is entitled to recover. If it did not, the question arises whether the defendant accepted it. The defendant had a right to inspect and examine (*Sales act,* § 47), and, if necessary, to test the goods even though the test involved destruction of a part. *Willis S.,* § 475. If, however, the defendant intimated to the plaintiff that it had accepted the goods, or if the defendant did any act inconsistent with the ownership of the plaintiff, or if, after the lapse of a reasonable time, it retained the goods without intimating to the plaintiff a rejection, then the defendant must be deemed to have accepted the goods and the right of rescission is gone. *Sales act,* § 48. If the defendant had the right to rescind and had not lost it when it finally notified the plaintiff that it had rejected the goods, and has actually rescinded, the verdict should be for the defendant, but not a verdict for damages.

If, however, the goods were not in accordance with the contract, and the defendant had accepted them, there would still be open the remedies allowed for breach of contract. The defendant, if such are found to be the facts of the case, had the option to recoup in diminution or extinction of the purchase price or to maintain a distinct action against the plaintiff for all its damages, including loss of profits and expenses to which it had been put. *Sales act,* § 69 (1), (*a*) and (*b*). The remedy under subdivision (*a*) is recoupment in the strict sense of that word, and involves merely an abatement of the purchase price which can amount to the whole purchase price only where the goods are worthless. The remedy under subdivision (*b*) is that which formerly was the subject of a cross-action but is now available by way of counterclaim under section 105 of the Practice act. *Pamph. L.* 1903, *p.* 568. This remedy is inconsistent with the claim of a rescission of the contract, and at the trial it will be necessary for the defendant to elect whether to stand upon the theory of a rescission and abandon its claim to damages, or to abandon the claim of rescission and rely upon the contract as subsisting and insist on damages for the breach. If it adopts the latter course, the plaintiff will be entitled to recover the value of the silk, which will be the full purchase price, unless the defendant establishes that it was of inferior quality, in which event it will be the actual value as proved (*Sales act,* § 49; *Willis. S.,* § 488), from which may be deducted such loss as the defendant may prove it has sustained directly and naturally resulting in the ordinary course of events from the breach of warranty.

STEVENS TANK & TOWER CO. *v.* BERLIN MILLS CO.

SUPREME COURT OF MAINE, NOVEMBER 18, 1914.

[*Reported in* 112 *Maine* 336.]

IN an action for the price of a hard pine tank claimed to have been sold and delivered by the plaintiff to the defendant, the court said, by CORNISH J., in answer to one of the defendant's points: If there was a breach of warranty in the quality, the defendant had a right to rescind the contract and return the goods within a reasonable time. The defendant's attempted rescission is expressed in the letter of July 1, in these words: "We have taken it down and it is in our yard at Berlin, subject to your shipping instructions." That does not meet the requirements of the law. The seller must be put in substantially the same position that he occupied before the contract. The buyer must return or tender back the goods to the seller at the place of delivery, unless upon making the offer so to do, he is relieved of the obligation by a refusal to receive them if tendered. It is not sufficient for a vendee who has taken delivery of the goods to make a proposal to return them or to notify the vendor that he holds them subject to his order. Tyler *v.* Augusta, 89 Maine, 180.[1]

THE REGINA COMPANY, RESPONDENT *v.* GATELEY FURNITURE COMPANY, APPELLANT.

APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, MARCH 8, 1916.

[*Reported in* 171 *N.Y. App. Div.* 817.]

WOODWARD, J. The complaint alleged that the defendant ordered vacuum cleaners from the plaintiff; that the cleaners were shipped and received by the defendant, who agreed to pay for them a stated price.

The answer set up a counterclaim on the ground of breach of warranty.

To this alleged counterclaim the plaintiff demurred on the grounds: "1. That said counterclaim is insufficient in law upon the face thereof. 2. That the counterclaim is not of the character specified in section 501 of the Code of Civil Procedure. 3. That the counterclaim does not state facts sufficient to constitute a cause of action;" and the learned court at Special Term has sustained the demurrer. There is no allegation of any express warranty, but as the plaintiff was a dealer in the kind of goods being sold, there was, of course, an implied warranty that the goods should be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample. (Pers. Prop. Law [Consol. Laws, chap. 41; Laws of 1909, chap. 45], § 97, as added by Laws of 1911, chap. 571.) At common law an express warranty survives acceptance, but an implied warranty does not. (Ferguson *v.* Netter, 204 N. Y. 505, 510.) Section 130 of the Personal Property Law (as added by Laws of 1911, chap. 571) has, however, extended the rights of purchasers, and it is there provided that "in the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale." This places the warranty, whether express or implied, upon the same foundation, but as a condition of this change it is provided, in the same section, that "if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know, of such breach, the seller shall not be liable therefor." Obviously the buyer takes this additional right to the survival of a warranty, expressed or implied, upon the condition that he shall give notice of a breach of the warranty within a reasonable time. Such notice is, therefore, a condition precedent, and this he is obliged to plead. There is nothing said in the alleged counterclaim of any notice having been given to the seller of any alleged breach of warranty, and in the absence of such an allegation there is a failure to state the facts necessary to constitute a counterclaim. (Buffalo Wholesale Hardware Co. *v.* Hodgeboom, 90 Misc. Rep. 53, 55, and authority there cited; Marx *v.* Locomobile Co. of America, 82 id. 468.)

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[1] A portion only of the opinion is printed.

The interlocutory judgment appealed from should be affirmed.[1]

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[1] A portion of the opinion is omitted.

Is it a promise, a collateral promise, or term which can construed as a promise – then suable.

WALLIS SON & WELLS *v.* PRATT & HAYNES.

In the Court of Appeal, June 21, 1910.

[*Reported in* [1910], 2 *K.B.* 1003.]

Fletcher Moulton L. J. read the following judgment: — In this case the Court is asked to interpret a certain written contract and to state the legal consequences of its interpretation. But although the decision relates only to this particular contract, the argument has been conducted on lines turning upon general rules of law with regard to written contracts and to the meaning and effect of the provisions of the Sale of Goods Act, and I find it necessary therefore to deal with the points raised in connection therewith before I apply the law to the construction of the contract in question.

A party to a contract who has performed, or is ready and willing to perform, his obligations under that contract is entitled to the performance by the other contracting party of all the obligations which rest upon him. But from a very early period of our law it has been recognized that such obligations are not all of equal importance. There are some which go so directly to the substance of the contract or, in other words, are so essential to its very nature that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all. On the other hand there are other obligations which, though they must be performed, are not so vital that a failure to perform them goes to the substance of the contract. Both classes are equally obligations under the contract, and the breach of any one of them entitled the other party to damages. But in the case of the former class he has the alternative of treating the contract as being completely broken by the non-performance and (if he takes the proper steps) he can refuse to perform any of the obligations resting upon himself and sue the other party for a total failure to perform the contract. Although the decisions are fairly consistent in recognizing this distinction between the two classes of obligations under a contract there has not been a similar consistency in the nomenclature applied to them. I do not, however, propose to discuss this matter, because later usage has consecrated the term "condition" to describe an obligation of the former class and "warranty" to describe an obligation of the latter class. I do not think that the choice of terms is happy, especially so far as regards the word "condition," for it is a word which is used in many other connections and has considerable variety of meaning. But its use with regard to the obligations under a contract is well known and recognized, and no confusion need arise if proper regard be had to the context.

This usage has been followed in the codification of the law of the contract of sale in the Sale of Goods Act. The word "condition" is used in the text of the Act, though no formal definition is given to it. But in the interpretation clause "warranty" is expressly defined in the following terms: — "'Warranty' as regards England and Ireland means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated." It is clear from this definition that a breach of warranty entitles the other contracting party to damages only. In contrast to this the additional right in the case of a breach of a condition is fully recognized in s. 11. In all this the Act adopts the well-settled law that existed at the date when it was passed.

It will be seen, therefore, that a condition and a warranty are alike obligations under a contract a breach of which entitles the other contracting party to damages. But in the case of a breach of a condition he has the option of another and higher remedy, namely, that of treating the contract as repudiated. But, as I have said, he must act promptly if he desires to avail himself of this higher remedy, and in s. 11, sub-s. 1 (*c*), two cases are given in which he will be deemed as a matter of law to have elected to content himself with his right to damages. The two cases named are, the case where the buyer has accepted the goods or part thereof, and the case where the contract is for specific goods, the property in which has passed to the buyer. It is not necessary to consider the question whether this list is complete. I see no reason to suppose that the Act intends that these should be the only modes in which a buyer can effectively bar himself from taking advantage of the choice of remedies given in the case of a breach of a condition, but that is a point which it is not necessary to discuss in the present case. When a buyer comes within either of the cases set forth in s. 11, sub-s. 1 (*c*), he is in precisely the same position in all respects as if he had voluntarily elected to take the remedy of damages in accordance with the provisions of s. 11, sub-s. 1(*a*).

The contract which the Court has to construe in the present case is (so far as material) as follows: "Sold to Messrs. Wallis, Son & Wells on the conditions printed on the back about 27½ qrs. sainfoin, 40*s.* ex Walker (common English), Pratt & Haynes." On the back are printed certain conditions, i.e., terms of the contract, the only material one being as follows: "(2). Sellers give no warranty, express or implied, as to growth, description, or any other matters, and they shall not be held to guarantee or warrant the fitness for any particular purpose of any grain, seed, flour, cake, or any other article sold by them, or its freedom from injurious quality or from latent defect." It will be seen, therefore, that the defendants by this contract sell to the plaintiffs a certain quantity of common English sainfoin on the above terms. I need hardly say that the use of the word "conditions" to describe the printed terms of the contract has nothing in common with the special use of the word "conditions" in relation to contracts of sale or otherwise of which I have been speaking.

This, then, is the contract which the Court has to construe, and were it not for the difference of judicial opinion which exists in this case I should have looked upon it as a plain case. The contract is for the sale of a given quantity of common English sainfoin, and it is admitted by both parties that the purchaser was entitled under this contract to receive common English sainfoin. But the seller is careful to say that he gives no warranty of any kind; that is to say, using the definitions of warranty in the Sale of Goods Act (which must apply, since neither the context nor subject-matter otherwise requires), he makes no agreement with reference to the goods which is collateral to the main purpose of the contract, i.e., the sale of common English sainfoin. The contract therefore means that the purchaser has the right to have delivered to him the stipulated quantity of common English sainfoin. The contract gives to him nothing more, but certainly it gives nothing less.

Now it is admitted that the vendors committed a breach of this contract in that they delivered seed of giant sainfoin, which is a different article of inferior value. Inasmuch as by the law the obligation to deliver the kind of goods stipulated for in a contract of sale is an obligation which has the status of a condition, this breach gave to the purchasers the choice of the two remedies, either of rejecting the goods and treating the contract as repudiated or suing for damages for delivery of the inferior article. But the purchasers resold the goods in ignorance of the breach (the two kinds of seed bearing a close resemblance to one another in appearance), and by the fact that they have resold the goods they have prevented themselves from exercising the higher right. They must therefore content themselves with suing for damages for breach on the vendors' part of the obligation which lay upon them under the contract. This they are doing, and we are asked to say whether their claim is a good one.

I confess that for my own part I can see no possible answer to it. So soon as it is determined that there is an obligation under the contract to deliver common English sainfoin, it follows that the other contracting party is at least entitled to damages if he has suffered from a breach of it. Indeed, he is entitled to elect to take a still higher remedy, if he has not voluntarily or by conduct precluded himself from doing so. The ingenious argument of the counsel for the defendants in this case was, in my opinion, based upon a fallacy. He was compelled to admit that the vendors undertook the obligation of delivering common English sainfoin and that this was an obligation having the higher status of a condition. It was thus outside the language and the scope of the clause in the contract relating to warranties. But he sought to say that, although this clause as to warranties did not affect the existence of the obligation, it took away the right to damages for a breach of it. His argument was that under s. 11 a condition becomes a warranty if any portion of the goods is accepted. The answer to this argument is, in my opinion, two-fold. In the first place s. 11, sub-s. 1, does not state that a condition becomes a warranty if the goods are accepted, but only that the legal remedies for the breach of a condition become, in that event, limited to the single remedy which exists in the case of a warranty, namely, suing for damages. Whether an obligation is a condition or a warranty is decided (as s. 11, sub-s. 1 (*b*), and the definition clause shew) by the contract itself and not by matters subsequent to the contract. Such matters (whether they consist of express election or election statutably implied from acts) may amount to a renouncement of, or may take away, the superior legal advantages of a condition as compared with a warranty, but they do not make it a warranty, and if the language of s. 11 be carefully examined it will be seen that it nowhere states that a condition ceases to be a condition, but merely that the breach of the condition can only be treated as a breach of warranty, that is, as a ground for damages and not for repudiation. By s. 11, sub-s. 1 (*a*), this is one of the remedies which is always open to the contracting party who is entitled to claim for a breach of a condition of the contract.

But there is another answer to the argument. The object and effect of the written contract are to define the respective obligations of the contracting parties. When the contract has been construed, that is, when those obligations have been ascertained, the law determines the consequences of their being violated. It is admitted that the language of the contract creates the obligation to deliver common English sainfoin and that this has the status of a condition. It cannot therefore be affected or limited by a clause which only negatives the existence of warranties, that is, of stipulations in the contract which, whatever their nature, are merely collateral to the main purpose of the contract, namely, the delivery of common English sainfoin. Since the language of the contract is admittedly adequate to create the obligation to deliver common English sainfoin, it follows of necessity that it brings with it the legal consequence that, if it is not performed, the purchaser has a right of action for damages for such non-performance. Counsel for the defendants would have us read the words as saying that although the vendors are bound to deliver common English sainfoin they are not liable in damages if they do not do so but deliver something else, a construction which to my mind is an impossible one. It would require express language in any contract to indicate any intention of negativing a right to damages for the breach of any obligation imposed by it, and I can find in the present contract no trace of any such language.

For these reasons I am of opinion that we ought to answer the question put to us in the special case in the affirmative and that this appeal should be dismissed.[1]

WHITE, Appellant *v.* SCHWEITZER *et al.*, Respondents.

Court of Appeals of New York, November 13, 1917.

[*Reported in* 221 *N.Y.* 461.]

McLaughlin, J. The action was brought to recover the purchase price of a carload of turkeys shipped by plaintiff's assignor, the Keystone Commercial Company, from Maysville, Ky., to the defendants in New York city. They were shipped on November 17th and arrived November 23, 1908. There was a dispute between the parties as to the terms of sale, that is, whether the turkeys were to be "dry picked" or "scalded." Those shipped were scalded and the verdict has settled the disputed question in favor of the defendants. When the car arrived in which the shipment was made the turkeys were examined by defendants and it was then discovered they were scalded instead of dry picked, and also that they were in bad condition. About half-past seven o'clock in the morning of that day the defendants wired plaintiff's assignor at Maysville: "Your car arrived scalded instead of dry picked. Stock sticky and cannot use it. Wire instructions." About two hours later on the same day, not having received an answer to the first telegram, they sent another, saying: "Having railroad inspector examine car. Will put in claim for you. Have turned car over to house that can sell such stuff." Both telegrams were delivered to plaintiff's assignor at the same time and neither of them was answered. At the time the second telegram was sent defendants delivered the turkeys to commission merchants for sale and the same were on that day sold for $729.69, which sum was subsequently tendered to the plaintiff's assignor and by it refused. At the time the turkeys were delivered to the commission merchants, one of the defendants wrote plaintiff's assignor, confirming the telegrams, and saying among other things: "I do not know just how I will make out with the sale of these goods, but in the event of any deficiency I will expect you to make good."

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[1] Vaughan Williams, L. J. and Farewell L. J. came to a contrary conclusion, but the opinion of Fletcher Moulton, L. J., though a dissenting opinion, was accepted on appeal by the House of Lords as a correct statement of the law and the decision of the Court of Appeal was reversed [1911] A. C. 394.

The principal question presented upon the appeal is whether the trial court erred in charging the jury, to which an exception was taken, that there was no evidence upon which it could find that the defendants accepted the turkeys. I am of the opinion the exception was well taken. (Harrison *v.* Scott, 203 N. Y. 369; Norton *v.* Dreyfuss, 106 N. Y. 90; Isbell-Porter Co. *v.* Heineman, 126 App. Div. 713.) It is not at all times easy to determine whether a purchaser's retention, sale or disposition of property constitutes an acceptance, but as a general rule it must be determined as a question of fact. (Burdick on Sales [3d ed.], 155.) It may be and usually is indicated by exercising acts of ownership, *e.g.*, where one resells the goods, as such action would be improper except on the assumption that the buyer had acquired title; that necessarily indicates an assent on the part of the buyer to become the owner. (Williston on Sales, sec. 483.) If the article purchased is not in accordance with the contract, then the purchaser must, upon discovering that fact, do nothing inconsistent with the vendor's ownership. (Brown *v.* Foster, 108 N. Y. 387; Duluth Log Co. *v.* Hill Lumber Co., 110 Minn. 124.) So, it has been held that an acceptance is made out by action of the vendee in insuring the goods or offering to mortgage them (Georgia Refining Co. *v.* Augusta Oil Co., 74 Ga. 497), or by loaning them (Hensen *v.* Beebe, 111 Iowa, 534), or by directing an agent to sell them (Brown *v.* Nelson, 66 Vt. 660), or, while disclaiming a purchase, permitting a third person to select and retain a portion of the goods upon his promise to account to the seller for them. (Bartholomai & Co. *v.* Paull, 18 W. Va. 771.) Mere complaint by the vendee that the goods do not come up to the contract does not amount to a rejection. Something more is required. If the goods received do not conform to the contract as to quality or kind, the purchaser must, as a general rule, within a reasonable time after such facts have been ascertained, return or offer to return them. (Mason *v.* Smith, 130 N. Y. 474.) In case the goods are in such condition that they must be speedily disposed of or else there will be a total loss, then there is an exception to the general rule which permits the purchaser to dispose of them. This right is implied from the necessity of the case and to make the loss as small as possible. But the exception only applies where the seller cannot be communicated with and instructions from him quickly obtained.

Applying the rule laid down in the authorities cited to the evidence adduced at the trial it at once becomes apparent that the question of acceptance was at least one of fact. It might well be doubted whether the uncontradicted facts did not show as matter of law an acceptance. (Benjamin on Sales [5th ed.], p. 752; Leggett & Meyer Tobacco Co. *v.* Collier, Robertson & Hambleton, 89 Iowa, 144.) That question, however, is not presented on the appeal and we do not pass upon it. The defendants ascertained, about seven o'clock on the morning of the 23d, when the goods were received, that the quality did not correspond to what they had purchased. They communicated that fact by a telegram to the seller, but did not state that they refused to receive or offer to return them; on the contrary, without waiting until an answer to the telegram could be received from the seller (at most three or four hours) they proceeded to treat the goods as their own by delivering them to commission merchants for sale and so informed the seller. Respondents suggest that the seller did not answer either telegram. There was no necessity for its doing so. Both telegrams were received at the same time and the second was to the effect that the goods had then been disposed of.

For the reasons stated it follows that the court also erred in instructing the jury they must find a verdict for the defendants if the contract was for dry picked turkeys. Such instruction also withdrew from the jury the question of an acceptance.

It follows that the judgment appealed from should be reversed, and a new trial ordered, with costs to appellant in all courts to abide the event.

HISCOCK, CH. J., COLLIN, CUDDEBACK, HOGAN, POUND and ANDREWS, JJ., concur.

Judgment reversed, etc.

LIST & SON CO. *v.* CHASE.

IN THE SUPREME COURT OF OHIO, MARCH 9, 1909.

[*Reported in* 80 *Ohio St.* 42.]

By admissions in the pleadings and by a verdict for the plaintiff in the trial court it was established that the plaintiff (the defendant in error) agreed to sell, and the defendant (the plaintiff in error) agreed to purchase 195 cases of eggs to be shipped over the Cleveland, Cincinnati, Chicago & St. Louis Railroad to Cleveland, Ohio, not later than June 7, 1906, and to be paid for at the rate of fifteen and a half cents a dozen; that on or about the 9th day of June the seller shipped 195 cases of eggs over the Toledo & Ohio Central Railroad, and upon their arrival at Cleveland the buyer, asserting that they were not fresh, refused to accept them and they were ultimately disposed of at a loss.

After verdict for the plaintiff, a motion for a new trial was overruled, judgment was rendered on the verdict, and the judgment was affirmed by the Circuit Court. The plaintiff in error now seeks to reverse these judgments.

DAVIS, J. In submitting the case to the jury the court swept aside all questions as to the quantity purchased and as to the route by which the eggs were to be shipped, as follows: "If you find that defendant after the bill of lading was sent and received, showing by what railroad route the eggs were shipped, and also the bill of eggs showing the number of cases, and made no objection on that account until after an inspection of the eggs, the defendant would waive any question as to the number of cases, as well as the railroad route by which they were to be shipped."

A waiver is a voluntary relinquishment of a known right. It may be made by express words or by conduct which renders impossible a performance by the other party, or which seems to dispense with complete performance at a time when the obligor might fully perform. Mere silence will not amount to waiver where one is not bound to speak. In this case the goods were perishable and exceedingly liable to be damaged by heat. The shipment was in the month of June and therefore the shortest and speediest route was a material condition. It is true that if the contract bound the plaintiff to ship by such a route, the defendant might have rescinded the contract on receiving the bill of lading showing a shipment on another and more hazardous route; but he was not bound to do so then. He might wait until inspection because inspection might show that the goods were not damaged, and he could then accept them or if damaged reject them. The purchaser therefore waived no right by waiting and the seller lost none, because the latter had already made a breach of his contract and could not remedy it. The same was true as to the quantity of eggs purchased. The purchaser was at liberty to accept all the eggs shipped to it, although in excess of the amount which it agreed to buy, or it might have accepted out of the excessive shipment the quantity which it agreed to buy; but it was not bound to do either. Mechem on Sales Section 1157–1161, and when it rejected the whole shipment it did not put the plaintiff in any worse position, for upon the hypothesis that the contract was as defendant claims, the plaintiff had already failed to perform his part of the contract.

The theory of plaintiff's counsel and of the courts below, that because in a telegram to plaintiff the defendant assigned only one ground for refusal to accept, viz., that the eggs "did not stand inspection," it waived all other grounds it might have, is not tenable. We do not deny that under some circumstances a refusal to accept goods for a stated reason may operate as a waiver of other objections, which might have been properly made. This may be so in cases where the silence of the purchaser and his conduct operate to mislead the seller and prevent him from protecting himself, in other words, where the conduct of the buyer would raise an estoppel against him. See Johnson *v.* Oppenheim, 55 N. Y., 280, 291; Smith *v.* Pettee, 70 N. Y., 13, 16–17. But when the buyer has absolutely rejected the goods, for whatever reason, his silence as to other objections which would justify his refusal to accept, when unaccompanied by conduct which may have misled and prejudiced the vendor, can not be construed as a waiver of the buyer's right to insist on his plea of non-performance on those grounds. The reason which underlies this proposition is that a waiver must be voluntary, that is intentional, with knowledge of the facts and of the party's rights, or it must be implied from conduct which amounts to estoppel. Therefore, since it does not appear in this case that the defendant, when it notified the plaintiff that it refused to accept the eggs for inferior quality, intended to waive objections as to quantity and change of route, or that the failure to notify plaintiff of those objections in any material way misled or prejudiced the plaintiff, a waiver of such objections cannot be implied.[1]

MORRIS, Appellant, *v.* BARON & CO.

In the House of Lords, October 19, 1917.

[*Reported in* [1918] *A.C.* 1.]

Lord Finlay L.C. My Lords, this action was brought for the recovery of 888*l.* 4*s.*, the price of goods which had been sold and delivered by the plaintiff to the defendants. The right of the plaintiff to recover this sum was not in dispute, but the defendants set up a counter-claim for damages for non-delivery of other goods by the plaintiff to the defendants.

The case was tried by Bailhache J. without a jury. He gave judgment for the plaintiff on the claim, and dismissed the counter-claim on the ground that the defendants had not made a valid exercise of their option under the contract to have the goods in question delivered to them.

The Court of Appeal reversed the judgment of Bailhache J. on the counter-claim, and entered judgment upon it for the defendants, the damages to be assessed by a referee.

From that decision this appeal is brought to your Lordships' House by the plaintiff in the action.

The appellant is a worsted manufacturer and the respondents are merchants. On September 24, 1914, they entered into a contract in writing for the sale by the appellant to the respondents of 500 pieces of cloth: 223 of these pieces were delivered. Disputes arose between the parties, the respondents complaining of delay in delivery under the contract, and the appellant complaining of the respondents' failure to pay for the goods which had been delivered, and litigation ensued.

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[1] The statement of facts is abbreviated and only a portion of the opinion printed.

The first action was brought on March 19, 1915. In it the plaintiff (the present appellant) claimed 888*l.* 4*s.*, the price of the goods delivered, while the defendants (the present respondents) counterclaimed for damages in respect of the failure to deliver 277 pieces, the balance of the 500 pieces contracted to be sold. On April 20, 1915 (three days after the delivery of the counter-claim), the parties at an interview agreed to a settlement, and on April 22 the respondents sent a letter to the appellant setting out the terms of settlement. The appellant did not admit the correctness of the statement of the terms in this letter, but Bailhache J. for the purposes of his judgment assumed its correctness, and I shall deal with the case on this basis, accepting the respondents' statement of the terms of settlement. The letter is as follows: —

"24 and 26, Brook Street, Bradford, April 22nd, 1915.

"Messrs. The Troydale Mill Co., Leeds.

"Dear Sirs: As personally arranged between Mr. Morris and Mr. Baron, we herewith confirm the terms agreed upon.

"Both to withdraw the legal proceedings and instruct the solicitors accordingly, and each to pay his own costs, you to allow 30*l.* (thirty pounds) to us to meet expenses incurred through not fulfilling the orders.

"The account to be left over for three months so as to give us the opportunity of selling the goods, and the goods not delivered to be kept for us if we ask for them.

"We have the option of taking up the balance of pieces to complete the order, giving time to make.

"Yours faithfully,
"Baron & Co."

The three months' extension of credit which was given by the terms embodied in this letter for the goods delivered expired on July 22, 1915, and on the 27th the appellant wrote asking for payment according to agreement. On the 28th the respondents wrote back saying that they would be pleased to pay the account if the appellant delivered the balance of the blue pieces to complete the order as stated in the respondents' letter of April 22. On August 17 the respondents wrote as follows to the appellant: —

"Gentlemen: We are surprised you have not replied to our letter of the 28th July. As explained in that letter, we shall be glad to pay your account on delivery of the balance of the pieces to complete the order.

"As you have not answered we must now ask you to deliver the balance of the blue pieces on or before the 21st September, 1915. Kindly let us know by return of post if you will do this."

A proposal was made by the respondents in September for a variation in the class of goods to be delivered, but this came to nothing.

On September 27 the respondents wrote pressing for delivery, and on February 15, 1916, the second action (that on which this appeal is brought) was begun by the appellant.

Notwithstanding the agreement of April 22, 1915, the respondents had consistently refused payment for the goods already delivered, insisting on their claim to keep back the payment until delivery of the further goods.

The statement of claim in the second action was for the 888*l.* 4*s.* for the goods delivered.

The defence admitted the plaintiff's claim, subject to the counter-claim.

The counter-claim set out the contract of September 24, 1914, the proceedings in the first action and the settlement embodied in the letter of April 22, 1915, alleging that the defendants had exercised their option thereunder, but that delivery had not been made, and claimed damages for non-delivery under the arrangement of April 22, 1915, or, alternatively, under the original contract of September 24, 1914.

The counter-claim was based before Bailhache J. solely on the agreement of April 22, and after hearing the evidence of the parties he delivered judgment, disallowing the counter-claim on the ground that the demand by the respondents for the delivery of the goods under the arrangement of April 22, 1915, was not a valid exercise of the option inasmuch as it was coupled with a refusal to abide by the terms of that arrangement as to payment for the goods already delivered.

It was contended before your Lordships on behalf of the respondents that the payment of that money was not a condition precedent to the exercise of the option. But the real question is not whether payment was a condition precedent, but whether the respondents could make a valid claim to have the goods delivered under the option while refusing to observe their part of the bargain. It is perfectly true that the appellant did not, as he might have done, claim that the contract of April 22, 1915, was at an end, treating the respondents' conduct as repudiation. But the question remains whether they could validly exercise their option while repudiating their own obligation under the agreement which conferred that option. Bailhache J. held that they could not, and I agree. It was contended that the obligation to pay the 888*l.* 4*s.* at the end of the three months did not go to the root of the contract and that the only remedy was an action for the amount. The question is whether the obligation was regarded by the parties as an essential part of the new contract, and I think that its terms show that it was so regarded. It is, indeed, in itself a very important question for a manufacturer whether he is to go on making goods without being paid for those which have been delivered, and the stipulation that he should have the money at the end of the three months appears to me to be an essential part of the contract. A party to a contract which imposes certain obligations and confers certain rights upon him cannot claim to exercise these rights while repudiating his obligations in material particulars. The option to take the goods might indeed have been exercised before the three months had expired, but it would not have been a valid exercise of the option within the three months if at the same time the defendant repudiated his obligation to pay at the end of that term.

For these reasons I agree with the decision of Bailhache J. on the contract of April 22.

An objection was also raised before Bailhache J. to the enforcement of the new contract on which the counter-claim is based on the ground that it is not enforceable by reason of the 4th section of the Sale of Goods Act. This point was not argued before him owing to the view which he took on the point I have just dealt with. It was raised and fully argued in the Court of Appeal and in your Lordships' House.

It was contended on behalf of the respondents that the new agreement was not an agreement for the sale of goods but for the settlement of an action. It was no doubt the settlement of an action but a part, and a very material part, of that settlement appears to me to have been an agreement for the sale of goods. It is an agreement that the respondents should have an option of taking the balance of goods undelivered, and it was implied that they were to pay for them on the terms of the original agreement. Surely this is an agreement for the sale of goods. This point, I agree with the Court of Appeal, would be enough to defeat the counter-claim.

But the Court of Appeal went on to hold that the arrangement of April 22, 1915, not being enforceable, must be wholly disregarded and the parties relegated to their rights under the original contract.

The Court of Appeal treated the case of Noble *v.* Ward[1] as having decided as a matter of law that in a case to which the 4th section of the Sale of Goods Act applies the original contract cannot be rescinded by a contract not complying with the section. In that case there was a valid contract on August 18 for the delivery of goods by the plaintiff to the defendant, and at an interview on September 27 it was agreed that the time for delivery should be extended. The defendant refused to take delivery and an action was brought for non-acceptance, the declaration covering either the contract of August 18 or that of September 27. The case was tried before Bramwell B., who directed a nonsuit on the ground that the contract of August 18 had been rescinded by the parol agreement of September 27, and that the parol agreement itself could not be sued on owing to the 17th section of the Statute of Frauds. The nonsuit was set aside by the Court of Exchequer, and Bramwell B. was himself a member of the Court and delivered the leading judgment. He pointed out that under s. 17 the contract of September 27 was not "allowed to be good," and that to treat it as having the effect of rescinding the old contract would be to hold that it was good for that purpose. A new trial was accordingly ordered. This decision was affirmed in the Exchequer Chamber, judgment being delivered by Willes J. He said that no rescission could be effected by an invalid contract and that it would be at least a question for the jury whether the parties did intend to rescind.

There are two observations to be made on this case.

In the first place, the agreement varying the first agreement was by s. 17 of the Statute of Frauds one which was not allowed to be good, while under s. 4 of the Sale of Goods Act, 1893, which applies in the present case, it is merely not enforceable by action.

There is a marked difference between the wording in this respect of the 4th section of the Statute of Frauds and the 17th section, as was pointed out in Leroux *v.* Brown,[1] and, notwithstanding the obiter dicta (for they are no more) of some eminent judges, I do not think that the language of the two sections had the same effect. For the present purpose it is enough to say that both Courts in Noble *v.* Ward [2] treated the contract as being invalid. The change made in the wording of the 4th section of the Sale of Goods Act as compared with s. 17 of the Statute of Frauds in my opinion altered the law. The agreement of April 22, 1915, in this case is not under that section invalid, as was the agreement in Noble *v.* Ward [2] under s. 17 of the Statute of Frauds. It is only not enforceable by action.

In the second place, Noble *v.* Ward [2] does not lay down as a matter of law that the parties cannot agree to rescind a written agreement which the law requires to be in writing by the substitution for it of another agreement not in writing, and therefore unenforceable. On the contrary Willes J. in the Exchequer Chamber says that the question would be for the jury. If the law were as the Court of Appeal in the present case has laid it down, he would have said that the judge must rule that such a rescission could not take place.

The point which arises in such cases seems to me to have been well stated by Lord Denman in Stead *v.* Dawber.[3] In that case there was an agreement for the sale of goods to be delivered "on the 20th to the 22nd." The plaintiff at the defendant's request verbally agreed to enlarge the time to the 23rd or 24th. Lord Denman, after saying that many cases had been cited, expressed himself as follows: "But it seems to us that we are mainly called on to decide a question of fact; what, namely, was the intention of the parties in the arrangement come to for substituting the 24th for the 22nd as the day of delivery; did they intend to substitute a new contract for the old one, the same in all other respects except those of the day of delivery and date of the accepted bill, with the old one?"

The present is not a case in which there has been a mere attempt to vary the written contract by parol, the situation of the parties being otherwise unchanged. The legal proceedings then pending between the parties were withdrawn, each bearing his own costs, a sum of 30*l.* was to be allowed to meet expenses from non-delivery, three months' credit was given to the respondents to give them the opportunity of selling the goods, and the respondents were released from the obligation to take the balance undelivered, getting an option instead. Under these circumstances it seems to me to be out of the question to hold that merely because the option is not enforceable on account of the 4th section of the Sale of Goods Act the rights of the parties are to be regarded as still governed by the original contract under which the respondents were bound to take delivery of the balance. Both parties treated the original contract as at an end until attention was called in the Court of Appeal to the case of Noble *v.* Ward,[1] and the respondents throughout insisted on the option given by the new arrangement and treated the obligation to take delivery as at an end. To go back to the default in making delivery before the first action would be to ignore the settlement for 30*l.* of that claim, and to give damages for a subsequent default would be to treat the respondents as having been willing after the settlement to perform the original contract, which they certainly were not.

The evidence in the present case points to the conclusion that the parties intended not merely to vary the original contract but to set it aside and substitute another for it, giving a mere option to take delivery of the parcel undelivered. This is the effect of the language of the memorandum of April 22, 1915, and it was on this assumption that all the subsequent dealings and correspondence of the parties proceeded. It is true that neither party adhered to its terms. The appellant tried to get payment of the 888*l.* 4*s.* before the three months' further credit had expired, and the respondents refused to pay when it had expired, claiming to retain the money until the goods were delivered. But neither party ever referred to the original contract as governing their rights; on the contrary, they treated it as at an end.

Is the law such as to prevent effect being given to the intention of the parties to treat the original contract as rescinded?

All that Noble *v.* Ward[1] decided was that it was a mistake to say that as a matter of law the original contract was rescinded, the variation being by parol and there being no change of circumstances. It did not decide that as a matter of law the first contract still existed. As was said in the judgment of the Exchequer Chamber, that would be a matter for the jury. There are some old cases in which it was held that there could not be an accord and a satisfaction by taking an unenforceable agreement in substitution for one which was enforceable (see Case *v.* Barber [2] in the 33rd year of Charles II.; also Comyns' Digest, "Accord" (B 4) 4, 6, and the case there cited of Wickham *v.* Taylor,[3] 33 Car. 2); but I do not think that these cases can be now regarded as good law. The non-enforceability of the new agreement would no doubt be a very material fact in arriving at a conclusion upon the question whether the new agreement with out performance was taken in accord and satisfaction of the old, but it seems to me to be immaterial when once this has been established in point of fact.

In the present case the parties, in my opinion, took the new agreement such as it was with the other terms of settlement in accord and satisfaction of the original agreement, and there is nothing in law to prevent them from doing so. The respondents, therefore, must stand or fall by the agreement of April 22. It was upon that agreement that the case was brought before Bailhache J., and the learned judge held that the respondents could not recover upon it because they not only failed to pay the 888*l*. 4*s*. at the expiration of the extended credit given by that agreement, but throughout insisted that they would not pay until the further goods had been delivered under the option.

In my opinion the decision of Bailhache J. should be restored and this appeal allowed with costs here and below.[1]

[1] Lords Haldane, Dunedin, Atkinson and Parmoor delivered concurring opinions.

APPENDIX

AN ACT TO MAKE UNIFORM THE LAW RELATING TO THE SALE OF GOODS.[1]

PART I.

Formation of the Contract.

1. — [*Contracts to sell and sales.*] (1) A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price.

(2) A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price.

(3) A contract to sell or a sale may be absolute or conditional.

(4) There may be a contract to sell or a sale between one part owner and another.

2. — [*Capacity — Liabilities for Necessaries.*] Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

Where necessaries are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section mean goods suitable to the condition in life of such infant or other person, and to his actual requirements at the time of delivery.

Formalities of the Contract.

3. — [*Form of Contract or Sale.*] Subject to the provisions of this act and of any statute in that behalf, a contract to sell or a sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be inferred from the conduct of the parties.

4. — [*Statute of Frauds.*] (1) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

(2) The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time or may not at the time of such contract or sale be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the

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[1] This statute was enacted in 1907 by Arizona, Connecticut and New Jersey; in 1908 by Massachusetts, Ohio and Rhode Island; in 1910 by Maryland; in 1911 by New York and Wisconsin; in 1913 by Alaska and Michigan; in 1915 by Illinois, Nevada and Pennsylvania; in 1917 by Minnesota, South Dakota and Utah, and in 1919 by Oregon and Tennessee.

goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

(3) There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods.

Subject Matter of Contract.

5. — [*Existing and Future Goods.*] (1) The goods which form the subject of a contract to sell may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract to sell, in this act called "future goods."

(2) There may be a contract to sell goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3) Where the parties purport to effect a present sale of future goods, the agreement operates as a contract to sell the goods.

6. — [*Undivided Shares.*] (1) There may be a contract to sell or a sale of an undivided share of goods. If the parties intend to effect a present sale, the buyer, by force of the agreement, becomes an owner in common with the owner or owners of the remaining shares.

(2) In the case of fungible goods, there may be a sale of an undivided share of a specific mass, though the seller purports to sell and the buyer to buy a definite number, weight or measure of the goods in the mass, and though the number, weight or measure of the goods in the mass is undetermined. By such a sale the buyer becomes owner in common of such a share of the mass as the number, weight or measure bought bears to the number, weight or measure of the mass. If the mass contains less than the number, weight or measure bought, the buyer becomes the owner of the whole mass and the seller is bound to make good the deficiency from similar goods unless a contrary intent appears.

7. — [*Destruction of Goods Sold.*] (1) Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have wholly perished at the time when the agreement is made, the agreement is void.

(2) Where the parties purport to sell specific goods, and the goods without the knowledge of the seller have perished in part or have wholly or in a material part so deteriorated, in quality as to be substantially changed in character, the buyer may at his option treat the sale —

(*a*) As avoided, or

(*b*) As transferring the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the sale was indivisible or to pay the agreed price for the goods in which the property passes if the sale was divisible.

8. — [*Destruction of Goods Contracted to be Sold.*] (1) Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault on the part of the seller or the buyer, the goods wholly perish, the contract is thereby avoided.

(2) Where there is a contract to sell specific goods, and subsequently, but before the risk passes to the buyer, without any fault of the seller or the buyer, part of the goods perish or the whole or a material part of the goods so deteriorate in quality as to be substantially changed in character, the buyer may at his option treat the contract —

(*a*) As avoided, or

(*b*) As binding the seller to transfer the property in all of the existing goods or in so much thereof as have not deteriorated, and as binding the buyer to pay the full agreed price if the contract was indivisible, or to pay the agreed price for so much of the goods as the seller, by the buyer's option, is bound to transfer if the contract was divisible.

THE PRICE.

9. — [*Definition and Ascertainment of Price.*] (1) The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealing between the parties.

(2) The price may be made payable in any personal property.

(3) Where transferring or promising to transfer any interest in real estate constitutes the whole or part of the consideration for transferring or for promising to transfer the property in goods, this act shall not apply.

(4) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

10. — [*Sale at a Valuation.*] (1) Where there is a contract to sell or a sale of goods at a price or on terms to be fixed by a third person, and such third person, without fault of the seller or the buyer, cannot or does not fix the price or terms, the contract or the sale is thereby avoided; but if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

(2) Where such third person is prevented from fixing the price or terms by fault of the seller or the buyer, the party not in fault may have such remedies against the party in fault as are allowed by Parts IV and V of this act.

Slightly varied from section 9 of the English Act.

CONDITIONS AND WARRANTIES.

11. — [*Effect of Conditions.*] (1) Where the obligation of either party to a contract to sell or a sale is subject to any condition which is not performed, such party may refuse to proceed with the contract or sale or he may waive performance of the condition. If the other party has promised that the condition should happen or be performed, such first-mentioned party may also treat the non-performance of the condition as a breach of warranty.

(2) Where the property in the goods has not passed, the buyer may treat the fulfillment by the seller of his obligation to furnish goods as described and as warranted expressly or by implication in the contract to sell as a condition of the obligation of the buyer to perform his promise to accept and pay for the goods.

12. — [*Definition of Express Warranty.*] Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty.

13. — [*Implied Warranties of Title.*] In a contract to sell or a sale, unless a contrary intention appears, there is —

(1) An implied warranty on the part of the seller that in case of a sale he has a right to sell the goods, and that in case of a contract to sell he will have a right to sell the goods at the time when the property is to pass.

(2) An implied warranty that the buyer shall have and enjoy quiet possession of the goods as against any lawful claims existing at the time of the sale.

(3) An implied warranty that the goods shall be free at the time of the sale from any charge or encumbrance in favor of any third person, not declared or known to the buyer before or at the time when the contract or sale is made.

(4) This section shall not, however, be held to render liable a sheriff, auctioneer, mortgagee, or other person professing to sell by virtue of authority in fact or law goods in which a third person has a legal or equitable interest.

14. — [*Implied Warranty in Sale by Description.*] Where there is a contract to sell or a sale of goods by description, there is an implied warranty that the goods shall correspond with the description and if the contract or sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

15. — [*Implied Warranties of Quality.*] Subject to the provisions of this act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose.

(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.

(3) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.

(4) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

(5) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(6) An express warranty or condition does not negative a warranty or condition implied under this act unless inconsistent therewith.

Sale by Sample.

16. — [*Implied Warranties in Sale by Sample.*] In the case of a contract to sell or a sale by sample:

(*a*) There is an implied warranty that the bulk shall correspond with the sample in quality.

(*b*) There is an implied warranty that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, except so far as otherwise provided in section 47 (3).

(*c*) If the seller is a dealer in goods of that kind, there is an implied warranty that the goods shall be free from any defect rendering them unmerchantable which would not be apparent on reasonable examination of the sample.

PART II.

Transfer of Property as Between Seller and Buyer.

17. — [*No Property Passes until Goods are Ascertained.*] Where there is a contract to sell unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained, but property in an undivided share of ascertained goods may be transferred as provided in section 6.

18. — [*Property in Specific Goods Passes when Parties so Intend.*] (1) Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade and the circumstances of the case.

19. — [*Rules for Ascertaining Intention.*] Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1. — Where there is an unconditional contract to sell specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment, or the time of delivery, or both, be postponed.

Rule 2. — Where there is a contract to sell specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done.

Rule 3. — (1) When goods are delivered to the buyer "on sale or return," or on other terms indicating an intention to make a present sale, but to give the buyer an option to return the goods instead of paying the price, the property passes to the buyer on delivery, but he may revest the property in the seller by returning or tendering the goods within the time fixed in the contract, or, if no time has been fixed, within a reasonable time.

(2) When goods are delivered to the buyer on approval or on trial or on satisfaction, or other similar terms, the property therein passes to the buyer —

(*a*) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction:

(*b*) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 4. — (1) Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

(2) Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in section 20. This presumption is applicable, although by the terms of the contract, the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words "collect on delivery" or their equivalents.

Rule 5. — If the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon.

20. — [*Reservation of Right of Possession or Property when Goods are Shipped.*] (1) Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may be thus reserved notwithstanding the delivery of the goods to the buyer, to a carrier or other bailee for the purpose of transmission to the buyer.

(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the seller or his agent, or to the order of the seller or of his agent, the seller thereby reserves the property in the goods. But if, except for the form of the bill of lading, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract.

(3) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the buyer or of his agent, but possession of the bill of lading is retained by the seller or his agent, the seller thereby reserves a right to the possession of the goods as against the buyer.

(4) Where the seller of goods draws on the buyer for the price and transmits the bill of exchange and bill of lading together to the buyer to secure acceptance

or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honor the bill of exchange, and if he wrongfully retains the bill of lading he acquires no added right thereby. If, however, the bill of lading provides that the goods are deliverable to the buyer or to the order of the buyer, or is indorsed in blank, or to the buyer by the consignee named therein, one who purchases in good faith, for value, the bill of lading, or goods from the buyer will obtain the property in the goods, although the bill of exchange has not been honored, provided that such purchaser has received delivery of the bill of lading indorsed by the consignee named therein, or of the goods, without notice of the facts making the transfer wrongful.

21. — [*Sale by Auction.*] In the case of sale by auction —

(1) Where goods are put up for sale by auction in lots, each lot is the subject of a separate contract of sale.

(2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made, any bidder may retract his bid; and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve.

(3) A right to bid may be reserved expressly by or on behalf of the seller.

(4) Where notice has not been given that a sale by auction is subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ or induce any person to bid at such sale on his behalf, or for the auctioneer to employ or induce any person to bid at such sale on behalf of the seller or knowingly to take any bid from the seller or any person employed by him. Any sale contravening this rule may be treated as fraudulent by the buyer.

22. — [*Risk of Loss.*] Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not, except that —

(*a*) Where delivery of the goods has been made to the buyer, or to a bailee for the buyer, in pursuance of the contract and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligations under the contract, the goods are at the buyer's risk from the time of such delivery.

(*b*) Where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

Transfer of Title.

23. — [*Sale by a Person not the Owner.*] (1) Subject to the provisions of this act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

(2) Nothing in this act, however, shall affect —

(*a*) The provisions of any factors' acts, recording acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof.

(*b*) The validity of any contract to sell or sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

24. — [*Sale by one Having a Voidable Title.*] Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith. for value, and without notice of the seller's defect of title.

25. — [*Sale by Seller in Possession of Goods already Sold.*] Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, the delivery or transfer by that person, or by an agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving and paying value for the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

26. — [*Creditors' Rights against Sold Goods in Seller's Possession.*] Where a person having sold goods continues in possession of the goods, or of negotiable documents of title to the goods, and such retention of possession is fraudulent in fact or is deemed fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void.

27. — [*Definition of Negotiable Document of Title.*] A document of title in which it is stated that the goods referred to therein will be delivered to the bearer, or to the order of any person named in such document is a negotiable document of title.

28. — [*Negotiation of Negotiable Documents by Delivery.*] A negotiable document of title may be negotiated by delivery.

(*a*) Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the bearer, or

(*b*) Where by the terms of the document the carrier, warehouseman or other bailee issuing the same undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the document has indorsed it in blank or to bearer.

Where by the terms of a negotiable document of title the goods are deliverable to bearer or where a negotiable document of title has been indorsed in blank or to bearer, any holder may indorse the same to himself or to any other specified person, and in such case the document shall thereafter be negotiated only by the indorsement of such indorsee.

29. — [*Negotiation of Negotiable Documents by Indorsement.*] A negotiable document of title may be negotiated by the indorsement of the person to whose order the goods are by the terms of the document deliverable. Such indorsement may be in blank, to bearer or to a specified person. If indorsed to a specified person, it may be again negotiated by the indorsement of such person in blank, to bearer or to another specified person. Subsequent negotiation may be made in like manner.

30. — [*Negotiable Documents of Title Marked "Not Negotiable."*] If a document of title which contains an undertaking by a carrier, warehouseman or other bailee to deliver the goods to the bearer, to a specified person or order, or to the order of a specified person, or which contains words of like import, has placed upon it the words "not negotiable," "non-negotiable" or the like, such a document may nevertheless be negotiated by the holder and is a negotiable document of title within the meaning of this act. But nothing in this act contained shall be construed as limiting or defining the effect upon the obligations of the carrier, warehouseman, or other bailee issuing a document of title of placing thereon the words "not negotiable" "non-negotiable," or the like.

31. — [*Transfer of Non-Negotiable Documents.*] A document of title which is not in such form that it can be negotiated by delivery may be transferred by the holder by delivery to a purchaser or donee. A non-negotiable receipt cannot be negotiated and the indorsement of such a receipt gives the transferee no additional right.

32. — [*Who May Negotiate a Document.*] A negotiable document of title may be negotiated —

(*a*) By the owner thereof, or

(*b*) By any person to whom the possession or custody of the document has been entrusted by the owner, if, by the terms of the document the bailee issuing the document undertakes to deliver the goods to the order of the person to whom the possession or custody of the document has been entrusted, or if at the time of such entrusting the document is in such form that it may be negotiated by delivery.

33. — [*Rights of Person to Whom Document Has Been Negotiated.*] A person to whom a negotiable document of title has been duly negotiated acquires thereby,

(*a*) Such title to the goods as the person negotiating the document to him had or had ability to convey to a purchaser in good faith for value and also such title to the goods as the person to whose order the goods were to be delivered by the terms of the document had or had ability to convey to a purchaser in good faith for value, and

(*b*) The direct obligation of the bailee issuing the document to hold possession of the goods for him according to the terms of the document as fully as if such bailee had contracted directly with him.

34. — [*Rights of Person to Whom Document Has Been Transferred.*] A person to whom a document of title has been transferred, but not negotiated, acquires thereby, as against the transferor, the title to the goods, subject to the terms of any agreement with the transferor.

If the document is non-negotiable, such person also acquires the right to notify the bailee who issued the document of the transfer thereof, and thereby to acquire the direct obligation of such bailee to hold possession of the goods for him according to the terms of the document.

Prior to the notification of such bailee by the transferor or transferee of a non-negotiable document of title, the title of the transferee to the goods and the right to acquire the obligation of such bailee may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to such bailee by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

35. — [*Transfer of Negotiable Document without Indorsement.*] Where a negotiable document of title is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the document unless a contrary intention appears. The negotiation shall take effect as of the time when the indorsement is actually made.

36. — [*Warranties on Sale of Document.*] A person who for value negotiates or transfers a document of title by indorsement or delivery, including one who assigns for value a claim secured by a document of title unless a contrary intention appears, warrants:

(*a*) That the document is genuine.

(*b*) That he has a legal right to negotiate or transfer it.

(*c*) That he has knowledge of no fact which would impair the validity or worth of the document, and

(*d*) That he has a right to transfer the title to the goods and that the goods are merchantable or fit for a particular purpose, whenever such warranties would have been implied if the contract of the parties had been to transfer without a document of title the goods represented thereby.

37. — [*Indorser not a Guarantor.*] The indorsement of a document of title shall not make the indorser liable for any failure on the part of the bailee who issued the document or previous indorsers thereof to fulfill their respective obligations.

38. — [*When Negotiation not Impaired by Fraud, Mistake or Duress.*] The validity of the negotiation of a negotiable document of title is not impaired by the fact that the negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the document was induced by fraud, mistake or duress to entrust the possession or custody thereof to such person, if the person to whom the document was negotiated or a person to whom the document was subsequently negotiated paid value therefor, without notice of the breach of duty, or fraud, mistake or duress.

39. — [*Attachment or Levy upon Goods for which a Negotiable Document Has Been Issued.*] If goods are delivered to a bailee by the owner or by a person whose act in conveying the title to them to a purchaser in good faith for value would bind the owner and a negotiable document of title is issued for them they cannot thereafter, while in the possession of such bailee, be attached by garnishment or otherwise or be levied upon under an execution unless the document be first surrendered to the bailee or its negotiation enjoined. The bailee shall in no case be compelled to deliver up the actual possession of the goods until the document is surrendered to him or impounded by the court.

40. — [*Creditors' Remedies to Reach Negotiable Documents.*] A creditor whose debtor is the owner of a negotiable document of title shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such document or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which cannot readily be attached or levied upon by ordinary legal process.

PART III.

PERFORMANCE OF THE CONTRACT.

41. — [*Seller Must Deliver and Buyer Accept Goods.*] It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract to sell or sale.

42. — [*Delivery and Payment are Concurrent Conditions.*] Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

43. — [*Place, Time and Manner of Delivery.*] (1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, or usage of trade to the contrary, the place of delivery is the seller's place of business if he have one, and if not his residence; but in case of a contract to sell or a sale of specific goods, which to the knowledge of the parties when the contract or the sale was made were in some other place, then that place is the place of delivery.

(2) Where by a contract to sell or a sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3) Where the goods at the time of sale are in the possession of a third person, the seller has not fulfilled his obligation to deliver to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on the buyer's behalf; but as against all others than the seller the buyer shall be regarded as having received delivery from the time when such third person first has notice of the sale. Nothing in this section, however, shall affect the operation of the issue or transfer of any document of title to goods.

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

44. — [*Delivery of Wrong Quantity.*] (1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts or retains the goods so delivered, knowing that the seller is not going to perform the contract in full, he must pay for them at the contract rate. If, however, the buyer has used or disposed of the goods delivered before he knows that the seller is not going to perform his contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received.

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

(3) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

(4) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

45. — [*Delivery in Instalments.*] (1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2) Where there is a contract to sell goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one of more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it depends in each case on the terms of the contract and the circumstances of the case, whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken.

46. — [*Delivery to a Carrier on Behalf of the Buyer.*] (1) Where, in pursuance of a contract to sell or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is deemed to be a delivery of the goods to the buyer, except in the cases provided for in section 19, Rule 5, or unless a contrary intent appears.

(2) Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

(3) Unless otherwise agreed, where goods are sent by the seller to the buyer under circumstances in which the seller knows or ought to know that it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such transit.

47. — [*Right to Examine the Goods.*] (1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose or ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

(3) Where goods are delivered to a carrier by the seller, in accordance with an order from or agreement with the buyer, upon the terms that the goods shall not be delivered by the carrier to the buyer until he has paid the price, whether such terms are indicated by marking the goods with the words "collect on delivery," or otherwise, the buyer is not entitled to examine the goods before payment of the price in the absence of agreement permitting such examination.

48. — [*What Constitutes Acceptance.*] The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

49. — [*Acceptance Does not Bar Action for Damages.*] In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor.

50. — [*Buyer is not Bound to Return Goods Wrongly Delivered.*] Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he notifies the seller that he refuses to accept them.

51. — [*Buyer's Liability for Failing to Accept Delivery.*] When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. If the neglect or refusal of the buyer to take delivery amounts to a repudiation or breach of the entire contract, the seller shall have the rights against the goods and on the contract hereinafter provided in favor of the seller when the buyer is in default.

PART IV.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

52. — [*Definition of Unpaid Seller.*] (1) The seller of goods is deemed to be an unpaid seller within the meaning of this act —

(*a*) When the whole of the price has not been paid or tendered.

(*b*) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has been broken by reason of the dishonor of the instrument, the insolvency of the buyer, or otherwise.

(2) In this part of this act the term "seller" includes an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price, or any other person who is in the position of a seller.

53. — [*Remedies of an Unpaid Seller.*] (1) Subject to the provisions of this act, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has —

(*a*) A lien on the goods or right to retain them for the price while he is in possession of them.

(*b*) In case of the insolvency of the buyer, a right of stopping the goods *in transitu* after he has parted with the possession of them.

(*c*) A right of resale as limited by this act.

(*d*) A right to rescind the sale as limited by this act.

(2) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and coextensive with his rights of lien and stoppage "*in transitu*" where the property has passed to buyer.

UNPAID SELLER'S LIEN.

54. — [*When Right of Lien may be Exercised.*] (1) Subject to the provisions of this act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely:

(*a*) Where the goods have been sold without any stipulation as to credit.

(*b*) Where the goods have been sold on credit, but the term of credit has expired.

(*c*) Where the buyer becomes insolvent.

(2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

55. — [*Lien after Part Delivery.*] Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an intent to waive the lien or right of retention.

56. — [*When Lien is Lost.*] (1) The unpaid seller of goods loses his lien thereon —

(*a*) When he delivers the goods to a carrier on other bailee for the purpose of transmission to the buyer without reserving the property in the goods or the right to the possession thereof.

(*b*) When the buyer or his agent lawfully obtains possession of the goods.

(*c*) By waiver thereof.

(2) The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained judgment or decree for the price of the goods.

Stoppage in Transitu.

57. — [*Seller may Stop Goods on Buyer's Insolvency.*] Subject to the provisions of this act, when the buyer of goods is or becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them *in transitu,* that is to say, he may resume possession of the goods at any time while they are in transit, and he will then become entitled to the same rights in regard to the goods as he would have had if he had never parted with the possession.

58. — [*When Goods Are in Transit.*] (1) Goods are in transit within the meaning of section 57 —

(*a*) From the time when they are delivered to a carrier by land or water, or other bailee for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee;

(*b*) If the goods are rejected by the buyer, and the carrier or other bailee continues in possession of them, even if the seller has refused to receive them back.

(2) Goods are no longer in transit within the meaning of section 57:

(*a*) If the buyer, or his agent in that behalf, obtains delivery of the goods before their arrival at the appointed destination;

(*b*) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent; and it is immaterial that a further destination for the goods may have been indicated by the buyer;

(*c*) If the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf.

(3) If goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent of the buyer.

(4) If part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped *in transitu,* unless such part delivery has been made under such circumstances as to show an agreement with the buyer to give up possession of the whole of the goods.

59. — [*Ways of Exercising the Right to Stop.*] (1) The unpaid seller may exercise his right of stoppage *in transitu* either by obtaining actual possession of the goods or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may prevent a delivery to the buyer.

(2) When notice of stoppage *in transitu* is given by the seller to the carrier, or other bailee in possession of the goods, he must redeliver the goods to, or according to the directions of, the seller. The expenses of such redelivery must be borne by the seller. If, however, a negotiable document of title representing the goods has been issued by the carrier or other bailee, he shall not be obliged to deliver or justified in delivering the goods to the seller unless such document is first surrendered for cancellation.

Resale by the Seller.

60. — [*When and How Resale May be Made.*] (1) Where the goods are of a perishable nature, or where the seller expressly reserves the right of resale in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time, an unpaid seller having a right of lien or having stopped the goods *in transitu* may resell the goods. He shall not thereafter be liable to the original buyer upon the contract to sell or the sale or for any profit made by such resale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

(2) Where a resale is made, as authorized in this section, the buyer acquires a good title as against the original buyer.

(3) It is not essential to the validity of a resale that notice of an intention to resell the goods be given by the seller to the original buyer. But where the right to resell is not based on the perishable nature of the goods or upon an express provision of the contract or the sale, the giving or failure to give such notice shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the resale was made.

(4) It is not essential to the validity of a resale that notice of the time and place of such resale should be given by the seller to the original buyer.

(5) The seller is bound to exercise reasonable care and judgment in making a resale, and subject to this requirement may make a resale either by public or private sale.

This section differs considerably from section 48 of the English Act. The wording of that section did not seem wholly adequate.

Rescission by the Seller.

61. — [*When and How the Seller may Rescind the Sale.*] (1) An unpaid seller having a right of lien or having stopped the goods *in transitu*, may rescind the transfer of title and resume the property in the goods, where he expressly reserved the right to do so in case the buyer should make default, or where the buyer has been in default in the payment of the price an unreasonable time. The seller shall not thereafter be liable to the buyer upon the contract to sell or the sale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

(2) The transfer of title shall not be held to have been rescinded by an unpaid seller until he has manifested by notice to the buyer or by some other overt act an intention to rescind. It is not necessary that such overt act should be communicated to the buyer, but the giving or failure to give notice to the buyer of the intention to rescind shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the right of rescission was asserted.

62. — [*Effect of Sale of Goods Subject to Lien or Stoppage in Transitu.*] Subject to the provisions of this act, the unpaid seller's right of lien or stoppage *in transitu* is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

If, however, a negotiable document of title has been issued for goods, no seller's lien or right of stoppage *in transitu* shall defeat the right of any purchaser for value in good faith to whom such document has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier or other bailee who issued such document, of the seller's claim to a lien or right of stoppage *in transitu.*

PART V.

ACTIONS FOR BREACH OF THE CONTRACT.

REMEDIES OF THE SELLER.

63. — [*Action for the Price.*] (1) Where, under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods.

(2) Where, under a contract to sell or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract. But it shall be a defense to such an action that the seller at any time before judgment in such action has manifested an inability to perform the contract or the sale on his part or an intention not to perform it.

(3) Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section 64 (4) are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price.

64. — [*Action for Damages for Non-acceptance of the Goods.*] (1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3) Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

(4) If, while labor or expense of material amount are necessary on the part of the seller to enable him to fulfill his obligations under the contract to sell or the sale, the buyer repudiates the contract or the sale, or notifies the seller to proceed no further therewith, the buyer shall be liable to the seller for no greater damages than the seller would have suffered if he did nothing towards carrying out the contract or the sale after receiving notice of the buyer's repudiation or countermand. The profit the seller would have made if the contract or the sale had been fully performed shall be considered in estimating such damages.

65. — [*When Seller May Rescind Contract or Sale.*] Where the goods have not been delivered to the buyer, and the buyer has repudiated the contract to sell or sale, or has manifested his inability to perform his obligations thereunder, or has committed a material breach thereof, the seller may totally rescind the contract or the sale by giving notice of his election so to do to the buyer.

REMEDIES OF THE BUYER.

66. — [*Action for Converting or Detaining Goods.*] Where the property in the goods has passed to the buyer and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain any action allowed by law to the owner of goods of similar kind when wrongfully converted or withheld.

67. — [*Action for Failing to Deliver Goods.*] (1) Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for non-delivery.

(2) The measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract.

(3) Where there is an available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed then at the time of the refusal to deliver.

68. — [*Specific Performance.*] Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price and otherwise, as to the court may seem just.

69. — [*Remedies for Breach of Warranty.*] (1) Where there is a breach of warranty by the seller, the buyer may, at his election —

(*a*) Accept or keep the goods and set up against the seller, the breach of warranty by way of recoupment in diminution or extinction of the price.

(*b*) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty.

(*c*) Refuse to accept the goods, if the property therein has not passed, and maintain an action against the seller for damages for the breach of warranty.

(*d*) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.

(2) When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted.

(3) Where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return or to offer to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer. But if deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning or offering to return the goods to the seller and rescinding the sale.

(4) Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for repayment of the price.

(5) Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by section 53.

(6) The measure of damages for breach of warranty is the loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(7) In the case of breach of warranty of quality, such loss, in the absence of special circumstances showing proximate damage of a greater amount, is the

difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

70. — [*Interest and Special Damages.*] Nothing in this act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

PART VI

INTERPRETATION

71. — [*Variation of Implied Obligations.*] Where any right, duty or liability would arise under a contract to sell or a sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale.

72. — [*Rights May be Enforced by Action.*] Where any right, duty or liability is declared by this act, it may, unless otherwise by this act provided, be enforced by action.

73. — [*Rule for Cases not Provided for by this Act.*] In any case not provided for in this act, the rules of law and equity, including the law merchant, and in particular the rules relating to the law of principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall continue to apply to contracts to sell and to sales of goods.

74. — [*Interpretation Shall Give Effect to Purpose of Uniformity.*] This act shall be so interpreted and construed, if possible, as to effectuate its general purpose to make uniform the laws of those states which enact it.

75. — [*Provisions not Applicable to Mortgages.*] The provisions of this act relating to contracts to sell and to sales do not apply, unless so stated, to any transaction in the form of a contract to sell or a sale which is intended to operate by way of mortgage, pledge, charge, or other security.

76. — [*Definitions.*] (1) In this act, unless the context or subject matter otherwise requires —

"Action" includes counterclaim, set-off and suit in equity.

"Buyer" means a person who buys or agrees to buy goods or any legal successor in interest of such person.

"Defendant" includes a plaintiff against whom a right of set-off or counterclaim is asserted.

"Delivery" means voluntary transfer of possession from one person to another.

"Divisible contract to sell or sale" means a contract to sell or a sale in which by its terms the price for a portion or portions of the goods less than the whole is fixed or ascertainable by computation.

"Document of title to goods" includes any bill of lading, dock warrant, warehouse receipt or order for the delivery of goods, or any other document used in the ordinary course of business in the sale or transfer of goods, as proof of the possession or control of the goods, or authorizing or purporting to authorize the possessor of the document to transfer or receive, either by indorsement or by delivery, goods represented by such document.

"Fault" means wrongful act or default.

"Fungible goods" means goods of which any unit is from its nature or by mercantile usage treated as the equivalent of any other unit.

"Future goods" means goods to be manufactured or acquired by the seller after the making of the contract of sale.

"Goods" include all chattels personal other than things in action and money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

"Order" in sections of this act relating to documents of title means an order by indorsement on the document.

"Person" includes a corporation or partnership of two or more persons having a joint or common interest.

"Plaintiff" includes defendant asserting a right of set-off or counterclaim.

"Property" means the general property in goods, and not merely a special property.

"Purchaser" includes mortgagee and pledgee.

"Purchases" includes taking as a mortgagee or as a pledgee.

"Quality of goods" includes their state or condition.

"Sale" includes a bargain and sale as well as a sale and delivery.

"Seller" means a person who sells or agrees to sell goods, or any legal successor in interest of such person.

"Specific goods" means goods identified and agreed upon at the time a contract to sell or a sale is made.

"Value" is any consideration sufficient to support a simple contract. An antecedent or pre-existing claim, whether for money or not, constitutes value where goods or documents of titles are taken either in satisfaction thereof or as security therefor.

(2) A thing is done "in good faith" within the meaning of this act when it is in fact done honestly, whether it be done negligently or not.

(3) A person is "insolvent" within the meaning of this act who either has ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he is insolvent within the meaning of the federal bankruptcy law or not.

(4) Goods are in a "deliverable state" within the meaning of this act when they are in such a state that the buyer would, under the contract, be bound to take delivery of them.

77. — [*Inconsistent Legislation Repealed.*] All acts or parts of acts inconsistent with this act are hereby repealed.

78. — [*Time when the Act Takes Effect.*] This act shall take effect on the day of one thousand nine hundred and

79. — [*Name of Act.*] This act may be cited as the Sales Act.

AN ACT CONCERNING CONDITIONAL SALES AND TO MAKE UNIFORM THE LAW RELATING THERETO[1]

Be It Enacted By

1. — [*Definition of Terms.*] In this Act "Conditional sale" means (1) any contract for the sale of goods under which possession is delivered to the buyer and the property in the goods is to vest in the buyer at a subsequent time upon the payment of part or all of the price, or upon the performance of any other condition or the happening of any contingency; or (2) any contract for the bailment or leasing of goods by which the bailee or lessee contracts to pay as compensation a sum substantially equivalent to the value of the goods, and by which it is agreed that the bailee or lessee is bound to become, or has the option of becoming the owner of such goods upon full compliance with the terms of the contract.

"Buyer" means the person who buys or hires the goods covered by the conditional sale, or any legal successor in interest of such person.

"Filing district" means the sub-division of the state in which conditional sale contracts, or copies thereof, are required by this act to be filed.

"Goods" means all chattels personal other than things in action and money, and includes emblements, industrial growing crops, and things attached to or forming a part of land which are agreed to be severed before sale or under the conditional sale.

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[1] This statute was recommended by the Commissioners for Uniform State Laws in 1918 for enactment by the several States.

"Performance of the condition" means the occurrence of the event upon which the property in the goods is to vest in the buyer, whether such event is the performance of an act by the buyer or the happening of a contingency.

"Person" includes an individual, partnership, corporation, and any other association.

"Purchase" includes mortgage and pledge.

"Purchaser" includes mortgagee and pledgee.

"Seller" means the person who sells or leases the goods covered by the conditional sale, or any legal successor in interest of such person.

2. — [*Primary Rights of Buyer.*] The buyer shall have the right when not in default to retain possession of the goods, and he shall also have the right to acquire the property in the goods on the performance of the conditions of the contract. The seller shall be liable to the buyer for the breach of all promises and warranties, express or implied, made in the conditional sale contract, whether or not the property in the goods has passed to the buyer.

3. — [*Primary Rights of Seller.*] The buyer shall be liable to the seller for the purchase price, or for installments thereof, as the same shall become due, and for breach of all promises made by him in the conditional sale contract, whether or not the property in the goods has passed to the buyer.

4. — [*Conditional Sales Valid Except as Otherwise Provided.*] Every provision in a conditional sale reserving property in the seller after possession of the goods is delivered to the buyer, shall be valid as to all persons, except as hereinafter otherwise provided.

5. — [*Conditional Sales Void as to Certain Persons.*] Every provision in a conditional sale reserving property in the seller, shall be void as to any purchaser from or creditor of the buyer, who, without notice of such provision, purchases the goods or acquires by attachment or levy a lien upon them, before the contract or a copy thereof shall be filed as hereinafter provided, unless such contract or copy is so filed within ten days after the making of the conditional sale.

6. — [*Place of Filing.*] The conditional sale contract or copy shall be filed in the office   in [the city,] [county,] [registration district] in which the goods are first kept for use by the buyer after the sale. It shall not be necessary to the validity of such conditional sale contract, or in order to entitle it to be filed, that it be acknowledged or attested. This section shall not apply to the contracts described in Section 8.

7. — [*Fixtures.*] If the goods are so affixed to realty, at the time of a conditional sale or subsequently as to become a part thereof and not to be severable wholly or in any portion without material injury to the freehold, the reservation of property as to any portion not so severable shall be void after the goods are so affixed, as against any person who has not expressly assented to the reservation. If the goods are so affixed to realty at the time of a conditional sale or subsequently as to become part thereof but to be severable without material injury to the freehold, the reservation of property shall be void after the goods are so affixed as against subsequent purchasers of the realty for value and without notice of the conditional seller's title, unless the conditional sale contract, or a copy thereof, together with a statement signed by the seller briefly describing the realty and stating that the goods are or are to be affixed thereto, shall be filed before such purchase in the office where a deed of the realty would be recorded or registered to affect such realty. As against the owner of realty the reservation of the property in goods by a conditional seller shall be void when such goods are to be so affixed to the realty as to become part thereof but to be severable without material injury to the freehold, unless the conditional sale contract, or a copy thereof, together with a statement signed by the seller briefly describing the realty and stating that the goods are to be affixed thereto, shall be filed before they are affixed, in the office where a deed would be recorded or registered to affect such realty.

8. — [*Railroad Equipment or Rolling Stock.*] No conditional sale of railroad, or street or interurban railway equipment or rolling stock shall be valid as against the purchasers and creditors described in Section 5, unless the contract shall be acknowledged by the buyer or attested in like manner as a deed of real property, and the contract, or a copy thereof, shall be filed or recorded in the office of ; and unless when any engine or car so sold is delivered there shall then be plainly and conspicuously marked upon each side thereof the name of the seller, followed by the word "owner."

9. — [*Conditional Sale of Goods for Resale.*] When goods are delivered under a conditional sale contract and the seller expressly or impliedly consents that the buyer may resell them prior to performance of the condition, the reservation of property shall be void against purchasers from the buyer for value in the ordinary course of business, and as to them the buyer shall be deemed the owner of the goods, even though the contract or a copy thereof shall be filed according to the provisions of this act.

10. — [*Filing.*] The filing officer shall mark upon the contract or copy filed with him the day and hour of filing and shall file the contract or copy in his office for public inspection. He shall keep a separate book in which he shall enter the names of the seller and buyer, the date of the contract, the day and hour of filing, a brief description of the goods, the price named in the contract and the date of cancellation thereof; except that in entering the contracts mentioned in Section 8 the shall record either the sum remaining to be paid upon the contract or the price of the goods. Such book shall be indexed under the names of both seller and buyer. For filing and entering such contract or copy the filing officer shall be entitled to a fee of [ten cents], except that for filing and entering a contract described in Section 8 the shall be entitled to a fee of [one dollar].

11. — [*Refiling.*] The filing of conditional sale contracts provided for in Sections 5, 6 and 7 shall be valid for a period of three years only. The filing of the contract provided for by Section 8 shall be valid for a period of fifteen years only. The validity of the filing may in each case be extended for successive additional periods of one year from the date of refiling by filing in the proper filing district a copy of the original contract within thirty days next preceding the expiration of each period, with a statement attached signed by the seller, showing that the contract is in force and the amount remaining to be paid thereon. Such copy, with statement attached, shall be filed and entered in the same manner as a contract or copy filed and entered for the first time, and the filing officer shall be entitled to a like fee as upon the original filing.

12. — [*Cancellation of Contract.*] After the performance of the condition, upon written demand delivered personally or by registered mail by the buyer or any other person having an interest in the goods, the seller shall execute, acknowledge and deliver to the demandant a statement that the condition in the contract has been performed. If for ten days after such demand the seller fails to mail or deliver such a statement of satisfaction, he shall forfeit to the demandant five dollars [$5.00] and be liable for all damages suffered. Upon presentation of such statement of satisfaction the filing officer shall file the same and note the cancellation of the contract and the date thereof on the margin of the page where the contract has been entered. For filing and entering the statement of satisfaction the filing officer shall be entitled to a fee of [ten cents], except that the shall be entitled to a fee of [fifty cents] for filing and entering a statement of the satisfaction of a contract described in Section 8.

13. — [*Prohibition of Removal or Sale Without Notice.*] Unless the contract otherwise provides, the buyer may, without the consent of the seller, remove the goods from any filing district and sell, mortgage or otherwise dispose of his interest in them; but prior to the performance of the condition, no such buyer shall remove the goods from a filing district in which the contract or a copy thereof is filed, except for temporary uses for a period of not more than thirty days, unless the buyer not less than ten days before such removal shall give the seller personally or by registered mail written notice of the place to which the goods are to be removed and the approximate time of such intended removal; nor prior to the performance of the condition shall the buyer sell, mortgage or otherwise dispose of his interest in the goods, unless he, or the person to whom he is about to sell, mortgage or otherwise dispose of the same, shall notify the seller in writing personally or by registered mail of the name and address of the person to whom his interest in the goods is about to be sold, mortgaged or otherwise transferred, not less than ten days before such sale, mortgage or other disposal. If any buyer does so remove the goods, or does so sell, mortgage or otherwise dispose of his interest in them without such notice or in violation of the contract, the seller may retake possession of the goods and deal with them as in case of default in payment of part or all of the purchase price. The provisions of this section regarding the removal of goods shall not apply, however, to the goods described in Section 8.

14. — [*Refiling on Removal.*] When, prior to the performance of the condition, the goods are removed by the buyer from a filing district in this state to another filing district in this state in which such contract or a copy thereof is not filed, or are removed from another state into a filing district in this state where such contract or copy is not filed, the reservation of the property in the seller shall be void as to the purchasers and creditors described in Section 5, unless the conditional sale contract or a copy thereof shall be filed in the filing district to which the goods are removed, within ten days after the seller has received notice of the filing district to which the goods have been removed. The provisions of this section shall not apply, however, to the goods described in Section 8. The provisions of Section 11 regarding the duration of the validity of the filing and the necessity for refiling shall apply to contracts or copies which are filed in a filing district other than that where the goods are originally kept for use by the buyer after the sale.

15. — [*Fraudulent Injury, Concealment, Removal or Sale.*] When, prior to the performance of the condition, the buyer maliciously or with intent to defraud, shall injure, destroy or conceal the goods, or remove them to a filing district where the contract or a copy thereof is not filed, without having given the notice required by Section 13, or shall sell, mortgage, or otherwise dispose of such goods under claim of full owernship, he shall be guilty of a crime and upon conviction thereof shall be imprisoned [in the county jail] for not more than [one year] or be fined not more than [$500] or both.

16. — [*Retaking Possession.*] When the buyer shall be in default in the payment of any sum due under the contract, or in the performance of any other condition which the contract requires him to perform in order to obtain the property in the goods, or in the performance of any promise, the breach of which is by the contract expressly made a ground for the retaking of the goods, the seller may retake possession thereof. Unless the goods can be retaken without breach of the peace, they shall be retaken by legal process; but nothing herein shall be construed to authorize a violation of the criminal law.

17. — [*Notice of Intention to Retake.*] Not more than forty nor less than twenty days prior to the retaking, the seller, if he so desires, may serve upon the buyer personally or by registered mail a notice of intention to retake the goods on account of the buyer's default. The notice shall state the default and the period at the end of which the goods will be retaken, and shall briefly and clearly state what the buyer's rights under this act will be in case they are retaken. If the notice is so served and the buyer does not perform the obligations in which he has made default before the day set for retaking, the seller may retake the goods and hold them subject to the provisions of Sections 19, 20, 21, 22 and 23 regarding resale, but without any right of redemption.

18. — [*Redemption.*] If the seller does not give the notice of intention to retake described in Section 17, he shall retain the goods for ten days after the retaking within the state in which they were located when retaken, during which period the buyer, upon payment or tender of the amount due under the contract at the time of retaking and interest, or upon performance or tender of performance of such other condition as may be named in the contract as precedent to the passage of the property in the goods, or upon performance or tender of performance of any other promise for the breach of which the goods were retaken, and upon payment of the expenses of retaking, keeping and storage, may redeem the goods and become entitled to take possession of them and to continue in the performance of the contract as if no default had occurred. Upon written demand delivered personally or by registered mail by the buyer, the seller shall furnish to the buyer a written statement of the sum due under the contract and the expense of retaking, keeping and storage. For failure to furnish such statement within a reasonable time after demand, the seller shall forfeit to the buyer [$10] and also be liable to him for all damages suffered because of such failure. If the goods are perishable so that retention for ten days as herein prescribed would result in their destruction or substantial injury, the provisions of this section shall not apply, and the seller may resell the goods immediately upon their retaking. The provision of this section requiring the retention of the goods within the state during the period allowed for redemption shall not apply to the goods described in Section 8.

19. — [*Compulsory Resale by Seller.*] If the buyer does not redeem the goods within ten days after the seller has retaken possession, and the buyer has paid at least fifty per cent of the purchase price at the time of the retaking, the seller shall sell them at public auction in the state where they were at the time of the retaking, such sale to be held not more than thirty days after the retaking. The seller shall give to the buyer not less than ten days' written notice of the sale, either personally or by registered mail, directed to the buyer at his last known place of business or residence. The seller shall also give notice of the sale by at least three notices posted in different public places within the filing district where the goods are to be sold, at least five days before the sale. If at the time of the retaking $500 or more has been paid on the purchase price, the seller shall also give notice of the sale at least five days before the sale by publication in a newspaper published or having a general circulation within the filing district where the goods are to be sold. The seller may bid for the goods at the resale. If the goods are of the kind described in Section 8, the parties may fix in the conditional sale contract the place where the goods shall be resold.

20. — [*Resale at Option of Parties.*] If the buyer has not paid at least fifty per cent of the purchase price at the time of the retaking, the seller shall not be under a duty to resell the goods as prescribed in Section 19, unless the buyer serves upon the seller, within ten days after the retaking, a written notice demanding a resale, delivered personally or by registered mail. If such notice is served, the resale shall take place within thirty days after the service, in the manner, at the place and upon the notice prescribed in Section 19. The seller may voluntarily resell the goods for account of the buyer on compliance with the same requirements.

21. — [*Proceeds of Resale.*] The proceeds of the resale shall be applied (1) to the payment of the expenses thereof, (2) to the payment of the expenses of retaking, keeping and storing the goods, (3) to the satisfaction of the balance due under the contract. Any sum remaining after the satisfaction of such claims shall be paid to the buyer.

22. — [*Deficiency on Resale.*] If the proceeds of the resale are not sufficient to defray the expenses thereof, and also the expenses of retaking, keeping and storing the goods and the balance due upon the purchase price, the seller may recover the deficiency from the buyer, or from anyone who has succeeded to the obligations of the buyer.

23. — [*Rights of Parties Where There is no Resale.*] Where there is no resale, the seller may retain the goods as his own property without obligation to account to the buyer except as provided in Section 25, and the buyer shall be discharged of all obligation.

24. — [*Election of Remedies.*] After the retaking of possession as provided in Section 16 the buyer shall be liable for the price only after a resale and only to the extent provided in Section 22. Neither the bringing of an action by the seller for the recovery of the whole or any part of the price, nor the recovery of judgment in such action, nor the collection of a portion of the price, shall be deemed inconsistent with a later retaking of the goods as provided in Section 16. But such right of retaking shall not be exercised by the seller after he has collected the entire price, or after he has claimed a lien upon the goods, or attached them, or levied upon them as the goods of the buyer.

25. — [*Recovery of Part Payments.*] If the seller fails to comply with the provisions of Sections 18, 19, 20, 21 and 23 after retaking the goods, the buyer may recover from the seller his actual damages, if any, and in no event less than one-fourth of the sum of all payments which have been made under the contract, with interest.

26. — [*Waiver of Statutory Protection.*] No act or agreement of the buyer before or at the time of the making of the contract, nor any agreement or statement by the buyer in such contract, shall constitute a valid waiver of the provisions of Sections 18, 19, 20, 21 and 25.

27. — [*Loss and Increase.*] After the delivery of the goods to the buyer and prior to the retaking of them by the seller, the risk of injury and loss shall rest upon the buyer. The increase of the goods shall be subject to the same conditions as the original goods.

28. — [*Act Prospective Only.*] This act shall not apply to conditional sales made prior to the time when it takes effect.

29. — [*Rules for Cases not Provided for.*] In any case not provided for in this act the rules of law and equity, including the law merchant, and in particular those relating to principal and agent and to the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy, or other invalidating cause, shall continue to apply to conditional sales.

30. — [*Uniformity of Interpretation.*] This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

31. — [*Short Title.*] This act may be cited as the Uniform Conditional Sales Act.

32. — [*Inconsistent Laws Repealed.*] Except so far as they are applicable to conditional sales made prior to the time when this act takes effect, the following acts shall be and hereby are repealed. [Here repeal all existing·acts in the field of conditional sales.]

33. — [*Time of Taking Effect.*] This act shall take effect [Here insert date]

APPENDIX.

SALE OF GOODS ACT.

An Act for codifying the Law relating to the Sale of Goods.

(*Chapter* 71 *of* 56 *&* 57 *Victoria, February*, 20, 1894.)

PART I.

FORMATION OF THE CONTRACT.

Contract of Sale.

1. — (1.) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part-owner and another.

(2.) A contract of sale may be absolute or conditional

(3.) Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is called a sale; but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4.) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

2. Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property.

Provided that where necessaries are sold and delivered to an infant, or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Necessaries in this section mean goods suitable to the condition in life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery.

Formalities of the Contract.

3. Subject to the provisions of this Act and of any statute in that behalf, a contract of sale may be made in writing (either with or without seal), or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties.

Provided that nothing in this section shall affect the law relating to corporations.

4. — (1.) A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

(2.) The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

(3.) There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre-existing contract of sale whether there be an acceptance in performance of the contract or not.

(4.) The provisions of this section do not apply to Scotland.

SUBJECT-MATTER OF CONTRACT.

5. — (1.) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this Act called "future goods."

(2.) There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3.) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

6. Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.

7. Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided.

THE PRICE.

8. — (1.) The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties.

(2.) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

9. — (1.) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, the agreement is avoided; provided that if the goods or any part thereof have been delivered to and appropriated by the buyer he must pay a reasonable price therefor.

(2.) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault.

CONDITIONS AND WARRANTIES.

10. — (1.) Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract.

(2.) In a contract of sale "month" means *primâ facie* calendar month.

11. — (1.) In England or Ireland —

(*a.*) Where a contract of sale is subject to any condition to be fulfilled by the seller the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated.

(*b*.) Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.

(*c*.) Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect.

(2.) In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitles the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part as a breach which may give rise to a claim for compensation or damages.

(3.) Nothing in this section shall affect the case of any condition or warranty, fulfilment of which is excused by law by reason of impossibility or otherwise.

12. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is —

(1.) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass:

(2.) An implied warranty that the buyer shall have and enjoy quiet possession of the goods:

(3.) An implied warranty that the goods shall be free from any charge or encumbrance in favor of any third party, not declared or known to the buyer before or at the time when the contract is made.

13. Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

14. Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows: —

(1.) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose:

(2.) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed:

(3.) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade:

(4.) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

SALE BY SAMPLE.

15. — (1.) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

(2.) In the case of a contract for sale by sample —

(*a.*) There is an implied condition that the bulk shall correspond with the sample in quality :

(*b.*) There is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample :

(*c.*) There is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

PART II.

EFFECTS OF THE CONTRACT.

TRANSFER OF PROPERTY AS BETWEEN SELLER AND BUYER.

16. Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.

17. — (1.) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

(2.) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

18. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1. — Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Rule 2. — Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

Rule 3. — Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

Rule 4. — When goods are delivered to the buyer on approval or "on sale or return" or other similar terms the property therein passes to the buyer : —

(*a.*) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction :

(*b.*) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

Rule 5. — (1.) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made:

(2.) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

19. — (1.) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2.) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *primâ facie* deemed to reserve the right of disposal.

(3.) Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honor the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.

20. Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.

Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodier of the goods of the other party.

TRANSFER OF TITLE.

21. — (1.) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

(2.) Provided also that nothing in this Act shall affect —

(*a*.) The provisions of the Factors Acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof;

(*b*.) The validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

22 — (1.) Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.

(2.) Nothing in this section shall affect the law relating to the sale of horses.

(3.) The provisions of this section do not apply to Scotland

23. When the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

24 — (1.) Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise.

(2.) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revest in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender.

(3.) The provisions of this section do not apply to Scotland.

25 — (1.) Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

(2.) Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

(3.) In this section the term "mercantile agent" has the same meaning as in the Factors Acts

26 — (1.) A writ of *fieri facias* or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time when the writ is delivered to the sheriff to be executed; and, for the better manifestation of such time, it shall be the duty of the sheriff, without fee, upon the receipt of any such writ to indorse upon the back thereof the hour, day, month, and year when he received the same.

Provided that no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he acquired his title notice that such writ or any other writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of the sheriff.

(2.) In this section the term "sheriff" includes any officer charged with the enforcement of a writ of execution.

(3.) The provisions of this section do not apply to Scotland.

PART III.

PERFORMANCE OF THE CONTRACT.

27 It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

28 Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods.

29. — (1.) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and if not, his residence; Provided that, if the contract be for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.

(2.) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3.) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf; provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

(4.) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5.) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

30. — (1.) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate.

(2.) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate.

(3.) Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole.

(4.) The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.

31. — (1.) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.

(2.) Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated.

32. — (1.) Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is *primâ facie* deemed to be a delivery of the goods to the buyer.

(2.) Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages.

(3.) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit.

33. Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

34. — (1.) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2.) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

35 The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

36 Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.

37. When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

PART IV.

RIGHTS OF UNPAID SELLER AGAINST THE GOODS.

38 — (1.) The seller of goods is deemed to be an "unpaid seller" within the meaning of this Act —

(*a.*) When the whole of the price has not been paid or tendered;

(*b.*) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonor of the instrument or otherwise.

(2.) In this part of this Act the term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

39. — (1.) Subject to the provisions of this Act, and of any statute in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law —

(*a*.) A lien on the goods or right to retain them for the price while he is in possession of them;

(*b*.) In case of the insolvency of the buyer, a right of stopping the goods *in transitu* after he has parted with the possession of them;

(*c*.) A right of re-sale as limited by this Act.

(2.) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage *in transitu* where the property has passed to the buyer.

40. In Scotland a seller of goods may attach the same while in his own hands or possession by arrestment or poinding; and such arrestment or poinding shall have the same operation and effect in a competition or otherwise as an arrestment or poinding by a third party.

UNPAID SELLER'S LIEN.

41. — (1.) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely: —

(*a*.) Where the goods have been sold without any stipulation as to credit,

(*b*.) Where the goods have been sold on credit, but the term of credit has expired,

(*c*.) Where the buyer becomes insolvent.

(2.) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee or custodier for the buyer.

42. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention.

43. — (1.) The unpaid seller of goods loses his lien or right of retention thereon —

(*a*.) When he delivers the goods to a carrier or other bailee or custodier for the purpose of transmission to the buyer without reserving the right of disposal of the goods;

(*b*.) When the buyer or his agent lawfully obtains possession of the goods;

(*c*.) By waiver thereof.

(2.) The unpaid seller of goods, having a lien or right of retention thereon, does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods.

STOPPAGE IN TRANSITU.

44. Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them *in transitu*, that is to say, he may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.

45. — (1.) Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodier for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodier.

(2.) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.

(3.) If, after the arrival of the goods at the appointed destination, the carrier or other bailee or custodier acknowledges to the buyer, or his agent, that he holds the goods on his behalf and continues in possession of them as bailee or custodier for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer.

(4.) If the goods are rejected by the buyer, and the carrier or other bailee or custodier continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

(5.) When goods are delivered to a ship chartered by the buyer it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier, or as agent to the buyer.

(6.) Where the carrier or other bailee or custodier wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end.

(7.) Where part delivery of the goods has been made to the buyer, or his agent in that behalf, the remainder of the goods may be stopped *in transitu*, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods.

46. — (1.) The unpaid seller may exercise his right of stoppage *in transitu* either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee or custodier in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.

(2.) When notice of stoppage *in transitu* is given by the seller to the carrier, or other bailee or custodier in possession of the goods, he must redeliver the goods to, or according to the directions of, the seller. The expenses of such redelivery must be borne by the seller.

Re-sale by Buyer or Seller.

47. Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage *in transitu* is not affected by any sale, or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale the unpaid seller's right of lien or retention or stoppage *in transitu* is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage *in transitu* can only be exercised subject to the rights of the transferee.

48. — (1.) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage *in transitu*.

(2.) Where an unpaid seller who has exercised his right of lien or retention or stoppage *in transitu* resells the goods, the buyer acquires a good title thereto as against the original buyer.

(3.) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to resell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may resell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

(4.) Where the seller expressly reserves a right of resale in case the buyer should make default, and on the buyer making default, resells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages.

PART V

ACTIONS FOR BREACH OF THE CONTRACT.

Remedies of the Seller.

49. — (1.) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

(2.) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract.

(3.) Nothing in this section shall prejudice the right of the seller in Scotland to recover interest on the price from the date of tender of the goods, or from the date on which the price was payable, as the case may be.

50. — (1.) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2.) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

(3.) Where there is an available market for the goods in question the measure of damages is *primâ facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept.

Remedies of the Buyer.

51. — (1.) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.

(2.) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

(3.) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.

52. In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just, and the application by the plaintiff may be made at any time before judgment or decree.

The provisions of this section shall be deemed to be supplementary to, and not in derogation of, the right of specific implement in Scotland.

53. — (1.) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may

(*a*) set up against the seller the breach of warranty in diminution or extinction of the price; or (*b*) maintain an action against the seller for damages for the breach of warranty.

(2.) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(3.) In the case of breach of warranty of quality such loss is *prima facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.

(4.) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.

(5.) Nothing in this section shall prejudice or affect the buyer's right of rejection in Scotland as declared by this Act.

54. Nothing in this Act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.

PART VI.

SUPPLEMENTARY.

55. Where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract.

56. Where, by this Act, any reference is made to a reasonable time the question what is a reasonable time is a question of fact.

57. Where any right, duty, or liability is declared by this Act, it may, unless otherwise by this Act provided, be enforced by action.

58. In the case of a sale by auction —

(1.) Where goods are put up for sale by auction in lots, each lot is *prima facie* deemed to be the subject of a separate contract of sale:

(2.) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid:

(3.) Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person: Any sale contravening this rule may be treated as fraudulent by the buyer:

(4). A sale by auction may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller

Where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction.

59. In Scotland where a buyer has elected to accept goods which he might have rejected, and to treat a breach of contract as only giving rise to a claim for damages, he may, in an action by the seller for the price, be required, in the discretion of the court before which the action depends, to consign or pay into court the price of the goods, or part thereof, or to give other reasonable security for the due payment thereof.

60. The enactments mentioned in the schedule to this Act are hereby repealed as from the commencement of this Act to the extent in that schedule mentioned.

Provided that such repeal shall not affect anything done or suffered, or any right, title, or interest acquired or accrued before the commencement of this Act, or any legal proceeding or remedy in respect of any such thing, right, title, or interest.

61. — (1.) The rules in bankruptcy relating to contracts of sale shall continue to apply thereto, notwithstanding anything in this Act contained.

(2.) The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, shall continue to apply to contracts for the sale of goods.

(3.) Nothing in this Act or in any repeal effected thereby shall affect the enactments relating to bills of sale, or any enactment relating to the sale of goods which is not expressly repealed by this Act.

(4.) The provisions of this Act relating to contracts of sale do not apply to any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security.

(5.) Nothing in this Act shall prejudice or affect the landlord's right of hypothec or sequestration for rent in Scotland.

62. — (1.) In this Act, unless the context or subject matter otherwise requires, —

"Action" includes counterclaim and set off, and in Scotland condescendence and claim and compensation:

"Bailee" in Scotland includes custodier:

"Buyer" means a person who buys or agrees to buy goods:

"Contract of sale" includes an agreement to sell as well as a sale:

"Defendant" includes in Scotland defender, respondent, and claimant in a multiplepoinding:

"Delivery" means voluntary transfer of possession from one person to another:

"Document of title to goods" has the same meaning as it has in the Factors Acts:

"Factors Acts" means the Factors Act, 1889, the Factors (Scotland) Act, 1890, and any enactment amending or substituted for the same:

"Fault" means wrongful act or default:

"Future goods" means goods to be manufactured or acquired by the seller after the making of the contract of sale:

"Goods" include all chattels personal other than things in action and money, and in Scotland all corporeal movables except money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale:

"Lien" in Scotland includes right of retention:

"Plaintiff" includes pursuer, complainer, claimant in a multiplepoinding and defendant or defender counterclaiming:

"Property" means the general property in goods, and not merely a special property:

"Quality of goods" includes their state or condition:

"Sale" includes a bargain and sale as well as a sale and delivery:

"Seller" means a person who sells or agrees to sell goods:

"Specific goods" mean goods identified and agreed upon at the time a contract of sale is made.

"Warranty" as regards England and Ireland means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.

As regards Scotland a breach of warranty shall be deemed to be a failure to perform a material part of the contract.

(2.) A thing is deemed to be done "in good faith" within the meaning of this Act when it is in fact done honestly, whether it be done negligently or not.

(3.) A person is deemed to be insolvent within the meaning of this Act who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he has become a notour bankrupt or not.

(4.) Goods are in a "deliverable state" within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them.

63. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-four.

64. This Act may be cited as the Sale of Goods Act, 1893.

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